

IN THE MATTER OF  
UNITED BRANDS COMPANY

ORDERS, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION  
OF SEC. 7 OF THE CLAYTON ACT AND/OR SEC. 5 OF THE FEDERAL  
TRADE COMMISSION ACT

*Docket 8835. Complaint, Feb. 11, 1971—Orders & Opinion, May 14, 1974.*

Order dismissing a complaint against a diversified New York City based company with decided interests in the food industry. The complaint challenged respondent's acquisition of the stock or assets of six California and Arizona farming operations producing lettuce and other vegetables.

Order requiring the filing of a special report and periodic subsequent reports informing the Commission of any increase since Feb. 11, 1971, or future increase in access to land commercially suitable for the production of lettuce.

*Appearances*

For the Commission: *Carl J. Batter* and *Lewis F. Parker*.

For the respondent: *Hourey, Simon, Baker & Murchison*, Washington, D.C. *M. Paul Gallop* and *Paul H. Farrell*, New York, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that AMK Corporation has acquired United Fruit Company, and subsequently consolidated AMK into United Fruit Company and changed its name to United Brands Company, and that United Brands Company, then the United Fruit Company, has acquired Nunes Bros. of California, Inc., as well as other similar concerns and corporations, in violation of Section 7 of Clayton Act, as amended, (15 U.S.C., Section 18), and/or in violation of Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C., Section 45), hereby issues this complaint pursuant to Section 11 of the Clayton Act (15 U.S.C., Section 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C., Section 45(b)), stating its charges in that respect as follows:

I

DEFINITIONS

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

(a) *Fresh Produce* includes each and every vegetable and fruit specifically grown in the United States for sale at retail in fresh form, *i.e.*,

not canned, not frozen, or otherwise preserved except for normal refrigeration, such as lettuce, celery, broccoli, cantaloupe, etc.

(b) *Carlot* is an actual rail car shipment, and actual truck shipments converted to a carlot unit (e.g., for lettuce on the basis of 1,000 cartons per carlot).

## II

### RESPONDENT

PAR. 2. United Brands Company (United Brands), the respondent herein, is a corporation organized and existing under the laws of the State of New Jersey, with its offices and principal place of business at 245 Park Avenue, New York, N.Y.

PAR. 3. On or about June 30, 1970, United Brands, Inc. became a successor corporation to AMK Corporation (AMK) which was formed in 1928 under the name American Seal-Kap Corporation. It then, and for many years thereafter, primarily provided the dairy industry with milk bottle capping materials and machinery. In May of 1965, the name of the corporation was changed to AMK Corporation and subsequently AMK acquired John Morrell and Company, a wholly owned subsidiary. John Morrell & Co. ranks among the four largest meat packers in the United States, with annual sales in excess of \$800,000,000. AMK was a corporation organized and existing under the laws of the State of Delaware, with its offices and principal place of business at 245 Park Avenue, New York, N.Y.

PAR. 4. For its fiscal year ending October 31, 1969, AMK had net sales and other income of almost \$1,500,000,000, a net income of over \$26,000,000, and total assets of over \$1 billion. On the basis of the October 31, 1969 financial statements, the 1970 Fortune Directory listed AMK Corporation as the 70th largest industrial corporation in the United States.

PAR. 5. At all times relevant herein, AMK and its successor corporation, United Brands Company, sold and shipped, and is now selling and shipping, products in interstate commerce throughout the United States; hence AMK was at the time of each of the acquisitions challenged herein, and United Brands is now, engaged in commerce as "commerce" is defined in the Clayton Act and in the Federal Trade Commission Act.

PAR. 6. John Morrell & Company ranks among the four largest meat packers in the United States and is particularly strong in hog slaughtering and in processed or cured pork products (not canned or made into sausage) made in meatpacking plants, sausage and similar products (not canned) made in meatpacking plants, and canned meats (except dog and

cat food) containing 20 percent or more meat and made in meatpacking plants, all of which products are or may be branded products carrying United Brand Company labels.

PAR. 7. United Fruit Company, (United Fruit), whose name was changed to United Brands Company, was a corporation organized and existing under the laws of the State of New Jersey with its head office and principal place of business in the Prudential Center, Boston, Mass.

PAR. 8. United Fruit was primarily a grower of bananas in Central and South America, and a seller and distributor of bananas in Europe, North America and Japan. United Brands, its successor corporation, has approximately 50 percent of the banana market in the United States. For the domestic distribution of bananas, United Brands maintains over 35 branch offices and has a network of distributors covering the entire United States. In recent years, it has diversified through acquisition, including (a) the acquisition in 1966 of J. Hungerford Smith Co., Inc., a syrup and flavoring concern, and its subsidiary, A & W International Inc., a root beer, restaurant and franchise operation, (b) the acquisition in 1967 of Baskin-Robbins, Inc., an ice cream and candy franchise operation, (c) the acquisition in 1968 of Nunes Bros. of California, Inc., and various other fresh produce grower-shippers in 1968 and 1969, and (d) the acquisition in 1969 of Cape Farms, Inc., and various other potted plants grower-shippers, among others.

PAR. 9. In 1968, United Fruit had total sales of \$464,297,000, net earnings of \$31,157,000, and total assets as of December 31, 1968, of \$439,799,000.

PAR. 10. Since 1960, United Fruit and United Brands have attempted to establish, and have on a region by region basis established, a brand differentiated banana under the trade mark "Chiquita." The Chiquita banana sells, throughout the United States and in particular regions, both at wholesale and at retail, generally at price levels in excess of the prices at which other bananas sell, differentiated or undifferentiated by brand. Brand differentiation was attained and is maintained in the banana market by United Fruit by means of substantial advertising, promotional and packaging expenditures.

PAR. 11. United Fruit was, and United Brands is, among the leading firms in the fast foods industry and the leading firm in the production and sale of root beer and root beer syrup, as well as a leading supplier of fruit flavors and extracts to the institutional market and the largest grower-shipper of fresh lettuce, fresh celery and potted plants in the United States.

PAR. 12. At all times relevant herein, United Fruit and its successor corporation, United Brands, sold, and shipped, and United Brands is now selling and shipping, products in interstate commerce throughout

the United States; hence United Fruit was at the time of the acquisitions challenged herein, and United Brands is now, engaged in commerce as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act.

## III

## NUNES BROS. OF CALIFORNIA, INC., etc.

PAR. 13. Prior to October 15, 1968, Earle Myers Co. and Demco Farms, Inc., corporations organized and existing under the laws of the State of California with their principal places of business located at Salinas, Calif., were engaged in one or more phases of the fresh produce industry, particularly lettuce and/or celery, namely the growing, shipping and marketing of fresh produce or the providing of supplies or services to growers, shippers or marketers of fresh produce.

PAR. 14. Prior to November 7, 1968, Nunes Bros. of California, Inc., a corporation organized and existing under the laws of the State of California with its principal place of business located at Salinas, Calif., was engaged in one or more phases of the fresh produce industry, particularly lettuce and/or celery, namely the growing, shipping and marketing of fresh produce or the providing of supplies or services to growers, shippers or marketers of fresh produce.

PAR. 15. Prior to November 1, 1968, Toro Farms, a partnership of Thomas P. Nunes, Robert F. Nunes and Thomas Nunes, Jr., located at Salinas, Calif., was engaged in one or more phases of the fresh produce industry, particularly lettuce and/or celery, namely the growing, shipping and marketing of fresh produce or the providing of supplies or services to growers, shippers or marketers of fresh produce.

PAR. 16. Prior to February 14, 1969, Peter A. Stollich Co., Inc., a corporation organized and existing under the laws of the State of California with its principal place of business located at Salinas, Calif., was engaged in one or more phases of the fresh produce industry, particularly lettuce and/or celery, namely the growing, shipping and marketing of fresh produce or the providing of supplies or services to growers, shippers or marketers of fresh produce.

PAR. 17. Prior to February 14, 1969, Monterey County Ice and Development Company, a corporation organized and existing under the laws of the State of California with its principal place of business located at Salinas, Calif., was engaged in one or more phases of the fresh produce industry, particularly lettuce and/or celery, namely the growing, shipping and marketing of fresh produce or the providing of supplies or services to growers, shippers or marketers of fresh produce.

PAR. 18. Prior to March 13, 1969, Jerome Kantro Enterprises, a corporation organized and existing under the laws of the State of

California with its principal place of business located at Salinas, Calif., was engaged in one or more phases of the fresh produce industry, particularly lettuce and/or celery, namely the growing, shipping and marketing of fresh produce or the providing of supplies or services to growers, shippers or marketers of fresh produce.

PAR. 19. Prior to March 15, 1969, the Salinas Valley Vegetable Exchange, a partnership of Miyoko Yuki, Thomas M. Bunn, and the administration of the estate of Takeo Yuki, with its principal place of business located at Salinas, Calif., was engaged in one or more phases of the fresh produce industry, particularly lettuce and/or celery, namely the growing, shipping and marketing of fresh produce or the providing of supplies or services to growers, shippers or marketers of fresh produce.

PAR. 20. Prior to July 2, 1969, Consolidated Growers, Inc., a corporation organized and existing under the laws of the State of California with its principal place of business located at Salinas, Calif., was engaged in one or more phases of the fresh produce industry, particularly lettuce and/or celery, namely the growing, shipping and marketing of fresh produce or the providing of supplies or services to growers, shippers or marketers of fresh produce.

PAR. 21. At all times relevant herein, the corporations and concerns listed in Paragraph 13 through 21 hereinabove, sold and shipped products in interstate commerce throughout the United States, and were, at the time each such business was acquired as described herein, engaged in commerce as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act.

#### IV

#### TRADE AND COMMERCE

PAR. 22. The lettuce and celery segments of the fresh produce industry consist primarily of a number of small independent concerns operating as grower-shippers and/or in some cases providing services, vacuum cooling for example, to themselves and/or other grower-shippers. No such concern was a large publicly held company with other non-related businesses. Each such concern was entirely dependent on its commercial farming operations, on local banks for credit, and upon local service companies for services and supplies.

PAR. 23. Since 1967 a merger trend has been developing in the lettuce and celery segments of the fresh produce industry. In addition to the AMK-United Fruit acquisitions, another company has acquired one or more such concerns.

PAR. 24. In 1967 and in 1968 no firm possessed more than a 10 percent

market share in terms of daily shipments, or in terms of acreage controlled in the California and Arizona growing areas, or in terms of shipments in any particular season and/or from any such growing area.

PAR. 25. Prior to 1968, the grower-shipper of lettuce and/or celery marketed his fresh produce in a substantially competitive market. In that market there were constant changes in prices in response to hourly, daily or weekly changes in the fresh produce market or in the retailing of fresh lettuce and celery, nor were there any long term supply arrangements, for a week or a month or a year, stabilizing prices and removing fresh lettuce and celery from the daily competitive market pricing. Each carlot was virtually a separate sale.

PAR. 26. Both AMK and United Fruit operated and United Brands operates primarily in oligopolistic industries, namely the banana industry, among others.

## V

## ACQUISITIONS

PAR. 27. On or about October 25, 1968, United Fruit acquired Earle Myers Co. and Demco Farms, Inc., by the purchase of all the outstanding shares of stock of these two corporations for approximately \$2,537,500.

PAR. 28. On or about November 7, 1968, United Fruit acquired Nunes Bros. of California, by the purchase of all the outstanding shares of stock of that corporation for approximately \$2,500,000.

PAR. 29. On or about November 1, 1968, United Fruit acquired the business and specified assets of Toro Farms by purchase for approximately \$1,500,000, and pursuant to other arrangements.

PAR. 30. On or about February 1, 1969, United Fruit and/or AMK-United Fruit acquired the business and specified assets of Peter A. Stollich Co., Inc. by purchase for approximately \$2,042,000, and pursuant to other arrangements.

PAR. 31. On or about February 14, 1969, United Fruit and/or AMK-United Fruit acquired Monterey Ice and Development Company by the purchase of all the outstanding shares of stock of this corporation for approximately \$2,537,500.

PAR. 32. On or about March 13, 1969, United Fruit and/or AMK-United Fruit acquired the business and specified assets of Jerome Kantro Enterprises by purchase for approximately \$395,000, and pursuant to other arrangements.

PAR. 33. On or about March 15, 1969, United Fruit and/or AMK-United Fruit acquired the business and specified assets of Salinas Valley Vegetable Exchange for approximately \$395,000, and pursuant to other arrangements.

PAR. 34. On or about July 2, 1969, AMK-United Fruit acquired the business and specified assets of Consolidated Growers, Inc. for approximately \$3,490,000, and pursuant to other arrangements.

PAR. 35. United Fruit and/or AMK-United Fruit have, or may have, made additional acquisitions, the identity of which presently are not known, by means of purchase, lease, joint venture, full supply agreement, etc., in the fresh produce industry.

## VI

## EFFECTS OF THE ACQUISITIONS

PAR. 36. The effect of the acquisitions by United Fruit and/or AMK-United Fruit, or United Brands, their successor corporation, of Earle Myers Co., Demco Farms, Inc., Nunes Bros. of California, Inc., Toro Farms, Peter A. Stollich Co., Inc., Monterey Ice and Development Company, Jerome Kantro Enterprises, Salinas Valley Vegetable Exchange, Consolidated Growers, Inc., and of others, individually and collectively, may be to lessen competition substantially or to tend to create a monopoly or to restrain competition in the fresh lettuce industry, the fresh celery industry, and in the fresh produce industry in the United States, or sections thereof, in the following ways, among others:

(1) Potential competition between AMK-United Fruit, or United Brands, and the acquired concerns in the growing, shipping and marketing of fresh lettuce and of fresh celery and other fresh produce has been, or may be, eliminated.

(2) Concentration has been increased in the fresh lettuce, in the fresh celery industry, and in the fresh produce industry generally.

(3) The substitution of United Fruit and AMK-United Fruit or United Brands, for the numerous small firms acquired by them has given United Fruit, AMK-United Fruit, and United Brands decisive competitive advantages over the remaining firms in the industry due to, but not limited to, (a) subsidization of financial losses in one product line by numerous other products and over long periods of time, (b) selling through nationwide organizations, national advertising, long term contracts, and special pricing, (c) sources of credit, (d) size of company, (e) dominant market share and position, and (f) opportunities for reciprocity.

(4) The structure of the fresh lettuce industry and the celery industry has been transformed or is being transformed, from industries of small independent profitable concerns selling in a competitive market at prices determined by the short term balance of supply and demand into industries dominated by large conglomerate companies selling at stable prices arrived at outside the competitive market by means of such

control mechanisms as brand differentiation, pre-selling of consumers, long term quotes or supply arrangements, and other means.

(5) Barriers to entry into the fresh lettuce industry and the fresh celery industry have been, or may be, heightened as a result of United Fruit's and AMK-United Fruit's or United Brands (a) substantial financial resources, (b) advertising and promotional capabilities, (c) nationwide selling and distribution organizations, (d) brand differentiation, (e) long term leases in major growing areas, (f) ability to borrow money at a lower interest rate than others, (g) ability to purchase inputs directly from the manufacturer at lower prices than others, (h) reciprocity, and (i) large market share, absolutely and relative to competitors, among other things, or any one or more of these factors.

(6) AMK's and United Fruit's, or United Brands' non-competitive pricing practices characteristic of their participation in oligopolistic industries are being, or may be, transferred to the lettuce industry, the celery industry, and the fresh produce industry.

VII

VIOLATIONS

PAR. 37. The acquisition of Earle Myers Co., of Demco Farms, Inc., of Nunes Bros. of California, Inc., of Toro Farms, of Peter A. Stollich Co., Inc., of Monterey County Ice and Development Company, of Jerome Kantro Enterprises, of Salinas Valley Vegetable Exchange, of Consolidated Growers, Inc., and of others, as alleged above, constitute separately and collectively, a violation of Section 7 of the Clayton Act (15 U.S.C. 18) as amended, and/or a violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) as amended.

INITIAL DECISION BY DONALD R. MOORE, ADMINISTRATIVE  
LAW JUDGE

MARCH 19, 1973

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PRELIMINARY STATEMENT

The complaint in this proceeding, charging violation of Section 7 of the Clayton Act and of Section 5 of the Federal Trade Commission Act, was issued on Feb. 11, 1971, and was duly served on respondent. The complaint challenged respondent's acquisitions of corporations and other enterprises engaged in the fresh produce industry in Calif. and Ariz. Respondent filed answer on Mar. 29, 1971, admitting certain of the factual allegations of the complaint but denying generally any violation of law and also pleading certain affirmative defenses.

After extensive prehearing procedures, hearings were held between April 18 and July 11, 1972, in Wash., D.C., Boston, Mass., San Francisco, Calif., and Phoenix, Ariz.

At these hearings, testimony and other evidence were offered in support of and in opposition to the allegations of the complaint. The testimony and evidence presented—aggregating 4106 pages of transcript and thousands of pages of documentary exhibits—have been duly recorded and filed.

The parties were represented by counsel and were afforded full opportunity to be heard, to examine and to cross-examine witnesses, and to introduce evidence bearing on the issues.

After the presentation of evidence, proposed findings of fact and conclusions of law and a proposed form of order were filed by counsel supporting the complaint and by counsel for respondent, together with supporting briefs and reply briefs. The proposed findings of the parties not adopted, either in the form proposed or in substance, have been rejected as lacking support in the record or as involving immaterial matters.

Having heard and observed the witnesses and having carefully reviewed the entire record in this proceeding, together with the proposed findings and briefs filed by the parties, the administrative law judge makes the following findings of fact, enters his resulting conclusions, and issues an appropriate order.

As required by Section 3.51(b)(1) of the Commission's Rules of Practice, the findings of fact include references to the principal supporting items of evidence in the record. Such references are intended to serve as convenient guides to the testimony and to the exhibits supporting the findings of fact, but they do not necessarily represent complete summaries of the evidence considered in arriving at such findings. Where references are made to proposed findings submitted by the parties, such references are intended to include their citations to the record unless otherwise indicated.

References to the record are made in parentheses, and certain abbreviations are used as follows:

CPF—Proposed Findings of Fact and Conclusions of Law filed by counsel supporting the complaint.

CRB—Reply Brief of complaint counsel.

CX—Commission Exhibit.

RPF—Respondent's Proposed Findings of Fact and Conclusions.

RRB—Respondent's Reply Brief.

RX—Respondent's Exhibit.

Tr.—Transcript. (References to testimony sometimes cite the name of the witness and the transcript page number without the abbreviation "Tr."—for example, Bradshaw 3868.)

#### FINDINGS OF FACT

##### United Brands Company

Respondent United Brands Company ("United Brands" or "respondent") is a corporation organized and existing under the laws of the State of New Jersey, with its office and principal place of business at 245 Park Avenue, New York, N.Y. <sup>1</sup> Respondent United Brands is a successor corporation to AMK Corporation (AMK).

AMK was a corporation organized and existing under the laws of the State of Delaware, with its office and principal place of business at 245 Park Avenue, New York, N.Y. AMK had been organized in 1928 under the name American Seal-Kap Corporation, which then and for many years thereafter was a supplier to the dairy industry of materials and machinery for the capping of milk bottles. Its name was changed to AMK in May 1965, and it subsequently acquired John Morrell & Company, one of the largest meat packers in the United States, with annual sales in excess of \$800 million. Total annual sales of AMK before its acquisition of United Fruit Company were approximately \$850 million.

<sup>1</sup> The term "respondent" may be used interchangeably to refer to the present corporation or to its predecessor corporations, AMK and United Fruit, as well as subsidiaries or divisions thereof.

In 1969 AMK acquired a controlling interest in United Fruit Company. On or about June 30, 1970, the two corporations were merged, and the corporate name was changed to United Brands Company.<sup>2</sup>

United Fruit Company was a corporation organized and existing under the laws of the State of New Jersey, with its principal office in Boston, Mass. United Fruit was primarily a grower of bananas in Central and South America and a seller and distributor of bananas in Europe, North America and Japan.

Prior to its acquisition by AMK, United Fruit had embarked on a program of diversification through acquisition, including the acquisitions challenged by the complaint herein (*infra*). Acquisitions other than those that are the subject of this proceeding included:

(1) The acquisition in 1966 of J. Hungerford Smith Co., Inc., a syrup and flavoring concern, and its subsidiary, A&W Root Beer Co., a root beer, restaurant, and franchise operation;

(2) The acquisition in 1967 of Baskin-Robbins, Inc., an ice cream and candy franchise operation;

(3) The acquisition in 1969 of various grower-shippers of potted plants, including Cape Farms, Inc.

In 1968, United Fruit had total sales of \$464.3 million, net earnings of \$31.2 million, and total assets (as of December 31, 1968) of \$439.8 million. In that year, United Fruit had virtually no debt; it had more than \$70 million in cash; and it had a capability of borrowing up to \$150 million on the basis of its net worth.

For its fiscal year ended October 31, 1969 (after the acquisition of United Fruit), AMK had net sales and other income of about \$1.5 billion, a net income of more than \$26 million, and total assets of more than \$1 billion. It was ranked 70th in the 1969 Fortune Directory of the 500 largest industrial corporations in the United States. At the end of 1971, United Brands, as the successor corporation to AMK and United Fruit, had some \$70 million in cash and marketable securities.

At all times relevant to this proceeding, AMK, United Fruit, and United Brands sold and shipped, and United Brands is now selling and shipping, products in interstate commerce throughout the United States; hence, AMK and United Fruit were, and United Brands was and now is, engaged in commerce, as "commerce" is defined in the Clayton Act and in the Federal Trade Commission Act.

(The foregoing facts about respondent and its corporate predecessors are essentially undisputed. Salient record references include the following: Complaint and Answer, Pars. 2-5, 7-9, 12; CX 200, pp. 2-3; CX 226;

<sup>2</sup> The proposed complaint issued under the Commission's consent order procedure in April 1970 contained a count challenging the AMK-United Fruit merger, but that count had been eliminated when the instant complaint was issued in 1971 (CPF, Par. 2, p. 1).

CX 396, p. 32; CX 224, p. 9; CX 199, p. 14; Black 1720-23; Fox 1450, 1466-67.)

### The Challenged Acquisitions

The acquisitions under challenge were the outgrowth of a diversification program instituted by United Fruit in 1960, when it announced its intention "to enter the general field of food and food processing" as an area "best suited to the Company's potentialities" (CX 152, pp. 2, 8; Fox 1451-52). By 1965, a modest beginning in diversification had been made, concentrating on the food industry in the United States and on non-banana activities in Latin American (CX 223, p. 8).

During 1968,

\* \* \* the Produce Group took several steps toward its objective of establishing a multinational, diversified fresh fruit and produce business which will take full advantage of the Company's strengths in the production, distribution and marketing of fresh and perishable products (CX 200, p. 10).

The plan called for an increase of tropical production, and new production in other areas of the world, while making wider use of United Fruit's shipping abilities. The 1968 Annual Report characterized as "[o]ne of the most significant steps in the Company's pursuit of a broader line of produce items" the acquisition of Nunes Bros. of California, Inc., Earle Myers Company, and Demco Farms, Inc., "firms engaged primarily in growing and marketing lettuce, celery and other produce" (CX 200, p. 10). The report emphasized that:

Finally, but most important, the plan will open up a wider range of produce items to which the CHIQUITA marketing strategy, the most outstanding branding success in produce history, can be applied.

At the time of respondent's diversification into the fresh vegetables business, it was dependent for its income principally on one product, *i.e.*, bananas. The management of respondent felt that it should stabilize its revenues and income by diversifying into other business areas so that respondent would not be completely exposed to the ups and downs of the banana business. Bananas are grown commercially, for the most part, in Central American countries, and their production is subject to the vagaries of the weather—sometimes violent—and the vagaries of the political climate in such countries—also sometimes violent. Bananas must be transported by ships to markets, with attendant shipping difficulties. Another significant factor that created the desire of respondent to diversify was the fact that statistics indicated a continually increasing over-production of bananas world-wide which, in respondent's opinion, limited the potential growth of its profits from the banana business. (Fox 1451-52, 1480)

After extensive studies of the fresh vegetables industry and

market—primarily lettuce—in 1967 and early 1968 (CPF, Pars 36-48, pp. 15-21), United Fruit's board of directors on July 22, 1968, authorized negotiations "for the purchase of the production facilities and related activities of one or more companies or partnerships [engaged in] the production, packaging, distribution, and sale of vegetable crops at an estimated price of \$20,000,000 \* \* \*" (CX 158 A).

Basic facts respecting the acquisitions challenged by the complaint are as follows:

*Earle Myers Co. and Demco Farms, Inc.*

The purchase of these companies was the first acquisition made by United Fruit in the vegetable crops industry. In October 1968 United Fruit purchased all the capital stock of these companies for \$2,537,500. Both companies were California corporations engaged in the growing, harvesting, packing, and selling of various fresh vegetables, including celery and cauliflower. In effect, the two corporations were one entity engaged in the production and sale of fresh vegetables. Demco Farms conducted the growing operation, and Earle Myers Co. handled packing and selling.

The Myers companies grew their crops on leased land in the Salinas Valley of California. Celery was the primary crop, but the farm land was capable of producing other vegetable crops. United Fruit considered that it was acquiring through these acquisitions a "strong organization with expertise in growing, processing, quality control and marketing of vegetable crops." Purchase arrangements included a five-year noncompetition agreement on the part of David E. Myers.

(Record references: Complaint and Answer, Pars. 13, 27; CX 167 A-E; CX 173 A-O)

*Nunes Brothers of California, Inc., and Toro Farms*

In November 1968 respondent purchased the capital stock of Nunes Brothers of California, Inc. (a California corporation) and selected assets of Toro Farms (a partnership) for \$4 million. Both the Nunes Brothers corporation and the Toro Farms partnership were owned and operated by the Nunes family (primarily two brothers). Many of the vegetable crops harvested and sold by Nunes Brothers were grown by Toro Farms. In essence, Toro Farms was a part of the Nunes Brothers' farming entity.

The Nunes companies were engaged in the growing, harvesting, packing, and selling of a wide variety of vegetable crops. Although their major crops were lettuce (1.8 million cartons in 1967), celery (312,000 cartons); and cauliflower (268,000 cartons), Nunes Brothers also grew and sold broccoli, beans, carrots, sugar beets, potatoes, onions, garlic,

tomatoes, and cabbage. Production was from leased land or from joint deals with other growers.

The Nunes operations were primarily located in the Salinas and Imperial Valleys of California, with additional leased land in Arizona.

Certain of the principals in the Nunes enterprise were subject to covenants not to compete with respondent for five years.

(Record references: Complaint and Answer, Pars. 14, 15, 28, 29; CX 166 A-W; CX 174 A-M; CX 175 A-Q; CXs 182-185)

*Peter A. Stolich Co., Inc.*

In February 1969 respondent purchased the business and selected assets of Peter A. Stolich Co., Inc. (a California corporation) for \$2,042,000. Stolich was engaged in the growing, harvesting, packing and selling of various vegetable crops, primarily lettuce, both on owned land and leased land, and through joint deals with other growers. Stolich produced crops in Salinas, Brentwood, and El Centro (Imperial Valley). Its lettuce volume was about one million cartons a year and accounted for 85 percent of revenues. About 48 percent of Stolich's lettuce volume was grown by it, and the remainder came from joint deals. Stolich lettuce was sold through Mutual Vegetable Sales, a growers' agent.

(Record references: Complaint and Answer, Pars. 16, 30; CX 170 A-I; CX 176 A-T)

*Jerome Kantro Enterprises*

Respondent's board of directors approved in February 1969 the purchase of the business and certain assets of Jerome Kantro Enterprises, a California corporation in which Jerome Kantro was the sole stockholder. Kantro Enterprises was the successor to a sole proprietorship formerly conducted as the Jerome Kantro Company. The acquisition was accomplished in March 1969 for a purchase price of \$395,000.

Kantro was engaged in the growing, packing and shipping of lettuce and other vegetable crops. Kantro had an annual volume of 1.3 million cartons of lettuce produced in Salinas and Brentwood, Calif., and Phoenix and Yuma, Ariz. Respondent acquired, among other things, leases on land owned by Kantro, as well as the right to use the Kantro name.

(Record references: Complaint and Answer, Pars. 18, 32; CX 172 A-K; CX 178 A-S)

*Monterey County Ice & Development Company*

Respondent also purchased in February 1969 for \$2,287,299 all of the stock of Monterey County Ice & Development Company, a California corporation that owned and operated vacuum and cooling facilities in

Salinas and in El Centro for the cooling of fresh vegetables. This company was primarily owned by individual and corporate shareholders associated with the Stolich and Kantro enterprises, who had sold their businesses to United Fruit.

(Record references: Complaint and Answer, Pars. 17, 31; CX 171 A; CX 177 A-Q)

*Salinas Valley Vegetable Exchange*

Pursuant to action of the board of directors in February 1969, respondent purchased for \$3,490,000 the business and selected assets of Salinas Valley Vegetable Exchange, a partnership engaged in the growing, harvesting, packing, and selling of fresh vegetables, including lettuce and celery, in the Salinas Valley, the Imperial Valley, and the Phoenix, Ariz., area. Its lettuce volume was then 2.2 million cartons.

Respondent brought the farming organization and business, including goodwill, but leased crop land owned by the individual partners. One partner executed a covenant not to compete, and the other became a consultant to respondent.

(Record references: Complaint and Answer, Pars. 19, 33; CX 169 A-J; CX 172 D-F; CX 179 A-R; CX 190)

*Consolidated Growers, Inc.*

Pursuant to authorization by the board of directors, respondent purchased in July 1969, the business and selected assets of Consolidated Growers, Inc., for approximately \$2.4 million. Consolidated was engaged in growing, harvesting, packing and selling vegetable crops produced on owned and leased land located in Salinas and Brentwood. Its crop land aggregated 1,594 acres, and it had annual lettuce sales of 890,000 cartons.

Respondent acquired virtually all of Consolidated's business assets, including those of Reliable Trucking Company, and the goodwill associated with both of these companies.

The principals of Consolidated signed covenants not to compete.

(Record references: Complaint and Answer, Pars. 20, 34; CX 168 A-J; CX 180 A-P; CX 192 A-C; CXs 193, 194 A-M)

In summary, during 1968 and 1969 respondent purchased, for an aggregate price of about \$17 million, the capital stock or selected assets of six fresh vegetable farm operations in California and Arizona and one cooler operation. The six farm enterprises grew and shipped several varieties of vegetables—predominantly lettuce, with one exception. Total annual lettuce shipments of the acquired companies were more than 7 million cartons in the year prior to acquisition:

Nunes Bros.	1,800,000 cartons
Stolich	1,000,000 "
Kantro	1,300,000 "
Salinas Veg. Exchange	2,200,000 "
Consolidated Growers	<u>890,000</u> "
TOTAL	7,190,000 "

The lettuce shipped by the acquired companies was in excess of 7 percent of the total national lettuce shipments in 1968 (Bradshaw 3907; CX 364, p. 11).<sup>3</sup>

Assets acquired by respondent included trucks, tractors, and other farm equipment, buses, sheds, and sales offices. The primary assets acquired were rights to the unexpired leases of land, experienced personnel, and farm equipment (RPF, Par. 18, p. 9).

At all relevant times, each of the corporations or other entities acquired by respondent sold and shipped products in interstate commerce throughout the United States, and their operations were in the flow of such commerce; hence, at the time of acquisition, each was engaged in commerce as "commerce" is defined in the Clayton Act and in the Federal Trade Commission Act. Although respondent initially denied the "commerce" allegation (Answer, Par. 21), it now appears to have conceded the point. In any event, the record references cited (mostly from respondent's own documents), as well as other evidence, leave no doubt that the acquired companies were in commerce.

The operations of the acquired companies were ultimately consolidated in a United Fruit subsidiary, Inter Harvest, Inc., although it appears that the names United Fruit Sales Corp. and United Fruit Produce, Inc., had also been used (CX 396, p. 18; Bradshaw 3906-07; Gibbons 1777; CX 309 C; CX 340).

Relevant Market

*Product Market*

At the outset, there remains a dispute as to the line of commerce or product line within which the legality of the challenged acquisitions is to be tested. The complaint (Par. 36) alleges that the effect of the acquisitions "may be to lessen competition substantially or to tend to create a monopoly or to restrain competition in the fresh lettuce industry, the fresh celery industry, and in the fresh produce industry \* \* \* " Fresh produce is defined in the complaint (Par. 1) as including "each and every vegetable and fruit specifically grown in the United States for sale at retail in fresh form, *i.e.*, not canned, not frozen, or otherwise preserved except for normal refrigeration, such as lettuce, celery, broccoli, cantaloupe, etc."

<sup>3</sup> For a tabulation of the total cartons of lettuce shipped annually, 1967-71, see p. 16 [p. 1633 herein], *infra*.

In describing the business of the acquired companies, the complaint Pars. 13-20) states that they were "engaged in one or more phases of the fresh produce industry, particularly lettuce and/or celery, namely, the growing, shipping and marketing of fresh produce or the providing of supplies or services to growers, shippers or marketers of fresh produce."

Elsewhere in the complaint (Pars. 22, 23), reference is made to the "lettuce and celery segments of the fresh produce industry."

At another point, in describing the market in which the grower-shipper of lettuce and/or celery operated, reference is made to the "fresh produce market" (Complaint, Par. 25).

In listing the specific effects allegedly stemming from the challenged acquisitions, the complaint refers to the "growing, shipping and marketing of fresh lettuce and of fresh celery and other fresh produce" and otherwise makes reference to the fresh lettuce industry, the fresh celery industry, and the fresh produce industry (Complaint Par. 36 (1)-(2), (4)-(6)).

Complaint counsel acknowledge that the "major thrust of the testimony related to the lettuce industry," but add that other evidence related to cauliflower<sup>4</sup> and celery, and to some extent to other crops grown in the particular geographic areas involved, *i.e.*, artichokes, carrots, garlic, broccoli, cantaloupes, and tomatoes (CPF, Par. 65, p. 28). The proposed findings go on to cite evidence tending to show that each commodity constitutes a separate product market (CPF, Pars. 66-70, pp. 28-30). Finally, they propose a conclusory finding that "each item of fresh produce—lettuce, celery, cauliflower, carrots—is a separate and distinct relevant market for antitrust purposes" (CPF, Par. 198, p. 125).

There is substantial evidence in the record to support the following conclusory findings:

1. Each fresh produce item is regarded by the industry and by State and Federal Governments as a separate market.
2. There is little or no cross-elasticity of demand between the various items.
3. End uses are often different.
4. Grower-shippers specialize in one item or another of fresh produce.
5. Even where grower-shippers do not specialize, they often have specialized personnel assigned to just one item (CPF Pars. 65-70, pp. 28-30; Par. 197, p. 124).

<sup>4</sup> Complaint counsel erroneously state that the "cauliflower industry" was pleaded as a relevant market in the complaint (CRB, Par. 261, p. 2).

On the authority of the leading cases dealing with the definition of a "line of commerce"<sup>5</sup>, it is found and concluded that within the fresh produce market, there is a fresh vegetables submarket, which, in turn, breaks down into a multiplicity of individual product submarkets, such as lettuce, celery, and cauliflower.

The fact that individual growers produce various crops and may shift their planting and production from season to season does not require, as respondent urges (RPF, Pars. 21-31, pp. 11-21; RRB, pp. 70-75), that the relevant line of commerce be broader than a single crop and embrace the entire fresh vegetables industry. True enough, to the degree that there is some interchangeability of production facilities, this poses some problems in determining market share, concentration, and other factors necessarily taken into account in assessing the legality of the acquisitions in this case, and this will be considered *infra*. Nevertheless, the record clearly establishes a line of commerce in lettuce, celery, and cauliflower, as well as in other fresh produce commodities.

The difficulty is not in the delineation of lettuce, celery, and cauliflower as submarkets within a broader fresh vegetables market or produce market. The question is whether the evidence is sufficient to determine the competitive effect in each of those submarkets. Careful review of this record has persuaded the administrative law judge that complaint counsel have presented adequate evidence only as to the lettuce submarket.

The evidence concerning celery and cauliflower is so fragmentary, and much of it is of such dubious reliability (CPF, Pars. 80-85, 105-06, 119-20, 149-50, pp. 36-37, 45, 64, 98-99; compare RRB, pp. 39-47), that the record does not permit definitive findings. As to the broader lines of fresh produce and fresh vegetables, there is only generalized information (CPF, Par. 71, pp. 30-31) that again precludes definitive findings. Accordingly, the specific findings herein are limited to the lettuce industry as a submarket within the fresh vegetables line of commerce. Lettuce is the line of commerce to be analyzed. (This limitation does not preclude the drawing of proper inferences as to the fresh produce industry or the fresh vegetables industry on the basis of the facts developed concerning the important lettuce segment. See *Conclusions, infra*, p. 60. [p. 1669 herein.]

#### *Geographic Markets*

The parties are in agreement, and the record confirms, that there is a national market for lettuce, as well as for other products included in the category of fresh vegetables or fresh produce (CPF, Par. 200, pp. 125-26; RPF, Pars. 51-72, pp. 45-62; RRB, pp. 75-76). Although there

<sup>5</sup> *Brown Shoe Co. v. U.S.* 370 U.S. 294, 325 (1962); *General Foods Corp. v. FTC.* 386 F.2d 936, 940-43 (3rd Cir. 1967); *Reynolds Metals Co. v. FTC.* 309 F.2d 223 (D.C. Cir. 1962); *U.S. v. E. I. duPont de Nemours & Co.*, 353 U.S. 586, 593-95 (1957); *U.S. v. Aluminum Company of America*, 377 U.S. 271, 273-77 (1964).

are, of course, sales for resale and consumption within each of the growing areas, it is clear that of the lettuce grown, harvested, and packed in the principal production areas (California, Arizona, Colorado, New Mexico, and part of Texas)—

\* \* \* [V]irtually any given lot may be, and often is, sold or transported to any market in the United States. The industry's domestic market for lettuce is the entire United States and its members are in daily contact with buyers across the Nation. (RX 1 I). Thus, lettuce from the designated production areas "is shipped to virtually every city in the United States" (*id.*; see also CX 269, p. 31).

Despite complaint counsel's concession as to the existence of a national market, the evidence as to market shares in such national market is limited to data for respondent and for a few other grower-shippers, including the acquired companies.

The national market, in turn, subdivides into a series of terminal markets in major cities throughout the country (CPF, Par. 201, p. 126). However, although the record contains references to such terminal markets and their impact on shipments, prices, etc., complaint counsel have not sought any finding respecting their relationship to the instant case.

For assessing the impact of the challenged acquisitions, complaint counsel have elected to rely on data concerning the principal shipping areas, or shipping point markets, in California and Arizona, which account for more than 80 percent of the Nation's lettuce (CPF, Pars. 202-03, p. 126). Despite respondent's attack on complaint counsel's analysis of these markets and the resulting "concentration" tabulations, respondent does not, in terms, deny that they constitute relevant markets.

The nature and significance of these "shipping point markets" are spelled out in one of respondent's exhibits (RX 4, p. 38):

The fresh fruit and vegetable industry can be divided into three sectors: production, wholesale, and retail sectors. The wholesale sector can be further divided into shipping point wholesale markets and receiving or terminal wholesale markets \* \* \*.

The principal difference between the two wholesale sectors is proximity to producers and consumers. Shipping point wholesale markets are comprised of wholesale-distributors located in or adjacent to the major fresh fruit and vegetable producing areas. The primary function of these firms is to provide the marketing services necessary for transferring fresh fruits and vegetables from producing areas to consuming markets. Wholesale terminal markets are concerned with the receiving and break-bulk marketing functions.

A fresh fruit and vegetable shipping point market is distinguished by volume shipments beyond local markets and the performance of attendant marketing services required by such shipments.

\* \* \* \* \*

Fresh fruit and vegetable shipping point markets are an important segment of the industry. As the assemblers and first handlers of producers' crops, these markets are instrumental in determining farm prices, the number and quality of initial marketing

services, and interregional shipment patterns. In addition, the frequent integration of the production and shipping point marketing functions provides the marketing sector a direct influence on the industry supply response and results in a portion of farm income deriving from the efficient organization and profitable operation of shipping point marketing firms. Finally, trends in the marketing and production of fresh fruits and vegetables such as geographic specialization, direct marketing, larger farm units, and improved transportation facilities indicate a more important future role for shipping point markets.

In any event, there can be no question that each of the major producing and shipping areas constitute, within the meaning of Section 7 of the Clayton Act, a "section of the country" in which it is appropriate to measure the competitive effects of the acquisitions under scrutiny (*U.S. v. Pabst Brewing Co.*, 384 U.S. 546, 549 (1966); *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 336-37 (1962)). The location and characteristics of these California and Arizona areas are described *infra*.

The Lettuce Industry

Before analyzing the competitive impact of the acquisitions, it is necessary to outline the industry setting in which the acquisitions took place. For the most part, the facts herein recited are not subject to serious dispute.

Lettuce is the Nation's most important fresh vegetable crop in terms of volume and total value, with an average annual farm value of more than \$220 million (RX 1 I). Its retail dollar value in 1967 was \$667.5 million (CX 158 C).

Lettuce is commercially grown in and shipped from each major area of the United States—the West (primarily California, Arizona, Colorado, New Mexico, and Washington); the Midwest (primarily Michigan, Ohio, and Wisconsin); the South (primarily Texas and Florida) and the East (principally New Jersey and New York). (CX 364, p. 11) Total U.S. shipments of lettuce during the five-year period 1967-1971 were as follows:

<i>Year</i>	<i>No. of carlots or carlot equivalents</i>	<i>Cartons</i> <sup>6</sup>
1967	95,602	94,049,925
1968	98,445	97,167,850
1969	99,500	98,250,850
1970	101,596	100,381,150
1971	101,536	100,280,725
		(CX 364, p. 11)

<sup>6</sup> The difference between the number of cartons shown here and complaint counsel's tabulation (CPF, Par. 73, p. 32) is due to the fact that complaint counsel used a conversion factor of 1,000 cartons per car or carlot equivalent, whereas the 1,000-carton conversion factor is applicable only to the States of California, Arizona, Colorado, New Mexico, and Texas. Elsewhere, the number of cartons per car or carlot equivalent is 825 cartons. (CX 364, p. 11, footnote c; Saylor 1309-11, 1323-24)

California and Arizona constitute the principal lettuce-producing areas. In recent years, the combined production of California and Arizona has approximated 85 percent of total United States production, with California accounting for more than 60 percent and Arizona, from 20 percent to 25 percent (CX 246, pp. 77-78; CX 158 D, N; CX 133 Z-6). The percentages vary by growing season, but the overall dominance of California and Arizona is plain. In 1969, for example, on the basis of harvested acres and total value, California and Arizona lettuce production accounted for the following percentages of total production:

YEAR SEASON	California		Arizona		ARIZONA- CALIFORNIA	
	Harvested Acreage	Value	Harvested Acreage	Value	Harvested Acreage	Value
1969						
Winter	64%	61%	18%	27%	82%	88%
Spring	38%	38-	47%	53%	85%	91%
Summer	70%	74%	—	—	70%	74%
Fall	63%	54%	23%	31%	86%	85%

(CPF, Par. 72, p. 31)

The following tabulation (CX 374 A, C, E) shows the percentages of total U.S. shipments of lettuce accounted for by California and Arizona for each month during 1968, 1969 and 1970:

	1968			1969			1970		
	Calif.	Ariz.	Total	Calif.	Ariz.	Total	Calif.	Ariz.	Total
January	77.4%	18.4%	95.8%	72.9%	18.9%	91.8%	76.8%	15.6%	92.4%
February	79.0	15.8	94.8	75.1	15.6	90.7	81.4	10.8	92.2
March	42.7	51.9	94.6	53.7	36.0	89.7	51.1	41.4	92.5
April	48.7	46.7	95.4	30.8	62.4	93.2	44.6	53.7	98.3
May	75.2	3.4	78.6	65.9	14.8	80.7	79.6	9.9	89.5
June	86.1	1.5	87.6	84.9	2.6	87.5	86.3	1.8	88.1
July	80.5	-	80.5	79.2	-	79.2	78.2	-	78.2
August	74.2	-	74.2	76.0	-	76.0	73.5	-	73.5
September	79.3	0.6	79.2	85.3	0.3	85.6	82.0	0.4	82.4
October	55.9	7.4	63.3	61.2	6.5	67.7	72.4	4.1	76.5
November	30.6	54.2	84.8	32.9	59.6	92.5	38.1	52.5	90.6
December	53.8	37.6	91.4	49.0	45.4	94.4	50.6	40.9	91.5

These data demonstrate California's domination of winter and summer lettuce and also the strong position of California lettuce during the rest of the year.

Within California, Monterey County is the principal lettuce producing area in summer, spring, and fall, while Imperial County is the principal lettuce-producing area in the winter (CX 380; CXs 295-305).

Lettuce shipments from Monterey County during each of the years 1968-1971 were as follows:

Year	Cartons
1968	28,326,492
1969	27,331,631

1970	28,327,177
1971	29,098,468
	(CX 309 B-E; CX 367 A-D)

Imperial County lettuce shipments were as follows:

<i>Year</i>	<i>Cartons</i>
1968-69	17,803,962
1969-70	19,418,611
1970-71	18,883,375
1971-72	19,654,528

(CXs 306 J-K, 307 B-C, 308 B, 368 A-D, 395 A-B; Taylor 2985-92)

(There are some discrepancies in some of the totals shown for each county in the cited exhibits, but the differences are negligible.)

California's next largest producing area is the Santa Maria-Guadalupe District (Santa Barbara and San Luis Obispo Counties), with between 7 million and 8 million cartons in 1971 (CX 364, p. 13; CX 414 A). Another major area is the Blythe District (Riverside County), which shipped 4.7 million cartons of winter lettuce in 1971 (CX 364, p. 13). The San Joaquin Valley, embracing 8 counties (CX 247), accounted for 5.9 million cartons in 1971, the bulk of it comprising fall lettuce (CX 364, p. 13).

Other lettuce-producing areas include Santa Cruz County, Kern County, and Santa Clara County, but their production of less than 3 million cartons annually is dwarfed by the totals for Monterey County and Imperial County (CXs 298-300, 295-297, 305, 312; see also CX 380; CPF, Pars. 75-77, p. 34; RPF, Pars. 55-72, pp. 48,62; RRB, pp. 26-39).

In Arizona, the major lettuce-growing areas are as follows:

Salt River Valley (Phoenix area), with 4.4 million cartons in 1971.

Marana-Red Rock-Maricopa-Eloy (southeast of Phoenix), with 5.6 million cartons in 1971.

Yuma area, with 7.6 million cartons in 1971. (CX 324)

Other lettuce-producing areas include Willcox (eastern Arizona), Parker-Poston (western Arizona), Aquila-Date Creek, and Harquahala (both in central Arizona). They account for less than 3 million cartons annually, with Parker-Poston shipping about half this total (CX 324).

Except for Yuma, Arizona's production is limited to spring and fall lettuce. Yuma is in production through the winter at the same time as the Imperial Valley of California, but it has also developed spring and fall seasons that overlap with the other Arizona areas. The Salt River Valley and the Marana area, both in central Arizona, are the major source of spring and fall lettuce in Arizona, while Yuma provides the only Arizona winter lettuce, as well as some spring and fall lettuce. (CXs 248-250, 264-265, 289-291, 324)

Total Arizona lettuce shipments in recent years have been as follows:

<i>Year</i>	<i>Cartons</i>
1968	19,481,000
1969	22,227,000
1970	20,016,000
1971	20,682,000

(CX 364, p. 11)

Accordingly, except for generalized statistics as to other lettuce-producing areas, the evidence in this case has been essentially limited to California and Arizona. Moreover, within California, "concentration" indices have been limited to Monterey County and Imperial County.

*Production and Distribution*

The lettuce industry consists of a combination of growers, grower-shippers, and shippers, together with brokers and buyers located at the various shipping points. The shipping points vary during the year. Starting with spring shipments, the Salinas-Watsonville-King City area (Monterey County and Santa Cruz County) furnishes the major share of the lettuce during the period May through October. In November, the largest share comes from Arizona. From December through March, the largest share of the shipments comes from California (the Imperial Valley plus—especially in March—the Blythe District). During April, as in November, the largest share comes from Arizona. In addition, there are other smaller shipments originating from other areas throughout the year. (CX 374 E; Faris 3413)

As outlined in this record, with little or no dispute between the parties (CPF, Pars. 86-111, pp. 38-47; RPF, Pars. 73-74, pp. 62-63; Pars. 94-101, pp. 79-83), the harvesting, shipping, and sale of lettuce is substantially as follows:

Lettuce is usually sold the same day it is harvested. Once the lettuce ripens, it must be harvested within a relatively short period—within three or four days (CX 246 M). The lettuce is cut, packed, and inspected in the field (Garner 1893). It is normally packed 24 heads to a cardboard carton and then trucked to a vacuum cooler, where the temperature is lowered to about 34 degrees. From the vacuum cooler the cartons are shipped by rail or truck to destinations throughout the United States. (Derdivanis 2052)

As a perishable product, lettuce must be cut, packed, and shipped daily or, at the latest, the succeeding day.

Most lettuce is shipped "naked" in the carton; the heads are not individually wrapped. The clear plastic film in which lettuce is displayed in retail stores is ordinarily added by the store after the lettuce head is cut and trimmed of any discoloration that may have taken place in transit. However, some retailers prefer the plastic film to be applied by

the shipper, and from 5 percent to 15 percent of lettuce shipments involve shipper-wrapped lettuce. This involves an extra cost for the grower-shipper of from 45¢ to 60¢ a carton. Wrapped lettuce accordingly is normally sold at premium prices to at least cover this cost. The major shipper of wrapped lettuce is Bud Antle, Inc., which has wrapped approximately 40 percent of its lettuce. The imprinting of a brand name on these wrappers is minimal, and the brands are not otherwise advertised to the consumer. (CX 157 C; Sherwin 4053-54; Bradshaw 3940-42; Antle 2721.)

Harvesting decisions are made on a day-to-day basis and depend on a variety of factors, including the volume shipped and the prices received on the preceding day, information as to the unloads and prices in major terminal markets, local weather conditions, weather conditions in terminal markets, and the condition of the crop (CX 246).

Growers, grower-shippers, and shippers keep abreast of the market by contacts with one another and through the services offered by the Federal-State Market News Service. By personal contact, by telephone, and by publications—some of them daily—both sellers and buyers have available a wide range of information concerning the market for lettuce. This includes information on unloads and on prices in terminal markets, on weather conditions in such markets, as well as in other producing areas; the shipping volume and prices for the preceding day; and also the current day's volume and pricing. Market News Reporters seek and disseminate information on both the selling and buying side of the market. This is done through contacts with shippers and with purchasers.

All concerned may obtain from the Market News Service the latest available information as to prices and shipping volumes. Such information is double-checked and published the following day.

As indicated, lettuce is sold on a day-to-day market basis. Negotiations over any particular sale begin in the morning and terminate in the afternoon after each party has had the opportunity of informing himself fully on the day's market, both through the Market News Service and by contacts with the trade. The purchasers are represented by brokers or by their own representatives.

Buyers and buyer representatives have an opportunity to inspect the lettuce at the vacuum cooling plant or even in the field.

Inspection normally takes place before a final purchase is made. Buyers have an opportunity to compare quality as between different grower-shippers or between the lettuce produced in different fields but handled by the same shipper or grower-shipper. Quality is an important factor in pricing and accounts in significant measure for the range of lettuce prices at each shipping point.

Most lettuce is sold f.o.b. at the shipping point. However, some lettuce is sold on a consignment basis. This usually represents an established relationship between a particular terminal market wholesaler and grower-shipper, with a consequent sharing of the profits or losses involved in resale at the terminal market.

At times, consignments are made on a distress basis—that is, cars that could not be sold at the shipping point are consigned to a wholesaler or another representative who will undertake to sell the contents at the terminal market for the best price he can get. In other words, the car has a “home,” where a designated representative will undertake to sell it.

In the absence of either a shipping point sale or a consignment, a grower-shipper may “roll” the car and endeavor to sell it while it is en route toward eastern markets. Otherwise, he may “no-bill” the car—that is, provide no bill of lading for that day but hold the car over for another day for possible sale or consignment at that time.

To the extent that the existence of any substantial volume of no-bills, rollers, and distress consignments is known in the trade—as it frequently is—this tends to depress the market since such cars are surplus at the going prices.

The seasonal lettuce crops in California and in Arizona are produced and sold pursuant to a variety of arrangements. There are several integrated operations that directly own or lease farm land and engage in the complete operation from production of the crop through harvesting and packing to sale (Garin 2839; Hansen 2301-02; Derdivanis 2023; Hart 3017; Schultz 3086). United Brands functions in this manner, producing and selling its own crops (Dale 2150-51; Willis 2138; Mohamed 2694-2718). Some lettuce producers sell through cooperatives (Lumsden 2212; Bertelsman 2507). Under this type of arrangement, the individual or the company takes all the risks and accordingly reaps all the profits or suffers all the losses (Bertelsman 2508).

At the other extreme, there are instances when the shipper takes the full risk by contracting for a farmer to grow his requirements of lettuce, paying the farmer a flat fee per acre of lettuce, for example, with the farmer receiving his full compensation whether or not the crop was harvested. In this type of arrangement, the farmer takes no risk but his profit is generally minimal. (Lee 2331-33.)

This record indicates that much of the lettuce grown in California and Arizona is produced by joint ventures between the farmer and the shipper, with the latter denominated as a grower-shipper. These “joints,” as they are known in the trade, involve a sharing of risks and profits between the farmer and the shipper. The exact arrangements vary, with the details subject to bargaining between farmer and ship-

per. Under many of these arrangements, the farming operation is basically allocated to the farmer, with some supervision by the shipper; and production costs, such as seed, fertilizer, irrigation water, etc., are shared under some agreed ratio. The expenses of harvesting and packing are incurred by the shipper. Upon sale of the crop, the profits, if any, are allocated between the two parties according to their contractual agreement, subject to the deduction of at least the harvesting and packing costs. (Derdivanis 2017; Bertelsman 2542-44; Martin 2804; Senini 3231-32)<sup>7</sup>

### *Competitive Climate*

At the time of respondent's entry, the lettuce industry was basically a small company industry, consisting essentially of privately-held or family-held corporations, cooperatives, partnerships, and proprietorships (Crossetti 2339-40; Laine 2197; Lumsden 2211; Bertelsman 2507; Morris 2891). With the exception of Bud Antle, Inc., which had annual sales of about \$27 million (Tr. 2722), these companies had annual sales ranging from \$500,000 to \$8 million (CPF, Par. 104, pp. 44-45). The enterprises acquired by respondent were fairly typical; their annual sales in the year prior to acquisition ranged from \$1 million to \$6 million (CX 233 F). Many of the grower-shippers specialized in lettuce, while others had related agricultural operations (CPF, Pars. 66-67, pp. 28-29; Par. 103, p. 44; Par. 197, p. 124). None were publicly held companies<sup>8</sup> or conglomerate enterprises. For the most part each was dependent on local banks for financing and on local concerns for services and supplies. (CPF, Pars. 109-110, p. 46.)

As a generalization, most of the growers and grower-shippers have grown up in the business. They have tended to begin as small producers; if they had ability in management and skill and experience in production (plus a little luck), they grew and accumulated resources until they became one of the larger firms in the industry. (Faris 3422-23; CRB Par. 281, p. 10.) The entry into or exit from the lettuce industry was primarily on the basis of the ability of the individual (Derdivanis 2015-16).

This competitive climate is not disputed by respondent. In its preliminary consideration of the lettuce industry, respondent recognized that the industry was "fragmented" and consisted mainly of "small producers." (CX 158 C) And it now concedes that—

<sup>7</sup> For an analysis of the various grower-shipper relationships, see CX 274, pp. 15-17.

<sup>8</sup> At the time of trial, Bud Antle, Inc., was in the process of registering with the Securities and Exchange Commission for the public sale of its stock (Tr. 2727, 2033).

The fresh vegetable industry is fragmented and is lacking in any concentration or oligopolistic characteristics to such extent that it approaches, as much as in any other industry in the United States, the concept of pure competition \* \* \*. (RPF, Par. 3 (3), p. 2).

Although phrased in the present tense, this is a concession as to the state of the industry before respondent's entry. Whether it is an accurate characterization today is the question to be resolved.

Respondent's entry into the industry was not the only change in the picture. At about the same time that respondent began its acquisitions, a similar program was undertaken by Purex Corporation, a conglomerate with annual sales of about \$300 million. This company made several acquisitions of lettuce enterprises and other agricultural operations and operated them through a subsidiary, Freshpict Foods, Inc. Indications were, however, that Purex, at the time of trial, was in the process of de-emphasizing its agricultural activities, particularly in the lettuce business, possibly because the Commission had issued a complaint challenging the acquisitions. (Leach 2443-54)

Traditionally, the industry has been characterized by considerable price uncertainty. Because of the perishable character of lettuce, huge volumes must be moved to market in a brief period of time. Supplies are highly variable, not only from area to area and from season to season, but also from year to year. Both the vagaries of weather and the uncoordinated production of many growers may result in sudden shortages or unanticipated surpluses. (RX 3, p. 49; CXs 246, 247, 274)

Moreover, the price elasticity of demand is inelastic for the industry. This means that a small change in quantity will generate an opposite but relatively larger change in the prevailing market price. On the one hand, if shipments are reduced by a given percentage, there is an opposite and more than proportional increase in price, resulting in greater total grower-shipper returns. On the other hand, if shipments are increased by given percentage, there is an opposite and more than proportional decrease in price, with a resultant decrease in total revenue for the industry. (CXs 246, 281; Blauch 1327-38; Faris 3411-15; Lumsden 2213; RX 1)

In addition, the record shows that weather conditions in consuming markets have a marked impact on consumer demand and consequently on the prices in terminal markets.

With the industry subject to so many variables on both the supply side and the demand side, prices tend to fluctuate widely and wildly. Prices may drop or rise by as much as 300 percent in a week's time—from \$5.50 to \$1.50 or the converse (RX 74, p. 31; CX 251, p. 25; see RPF, Pars. 98-101, pp. 81-83).

In its review of lettuce prices (RPF, Pars. 80-101, pp. 68-83), re-

spondent has emphasized the periods of depressed prices, with consequent industry losses. But the statistics also show periods of prosperity for the grower and shipper of lettuce (CRB, Pars. 269-277, pp. 7-9). The situation of the lettuce industry was aptly described in a California Department of Agriculture study (CX 246, pp. 5-6) as follows:

[T]he lettuce industry often will be faced with average annual prices over a two or three-year period which do not cover total costs of production and harvesting. For this reason, well-established grower-shippers and shippers plan their schedules and evaluate financial performance over relatively long periods of operation of up to four to five years, with the expectancy that losses in one year will be offset by income gains in others. As would be expected, successful shippers and grower-shippers require sufficient cash reserves to carry them through possible years of low return.

During periods of oversupply and resultant low prices, lettuce may be sold at prices below the cost of production, harvesting, and sale. Or the lettuce may be left in the field unharvested—plowed up.

As a rough rule of thumb, it is considered that the return on a carton of lettuce should exceed \$1.75 to show a profit to the grower. However, since the fixed costs of production have already been incurred once the lettuce is in the ground, grower-shippers will harvest and sell lettuce at any price that will exceed the cost of harvesting, packing, and selling, so as to contribute some revenue to the "land"—that is, toward the fixed or sunken costs. The record indicates that the costs of harvesting, packing, and shipping a carton have ranged in recent years between \$1.00 and \$1.25. (CPF, Par. 98, pp. 42-43; CRB, Pars. 311-313, pp. 23-27; RPF, Pars. 98-99, pp. 81-82)

In the face of the price volatility that characterizes the lettuce industry, resulting in periodic low prices and consequent losses, there has been an increasing trend for the larger grower-shippers to develop year-round operations. Not only does this spread the risks in both time and space, but it also provides a continuing source of supply to customers and results as well in certain economies in the utilization of manpower and facilities. However, there are limitations on the availability of land suitable for lease or development for profitable year-round production.

Such limitations constitute a barrier to entry into the lettuce industry and were recognized as such by respondent when it decided on entry by acquisitions rather than on *de novo* entry (CX 158 P). (This will be considered in more detail *infra*.)

The picture that emerges from this record shows a fragmented, substantially competitive industry, consisting of many sellers, with even the largest grower-shippers having relatively small market shares. There was no brand differentiation of product. The market was from day to day, with the daily pricing of lettuce dependent on actual

supply and demand factors. Price was determined by market forces and was not subject to the conscious control of any individual seller. In respondent's words, prices have been "dictated by supply and demand," and the industry approached "pure competition" (RPF, Par. 3 (3) (4), p. 2).

#### Competitive Effects

Such, in brief, was the state of the lettuce industry before respondent became a grower-shipper in 1968-69. The question for decision is whether respondent's entry by acquisition has had or may have the effect of substantially lessening competition or tending to create a monopoly in the lettuce industry (Complaint and Answer, Par. 36).

This is a case involving the entry by a giant corporate conglomerate into a traditionally small-enterprise industry. The case has some unique aspects, but despite the protestations of respondent, the problem posed is amenable to the application of traditional antitrust concepts. The parties are in agreement, and the record confirms, that the fresh vegetables industry, including the lettuce segment, has been atomistic in structure and vigorously competitive, with prices determined by supply and demand. Essentially, they part company on the question whether the entry of United Brands by acquisition has resulted or may reasonably result in such a change in these characteristics as to bring the acquisitions within the ambit of Section 7 of the Clayton Act or of Section 5 of the Federal Trade Commission Act. In this section, we shall examine a variety of competitive factors that are important in arriving at a proper answer to this question.

#### *Reciprocity*

At the outset, we can dispose of two of the allegations of the complaint. First, the Government offered no proof concerning reciprocity (Complaint, Par. 36(3) (F) ). Respondent's lettuce customers are brokers, fresh produce wholesalers, and chain stores. The uncontradicted testimony is that respondent buys nothing from these customers and therefore has no buying power to use in forcing lettuce sales (Fox 1484; Mason 3870-71).

#### *Potential Competition*

Second, complaint counsel appear to have abandoned the potential competition charge of the complaint (Par. 36(1)) to the effect that the acquisitions are actionable under Section 7 of the Clayton Act or Section 5 of the Federal Trade Commission Act because potential competition between respondent United Brands and the acquired companies in the growing, shipping, and marketing of fresh lettuce and of fresh celery

and of other fresh produce has been, or may be, eliminated. Complaint counsel state:

Although plainly a potential entrant into fresh produce, as a potential entrant United Brands probably had no real effect upon the competitive climate, since it was already one approaching pure competition (CPF, Par. 140, p. 92).

In any event, not only is there an absence of proof that respondent had considered entry by internal expansion, but the evidence is to the contrary (Fox 1472). There is likewise no proof that respondent was considered by industry members to have been threatening entry, with a consequent impact on the competitive climate.

Moreover, the position of the Government is ambivalent on the subject of respondent as a potential entrant. While the complaint alleges that respondent's removal as a potential competitor had or might have an adverse effect on competition, the proposed order contained in the complaint would prohibit respondent from entering the industry by internal expansion as well as by acquisition, and complaint counsel continue to press for such an order.

As an alternative theory, complaint counsel would extend the orthodox concept of potential competition by focusing on the acquired companies as possible sources of new competition in the relevant industry or industries. They propose a finding as follows:

\* \* \* [I]n making its several acquisitions, United Brands extracted from the principals of the concerns acquired consulting agreements or agreements not to compete of some five years duration. \* \* \* Since the actual source of new entrants into the shipping of lettuce, celery and/or cauliflower are on the whole individuals associated with fresh produce as farmers, shippers, brokers, buyers, etc. \* \* \*, and since the skills, knowledge and know-how associated with fresh produce constitute barriers which this group is uniquely qualified to overcome, the United Brands acquisitions \* \* \* [have] systematically eliminated an important portion of the possible entrants into lettuce, celery and cauliflower. (CPF, Par. 140, pp. 92-93)

In their proposals for conclusory findings of fact and conclusions of law, complaint counsel repeat in substance this proposed finding and contend that "the elimination of the acquired concerns as active competitors in the fresh produce industry, and the elimination of the owner-managers of these enterprises as possible competitors through the use of consulting agreements and noncompeting agreements is of considerable significance and importance" (CPF, Par. 204, p. 127). Accordingly, they propose a conclusion that, for these reasons, the acquisitions are an "unreasonable restraint of trade in violation of Section 5 of the Federal Trade Commission Act" (CPF Par. 205, p. 127).

In the opinion of the undersigned, this attempted transformation of the potential competition theory of the complaint must be rejected. The legality of the acquisitions must be determined as such. The consulting

arrangements and the covenants not to compete were ancillary to the acquisitions and are, by their terms, of limited duration. Their legality was not put in issue by the complaint. Accordingly, this aspect of the matter does not afford a basis for a determination that the acquisitions, as such, are unlawful under either the Clayton Act or the Federal Trade Commission Act.<sup>9</sup> At any rate, the elimination of *actual* competition between and among the acquired companies is of greater significance.

#### *Competitive Advantages*

One of the primary questions in a Section 7 case is whether the advantages over competitors resulting or likely to result from corporate acquisitions threaten to be "decisive" (H.R. Rep. No. 1191, 81st Cong., 1st Sess. 8). This record affords numerous examples of advantages enjoyed by the acquired enterprises once they were integrated into the United Brands corporate family.

#### "Deep Pocket"

The "power of the 'deep pocket' or 'rich parent' \* \* \* in a competitive group when previously no company was very large and all were relatively small" is an advantage that has been found sufficiently decisive to outlaw an acquisition, *Reynolds Metals Co. v. F.T.C.*, 309 F.2d 223, 229-30 (D.C. Cir. 1962; opinion by Judge (now Chief Justice) Burger). The Court focused on the "possibility and power" that the "rich parent" afforded its subsidiary "to sell at prices approximating cost or below and thus to undercut and ravage the less affluent competition."

This record affords a classic example of the competitive advantage enjoyed by an enterprise as a result of the "deep pocket" of the parent corporation. Respondent's farming subsidiary (Inter Harvest) suffered in 1970 an operating loss of \$8,287,000 (CXs 401, 403 Z-7, 409 F, 417 Z-3; Gibbons 1789). As a result, respondent's corporate headquarters transferred funds totaling \$7,608,000 to Inter Harvest (CX 410 B; Gibbons 1804). Without this transfusion of funds, Inter Harvest would have been out of business (Gibbons 1806-07). Despite respondent's rationalization as to the reasons for the \$8 million loss in 1970 and the adjustments that should be made in the financial statement to reduce it to \$2,804,951 or even to \$1,274,543 (RPF, Pars. 202-205, pp. 154-70; RRB, pp. 7-8), the stubborn fact remains that Inter Harvest suffered an \$8 million loss and was bailed out by the parent company. It

<sup>9</sup> Neither party has pointed to any record evidence as to the present or future status of the individuals involved in the consulting arrangements and in the covenants not to compete, but it appears that by the time this case is finally decided, the terms of such agreements will either have expired or will be approaching their expiration dates. Depending on the eventual outcome of this litigation, the question of the legal status of any renewals of such restrictions on re-entry into the business may be left for later determination.

is apparent that Inter Harvest enjoyed a unique advantage by virtue of its parent's deep pocket (Gibbons 1802-03; CX 410 A).<sup>10</sup>

Support from the parent treasury extended beyond the immediate needs of cash flow or the inability to meet current obligations from earnings. Subsidization extended as well to capital expenditures. For example, respondent financed the following in 1970-71:

1. \$376,600 for a vacuum cooler and other items (CX 408 A-C).
2. \$409,000 to lease tractors (CX 408 I-J).
3. \$118,800 to purchase trucks (CX 408 S-U).

Although United Brands followed the practice of transferring the profits of a subsidiary to corporate headquarters (CX 410 A), profits from the Inter Harvest operation before 1970 were entirely inadequate to compensate for the losses incurred in 1970 or to provide funds for capital expenses (CXs 397 A, 398 A, 409 B).

In a high-risk industry like lettuce, where low prices may create losses year after year, the availability of respondent's deep pocket is a decisive advantage over competitors with limited capital resources.<sup>11</sup>

For this advantage to be recognized, it is not necessary that respondent be found guilty of predatory pricing, as in the *Reynolds Metals* case, *supra*. As a matter of fact, complaint counsel disclaim any issue of predatory pricing in this case (CRB, Par. 311, p. 23). But, as noted in *Reynolds Metals, supra*, it is the "possibility and power" of thus undercutting and ravaging competitors that is to be considered.

Aside from any possibility of intentional depression of prices to drive competitors out of business, respondent is simply better equipped to cope with the risks inherent in lettuce production. For others in the business, limited funds have required a reduction in the intensity of lettuce production on either leased or owned land. High risk forces growers to limit their production. Banks demand other crops, contracts, or assets in order to finance lettuce production when a grower's funds become depleted. Growers owning land but with only limited capital can plant but a relatively small percentage of their acreage to lettuce. It is only as available funds increase that the grower can plant as much as 30 percent of his land into a high-risk crop like lettuce. (CX 274; Faris 3429) Respondent recognized that its financial power permitted it to "maximize the use of the land for growing lettuce rather than grow a diversified product line solely to minimize risk as is the practice of many smaller farmers" (CX 158 E).

Respondent has demonstrated its capability of expanding production toward its goal of controlling 15 percent to 25 percent of the market (CX

<sup>10</sup> Although Inter Harvest wound up in the black for the year 1971 (CXs 405 Z 17, 417 Z-3), it was in a loss position for the first 9 months of the year (CX 405 Z-3 -5).

<sup>11</sup> The extent of respondent's financial resources and borrowing power is outlined *supra*, pp. 4-5 [p. 1624 herein].

158 F; Fox 1498; CPF, Par. 168, p. 109). Likewise, it was and is able to spend substantial amounts on advertising and promotion (CXs 317 A-B, 128 A-W).

Finally, in contrast to the limitations imposed on other industry members by their small size and their limited capital resources, United Brands was able to announce in February 1970

\* \* \* plans on a long-range basis to diversify into a wide variety of agricultural and fruit related products and services. These would be distributed through mass outlets, and would utilize the consolidated company skills in handling perishable products from their source to their ultimate consumers \* \* \* (Black 1727-1728)

That plan envisioned the establishment of a network of regional cold-storage warehouses for the distribution of lettuce and other fresh produce directly to chain stores and others (CX 124 B).

Clearly, the disparity in size and power between United Brands and its competitors gives United Brands decisive advantages.

As one of the grower-shipper witnesses put it, the lettuce industry is a "gamble game" like poker. Formerly, there were "table stakes" that all participants could afford. With United Brands' entry as a "new guy" in the game, the picture changed; United Brands can raise the ante to the point that the "game \* \* \* will break up." He added:

The same entities will no longer be playing poker. It will be a big game for big money.

And using this simile is what I feel, in my opinion, of how we are going to be pushed out of the produce business. (Garin 2871-2873)

The validity of the simile is not destroyed by the fact that the witness quoted had been able, prior to respondent's entry, to invest \$1 million in leasing and developing for lettuce production 2,000 acres near Parker, Arizona (Garin 2841-43; RRB, p. 10).

#### Economies of Scale, Etc.

Complaint counsel are ambivalent as to economies of scale that respondent may enjoy by virtue of the size and scope of its farming operations. While asserting that respondent does or may enjoy lower costs in the purchase of "inputs" (fertilizer, etc.) at "substantial cost reductions" (CPF, Pars. 154-156, pp. 101-02), they also state that "at the farm level United Brands' size does not bring with it any significant cost benefits" (CPF, Par. 154, p. 101) and that "farming has severe built-in limitations on size in terms of diseconomies of scale \* \* \* " (CPF, Pars. 255-256, pp. 147-48).

On one element of input—fertilizer—the evidence is at most suggestive. The evidence shows only that respondent enjoyed price advantages from one fertilizer supplier, as compared with certain competitors, but that other competitors enjoyed better prices than did respondent. Some of the low prices cited as showing respondent's buy-

ing power were the same as those charged one of the acquired companies. Complaint counsel also rely on testimony to the effect that respondent ceased doing business with one fertilizer supplier that had formerly sold to several of the acquired companies and that this was on the basis of inability to meet competitive prices.<sup>12</sup> (CPF, Pars. 156-161, pp. 102-106; RPF, Pars. 229-231, pp. 180-182; RRB, pp. 8-9, 49-51)

Thus, the record does not contain substantial evidence that respondent either induced or obtained discriminatory prices in its fertilizer purchases by virtue of its size and massive purchasing power.

Another effort to show the likelihood of respondent's enjoying lower costs by virtue of the size and scope of its farming operations also proved abortive. This was a treatise authored by complaint counsel's economic expert on the general subject of economies of scale in farming but not directly related to the lettuce industry. In the light of certain concessions made in the treatise itself, as well as concessions made by the expert in the course of cross-examination, the treatise hardly constitutes substantial evidence of the point contended for. (CX 276; Faris 3620-29; Bradshaw 3916-28; CPF, Par. 154, p. 101; Pars. 255-256, pp. 147-48)

This is not to say that there does not exist a potential for respondent to enjoy such price advantages in the purchase of inputs such as seed, fertilizer, etc. Respondent's management clearly contemplated the likelihood of such cost savings on a substantial scale in respondent's integrated farming operations (CXs 113 A, 157 D-E, 146 D, 158 E-F, 167 B).

Moreover, despite the skepticism and indignation of respondent's chief executive officer (Fox 1497) and its counsel (RPF, Par. 44, p. 33; RRB, p. 9), it is relevant that consideration was given to the possibility of extensive cost savings through respondent's own manufacture of the cartons in which lettuce is shipped (CXs 10, 17, 158 F; Morris 2902-03; Senini 3233). Respondent already operates box plants in the tropics in connection with its banana business and also had been a joint owner of a plant manufacturing kraft linerboard used in the production of boxes (Fox 1453). The fact that the box plant proposal had not been considered by "top management" does not rule it out as a reasonable possibility.

Although respondent's initial efforts to bypass the lettuce brokers and to sell lettuce through its regional banana sales offices (CXs 86 B-C, 133 Z-50, 136 B, 183 B; Service 1595-98; Dale 2152) was soon abandoned, the cost savings that might thereby be realized—about \$800,000

<sup>12</sup>Complaint counsel here rely on an exhibit (CX 328-Id.) that was rejected when it was offered for another purpose (Tr. 2632). The undersigned sees no basis for reversing the ruling. Likewise, the undersigned rejects the petition that rulings relating to other exhibits, as well as to testimony and stipulations, be reversed (CPF, Attachment E).

in 1970 and 1971 (CXs 403 Z-7, 405 Z-20)—remains a potential advantage to be reckoned with. As in the case of product differentiation through branding (*infra*), respondent has repudiated all the management studies tending to show the feasibility and the advantages of direct selling and has indicated its intention of conforming to previous customs of the trade (RPF, Pars. 42-50, pp. 24-45; RRB, p. 15). Nevertheless, once respondent became better established and built up its market share, it conceivably might successfully eliminate or substantially reduce the cost of brokerage.

Irrespective of the possibility of direct selling, respondent's regional representatives give it an advantage in on-the-spot handling of complaints as to lettuce quality, etc. (CPF, Par. 163, p. 107). In addition, the company enjoys direct access to top officials of the major retail chains (Bull 1576-77; Schultz 3095-96).

#### Price Leadership

Respondent clearly envisioned for itself the role of "price leader" in the lettuce industry. Its objectives were:

1. To fill the "leadership vacuum in the lettuce industry"—to establish itself as the "non-preemptable leader in fresh vegetable marketing."
2. To stabilize "erratic" market prices—to "subdue the historical variations of the fresh vegetable market, especially in terms of price fluctuations \* \* \*."
3. To achieve a premium price for branded lettuce.

These goals were to be accomplished by product differentiation (branding), by direct sales, and by advance-order selling. CXs 85 A-D, 86 D-E, 136 A-B, 137 A-C, 158 D)

No matter that this did not work out as planned. It provides a fair basis for not only assessing certain post-acquisition developments, but for assessing as well the probable effects on competition if respondent were allowed to keep the business that it acquired and were granted the opportunity to try to overcome the obstacles that stood in the way of its game plan.

Despite all the testimony and the great volume of exhibits related to post-acquisition pricing, the most that can be concluded is that:

1. With the volume of lettuce produced and sold by respondent, its pricing policies and practices had a substantial impact on the shipping-point markets where it operated.
2. During periods of low prices, respondent was blamed for the depressed state of the market—sometimes with justification, sometimes not.
3. Complaint counsel do not contend that respondent engaged in predatory pricing—deliberate selling at low prices with the purpose or

effect of driving competitors out of business. Complaint counsel refer to predatory pricing as an "issue which has not been pleaded or raised in any form" (CRB, Par. 311, p. 23; but see CPF, Par. 232, p. 137; CRB, Par. 298, p. 18).

Even competitors critical of respondent's practices acknowledged that its 1970 pricing was an error in judgment or the result of poor coordination between the production department and the sales department (Derdivanis 2124, 2134).

During the 4-month period July-October 1969, a respondent rather consistently followed the industry pattern of infrequent rollers or distress consignments, selling f.o.b. shipping point between 95 percent and 99 percent of its lettuce (CXs 1, 356 A-F). Beginning in November 1969, respondent greatly increased its rollers and consignments, so that in the next several months, it sold only from 76 percent to 85 percent of its lettuce f.o.b. shipping point (CXs 1, 356 G-J). During January 1970, the rollers and consignments from the Imperial Valley (El Centro) included a substantial volume of "30's," which consist of small heads of lettuce packed 30 to a carton rather than the usual pack of 24. This took place on a declining market, with the result that the price for the 30's declined to \$1.10 per carton. Respondent's volume of rollers and consignments, including the 30's, had a depressing effect on a depressed market. (CXs 1, 407 A-K, CX 253, (p. 22); Derdivanis 2096-2106, 2114-30; Lumsden 2206-09)

Respondent was blamed by several witnesses for the "disastrous" season in the Imperial Valley during 1969-70 (Derdivanis 2096-2106, 2114-30; Garin 2873-75; Schultz 3089-3098; CX 407). Respondent was accused of increasing its acreage and production and offering its lettuce at prices as low as 85 cents. However, the record shows no 85-cent f.o.b. prices for respondent in the Imperial Valley during that season and only a relatively small percentage (less than one-half of 1 percent) under \$1.00. One of the complaining witnesses (Garin) sold a higher percentage of its shipments at less than \$1 net than did respondent. (RX 115 A-E)

Moreover, there is no reliable evidence that respondent increased its planting over that formerly controlled by some of the companies that it acquired. Out of a total Imperial Valley increase of 1.6 million cartons, 1969-70 compared to 1968-69, respondent's increase in shipments totaled only 40,000 cartons over those of its acquired companies in 1968-69.<sup>13</sup> As a matter of fact, respondent left an estimated 25 percent of its lettuce unharvested in this season, while other shippers were increasing

<sup>13</sup> Complaint counsel computed the increase at 549,854 cartons, but this was erroneous. (Compare CPF, Par. 142, pp. 93-94; Par. 175, p. 113; with RPF, Par. 184-185, pp. 140-42; RRB, pp. 59-61.)

shipments, including at least one who complained of "dumping" on the part of respondent (Schultz 113; Bradshaw 3932).

During the spring season in Salinas Valley in 1972, one grower-shipper complained that respondent had forced prices down to \$1.10 (CX 416). The manager of Inter Harvest testified without contradiction that other shippers were the first to go to \$1.10 (Bradshaw 3954-55).

Although there is considerable testimony that respondent was the first to quote low prices, such testimony was admittedly on a hearsay basis, and there is little or no reliable evidence that this was the fact. Nevertheless, whether or not respondent actually exercised price leadership by being the first to quote a price lower than the going range, there is no doubt that with the volume of lettuce that it was moving,<sup>14</sup> its prices tended to set the market price or, at least, to have a strong influence thereon.

Large-volume shippers are under pressure to cut prices in order to move their production, and, during periods of depressed markets, are blamed, rightly or wrongly, for low prices. This follows from the inelastic demand for lettuce at the industry level. The larger the quantity under the control of a firm, the more inelastic the demand facing the firm. The firm selling larger quantities of lettuce must lower price more percentagewise to sell its shipments or else stop harvesting. The largest volume company makes the price on a depressed or slow market because the buyers use that price to "whipsaw" the sellers. (Derdivanis 2086-94; Lumsden 2206-28; Garin 2874, 2855-56; Martori 3206-07; Senini 3239-40, 3249-50, 3262-68; Blaich 1333-34; Faris 3403, 3417-18, 3434-35, 3509, 3513, 3561-63)

When this state of affairs is coupled with industry recognition of respondent's deep pocket—its greater financial ability to withstand a period of low prices—the result is that the nature of the day-to-day market at the various shipping points is altered.

Among other things, the presence in the market of a company like respondent must have its impact on the "psychology of the market." According to a study made under the auspices of the California Department of Agriculture in 1966, next to supply factors as a determinant of price, the psychology of the market may be the primary determinant of the "level of and the variability in the 'mostly' range of prices in any one season or region \* \* \*." The study states:

The degree of pessimism or optimism on the part of buyers and shippers contributes to the combination of other factors which affect price and therefore may be the decisive factor which determines whether or not growers and shippers have a financially profitable season.

\* \* \* \* \*

<sup>14</sup> For a sampling of the lettuce volume sold by respondent at various shipping points on a weekly basis during 1969 and 1970, see CPF, Appendix C.

Probably the most unpredictable element contributing to the determination of price is the general attitude of buyers and sellers. Not infrequently unusually high or low prices are unexplainable except by reference to this one factor alone. (CX 246 J, L; see *Derdivanis* 2072, 2118-19)

That respondent sold below cost is not disputed, but it was by no means unique in this respect. And, as we have seen, there is neither claim nor proof of predatory pricing. Moreover, while there have been depressed prices since respondent's entry, the record clearly establishes that this is a historic pattern in the lettuce industry (RPF, Pars. 80-101, pp. 68-83; Pars. 174-187, pp. 132-45). The extent to which respondent was responsible for low prices is not clear, but there is no doubt that it contributed substantially to such downward swings since 1969.

Although complaint counsel introduced exhibits comparing prices realized by respondent on "rollers" and consignments and comparing these prices with the "mostly" prices<sup>15</sup> reported by Market News (CXs 357 A-D, 361 A-F), their proposed findings do not include any reference to these tabulations. In any event, respondent presented evidence showing that in many instances, respondent's prices were not as low as those of the complaining witnesses and that these witnesses had previously priced not only under the "mostly" price but under the lowest prices reported in the range. (RPF, Pars. 188-200, pp. 146-53; Pars. 159-173, pp. 120-32; RRB, pp. 11-12, 53-54) Thus, there is no basis for a charge that respondent was selling at unreasonably low prices, and complaint counsel do not so contend.

For what it may be worth, the record shows that respondent stopped using rollers and consignments<sup>16</sup> in January 1971 and, as of the time of trial in mid-1972, had not sold below \$1.25 since that date (Dale 2157; Ronan 2430-31; Bradshaw 3976-77, 4005). One ironical footnote is that whereas most witnesses roundly condemned respondent for its former use of consignments (*supra*), one witness was critical of respondent's 1971 decision to sell essentially on an f.o.b. basis (Lumsden 2203, 2210-11, 2222-23, 2249-51). His objection was that a strict f.o.b. policy could result in depressing the f.o.b. market.

Despite the somewhat cloudy picture on pricing, the evidence shows nevertheless that respondent had and has both the intent and the power to exercise price leadership. Such power plainly constitutes a competitive advantage and also serves as a barrier to new entry.

### *Concentration*

Respondent agrees that over the past decade there has been a decline

<sup>15</sup> The "mostly" price is that reflected in 55 percent to 90 percent of sales (RX 5, p. 42).

<sup>16</sup> Except for what is known as a "guarantee," whereby the consignee pays a minimum price that may be as much as 25 cents under the "mostly" price (Dale 2157-58; Bradshaw 4005-06).

in the number of growers and shippers of lettuce (RRB, pp. 6, 25).<sup>17</sup> It is not surprising, therefore, that concentration has increased, both nationally and in the growing-shipping areas with which this case is primarily concerned.

#### National Concentration

Information as to national concentration is at best sketchy. Either by reason of the unavailability of published data showing the breakdown by shipper of total lettuce shipments or the staggering magnitude of collecting such data, the record does not contain precise total shipment figures for any shipper except respondent (CPF, Par. 112, p. 47, Par. 118, p. 63). However, in its pre-acquisition studies of the lettuce industry in 1968, respondent estimated that Bud Antle, Inc., accounted for about 7 million cartons annually and was the industry leader with from 6.5 percent to 7 percent total shipments and that the second largest shipper (Bruce Church, Inc.) accounted for about 5 million cartons or from 4.5 percent to 5 percent of the industry total (CXs 157 C, 158 D).

The estimated volume of the lettuce shipments of the companies that respondent acquired in 1968-69 was 7.2 percent of the industry total (*supra*, p. 10 [p. 1629, herein]).

On the basis of the foregoing approximations, "top-two" concentration increased from about 12 percent to about 14 percent or an increase of between 17 percent and 21 percent, depending on the figures used. Since then, respondent's shipments have increased, so that in 1971 it had a market share nationally of 10.8 percent (RX 117 A-B; Bradshaw 3909). On the assumption that Bud Antle's shipments remained constant, even though there is evidence of increased shipments,<sup>18</sup> "top-two" concentration has increased to more than 17 percent in 1971, or by approximately 40 percent or 50 percent since 1968, again depending on which figures are used for 1968.

Although it seems strange that such crucial figures should have been developed on the basis of estimates, the estimates appear to be reasonably reliable. Thus, they constitute substantial evidence of the facts. In addition, other witnesses appeared to be satisfied that respondent and Bud Antle, Inc., were the two largest shippers of lettuce, and nothing appears to the contrary. The record contains no total shipment figures for any other shipper.

<sup>17</sup> No definitive overall figures were developed in this record, but there is no doubt as to the downward trend (CX 278, pp. 102-04; Paris 3416-17). For area breakdowns, see CPF, Par 143, p. 95; Par 146, p. 97; CPF, Attachment D, p. 11; compare RRB, pp. 21-27.

<sup>18</sup> The president of Bud Antle, Inc., was a witness, but he was not asked about his total shipments for 1968 or for any other year. However, after acknowledging sales of approximately \$27 million in 1967 and 1968, he did express the belief that Antle was the largest lettuce shipper from 1965 to 1968 (Tr. 2722-23).

## Regional Concentration

With only limited data on a national scale, complaint counsel have focused on concentration analyses for Monterey County and Imperial County in California and all of the lettuce-producing areas in Arizona.

Monterey County and Imperial County were selected for analysis because they constitute the two major lettuce-growing areas in California and because lettuce shipments of individual firms were available from official records. Similarly, the record contains data respecting individual lettuce shipments from all the growing-shipping areas in Arizona, and concentration analyses were prepared for (1) the Salt River Valley, (2) Yuma, and (3) all other Arizona shipping points combined. These data (CXs 367 A-D, 368 A-D, 370 A-E, 371 A-E, 372 A-E, and 373 A-E) are attached in an appendix.

Statistics cited earlier (*supra*, p. 17) [p.—herein] show that Monterey County produces approximately 30 percent of the nation's lettuce. At the peak of its season, it accounts for 60 percent of the lettuce then being shipped. The Imperial Valley produces over a 4-month period approximately 20 percent of the nation's annual production of lettuce (*supra*, p. 18) [p.—herein]. During the peak of its season (January and February), the Imperial Valley produces from 70 percent to 80 percent of total United States lettuce shipments during that period. Arizona accounts for approximately 20 percent of U.S. shipments (*supra*, p. 19) [p.—herein] and is the dominant factor in spring lettuce (*supra*, p. 16) [p.—herein]. Thus, the areas covered in the exhibits account for some 70 percent of the total U.S. shipments of lettuce and, on a seasonal basis, are of particularly vital significance.

CXs 367 A-D (Appendix) show the following: Concentration in Monterey County increased from 28.95 percent for the top 4 in 1968, just prior to United Brands' acquisitions, to 39.61 percent in 1969, when all of its acquisitions were completed, to 40.87 percent in 1970, and to 41.05 percent in 1971. For the top 4, this is an increase in concentration of 41.8 percent in just four years, most of it in the very first year as an immediate result of the acquisitions, which combined the 5th, 8th, 14th, 15th, and 25th ranked lettuce producers in that county (CX 309). For the top 8, concentration was 47.52 percent in 1968, 57.78 percent in 1969, 58.12 percent in 1970, and 58.34 percent in 1971. This is an increase in top 8 concentration of 22.8 percent in just four years. As a result of the acquisitions, respondent was the no. 1 shipper in 1969, 1970, and 1971, with 15 percent to 17 percent of total Monterey County shipments.

For Imperial County, CXs 368 A-D (Appendix) show top 4 and top 8 concentration as follows:

	Initial Decision	83 F.T.C.
	<i>Top 4</i>	<i>Top 8</i>
1968-69	22.5%	35.7%
1969-70	23.07%	38.33%
1970-71	30.51%	44.63%
1971-72	29.25%	44.57%

Respondent became the top shipper in 1969-70 by its consolidation of firms not in the top 4 in 1968-69, thereby attaining nearly 8 percent of Imperial County shipments. Its share of shipments in the next two seasons approximated 10 percent. Over the four seasons, top 4 concentration rose nearly 30 percent, and top 8 concentration, about 25 percent.

The concentration picture in Arizona is mixed, showing a marked increase in the Salt River Valley but a decline in the other areas. The date may be summarized as follows:

	1967-68*	1968-69*	1969-70*	1970-71*
A-Central Arizona:				
1) Salt River Valley— <i>Fall</i>				
Top 4	27.00%	30.26%	42.56%	52.86%
Top 8	47.63	52.23	66.55	72.96
2) All others— <i>Fall</i>				
Top 4	47.33%	40.71%	39.23%	39.69%
Top 8	72.02	65.10	62.57	60.31
3) Salt River Valley— <i>Spring</i>				
Top 4	28.83%	37.48%	49.66%	54.15%
Top 8	51.20	57.88	73.09	81.81
4) All others— <i>Spring</i>				
Top 4	42.72%	43.17%	36.86%	40.97%
Top 8	66.50	62.48	56.77	60.83
B-Yuma ( <i>Winter</i> )				
Top 4	49.04%	47.15%	43.13%	38.26%
Top 8	71.07	71.27	68.83	65.21

\*Shipments from Sept. 1 through August 30. Sources: CXs 370-373 (Appendix).

This concentration analysis is not without its flaws, as respondent has noted at considerable length (RPF, Pars. 55-72, pp. 48-62; Pars. 152-156, pp. 115-18; RRB, pp. 4-6, 17-39). Respondent's basic objections may be summarized as follows:

1. Despite the large volume of shipments originating in each of the areas analyzed, the tabulations fail to take into account the competition from other areas, including immediately adjoining counties, where some of the same shippers, as well as others, are shipping lettuce to the same markets at the same time. For example, the economic expert who prepared the tabulations agreed that areas shipping at the same time should be "lumped together" (Walker 3324).

2. As for Arizona, the tabulations carve out the Salt River Valley in Central Arizona as a separate area and then lump together all the other

areas (Central Arizona, Eastern Arizona, and part of Western Arizona) where spring and fall lettuce is grown.

3. Because growers shift their lettuce planting from area to area and from year to year and because shippers likewise move in and out of particular growing areas from year to year, an analysis of a limited number of separate growing areas fails to give a complete or accurate picture. Aside from specific figures for respondent's total shipments and an estimate of those of Bud Antle, Inc., the record is silent as to the annual totals for any grower-shipper, many of whom ship not only from the areas analyzed, but from other areas as well.

Although there is testimony that the grouping of the areas in the Arizona tabulations was occasioned by lack of consistency in area definitions in the State market reports and by other statistical difficulties (Walker 3319-24), it is probably true that the Salt River Valley was analyzed separately because respondent had "staked out a strong position" there (CPF, Par. 145, p. 95), becoming the No. 1 shipper in 1969-70, with 17 percent of the fall shipments and 20.6 percent of the spring shipments; and increasing these percentages to 22 percent and 23 percent, respectively, in 1970-71. Here there was a clear increase in concentration in which respondent played a significant role. The fact that other factors contributed to this concentration—a downward trend in lettuce production in the Salt River Valley (RRB, pp. 19-24, 32)—does not erase the fact of increased concentration. Nor does the fact that in nearby competing areas, other shippers had higher shipment percentages than respondent did in the Salt River Valley (RRB, pp. 35-36) overcome the fact of respondent's dominance there.

Although respondent's criticisms have some merit, the fact remains that the analyses deal with areas accounting for a major part of the lettuce crop; and the impact of concentration within each such area at any given time constitutes a valid antitrust consideration. For example, conceding the existence of competition between Monterey County shippers of spring and fall lettuce, on the one hand, and Arizona shippers on the other, the existence of concentration in either area is a factor affecting supply and price not only within that area but also in the competing area. Notwithstanding their deficiencies, the analyses are sufficient to indicate that respondent's acquisitions have contributed to a concentration trend in several of the principal growing-shipping areas in the West.

In an effort to meet some of respondent's criticisms of the foregoing concentration analyses, complaint counsel have presented a series of alternative analyses (CPF, Par. 147, pp. 97-98)<sup>19</sup> as follows:

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<sup>19</sup> A few errors in the percentages shown have been corrected.

## CONCENTRATION

		1968-69	1970-71	Percentage Increase
(1) Arizona Fall lettuce: (excluding Yuma)	Top 4	25.10%	30.48%	21%
	Top 8	41.61	49.27	18
(2) Arizona Spring lettuce: (excluding Yuma)	Top 4	30.52%	34.47%	13%
	Top 8	45.38	51.12	13
(3) All Arizona lettuce: (including Yuma)	Top 4	24.39%	28.87%	18%
	Top 8	39.33%	43.38	10
(4) Winter lettuce: (Yuma & Imperial County)	Top 4	20.42%	27.97%	37%
	Top 8	32.25	39.63	23
(5) Arizona & California: (Monterey & Imperial Counties only (CXs 306-309, 389-391, 324)	Top 4	22.09%	32.36%	46%
	Top 8	32.86	43.14	31%

The foregoing tabulation goes a long way toward meeting respondent's objections, but is still subject to some critical analysis. It essentially combines the Arizona areas that ship at the same time and analyzes total Arizona shipments as well. It combines two of the principal producing areas of winter lettuce (Yuma, Arizona, and Imperial County, California). Finally, it takes account of the competition between the two principal lettuce counties in California, on the one hand, and all of Arizona, on the other. Although other producing areas in California and elsewhere are omitted, the final analysis (No. 5) covers substantially all the areas where the record contains data on individual shipments. (The calculations for this analysis are contained in CPF, Attachment D.)

Plainly, concentration is up in all alternative markets that may be considered. And for the largest market (No. 5 above), covering more than 65 percent of U.S. shipments, concentration has been greatly increased. In 1970-71, moreover, respondent was the leader in Arizona fall lettuce, with 10 percent; in total Arizona shipments, with 9 percent; in winter lettuce (Yuma and Imperial County), with 9 percent; in winter lettuce (Yuma and Imperial County), with 9 percent; and in the combined shipments for Arizona plus Monterey and Imperial Counties, with 13 percent. In Arizona spring lettuce, it was No. 2, with 10 percent; Bud Antle, Inc., had 13 percent. (CPF, Appendix D, pp. 1-5)

*Barriers to Entry*

One of the factors to be considered in testing the legality of mergers and acquisitions is barriers to entry into the industry under scrutiny—either the creation of new barriers or the raising of existing barriers. In this section we shall consider such barriers as availability of suitable lettuce land, product differentiation, "know-how," price inelas-

ticity of demand, financing, etc., on each of which respondent's acquisitions have had an impact.

Respondent's protestations that there are no barriers to entry in the lettuce industry—that there is complete ease of entry—are belied by its own documents. Just before respondent entered the fresh vegetables industry in general, and the lettuce industry in particular, in 1968, its management identified three barriers to entry that impelled it to take the acquisition route rather than to enter *de novo*:

1. There was "not sufficient land available for lease or development in the areas required for year-round production," all "suitable land" being then under lease (up to five years) to existing growers.

2. There was "no practical method of developing 'know-how' or for training the personnel required to produce lettuce," these skills being "available only in the organizations \* \* \* [then] growing lettuce."<sup>20</sup>

3. Finally "experienced professional vegetable type management" was required but was "not available" except in conjunction with the properties then owned and operated by such management; such management personnel were essential because they were familiar with other growers and had the required detailed knowledge of the land and of leasing arrangements. (CX 158 O-P, F)

These barriers and others will be the next subject for discussion.

#### Availability of Lettuce Land

Despite the foregoing admission by respondent that even a corporate giant such as United Fruit found the *de novo* acquisition of suitable lettuce land a barrier to proper entry, respondent now insists (RPF, Pars. 124-130, pp. 103-06; Pars. 139-152, pp. 110-15; RRB, pp. 13-14) that there is ample land throughout the nation for the production of lettuce, so that availability of land is not a barrier to entry.

However, the concept that respondent embraces is more theoretical than real. Respondent quotes at length testimony and documents to the effect that there is land in California, Arizona, Texas, and elsewhere that could be converted to lettuce production if the demand and the price warranted such a shift. Although that is a big "if," the argument has some validity because the record shows that farmers do shift from lettuce to other crops and vice versa. But there are obvious natural and economic reasons why so much of the production of lettuce is concentrated in California and Arizona. Respondent recognized at the outset of its exploration of entry into the lettuce industry that the Salinas Valley

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<sup>20</sup> The record confirms that entry into the industry as a new and separate entity has generally come only from individuals closely associated with the industry—individuals who were born and raised in the growing areas, or who were growers, handlers, or brokers, or who sold to or provided services to the industry (CPF, Par. 127, p. 86; CRB, Par. 281, p. 10).

of California was a "vital source of supply for a fairly extended period of the year," so that it was essential for respondent to have supplies in that area (Fox 1454-55). Moreover, the short answer to respondent's contentions regarding the availability of lettuce land is found in the management report quoted *supra* (p. 44) [p. 1657 herein] as to the problem of obtaining "suitable" lettuce land.

If any further answer be needed, the absurdity of respondent's position, as a practical matter, was demonstrated when an agricultural economist commented that if the price of lettuce were high enough, it would be grown at the North Pole if this were physically possible (Blaich 1355). Similarly, another witness conceded that land not now used for lettuce in the Salinas Valley could be used for lettuce production even though it might not be feasible to harvest a lettuce crop (Garner 1929).

The record makes abundantly clear that of all the land now in lettuce production or capable of being used for this purpose, some areas are clearly superior to others for a variety of reasons. It has already been noted that there is a trend to year-round production in order to supply customers on a year-round basis and to spread the risks inherent in lettuce production. As far as the Western producer is concerned, this necessitates land in the Salinas Valley, particularly in the Blanco area. Such land is difficult to obtain at reasonable cost. (Hansen 2307-09; Crosetti 2342-49; Jackson 2495-98; Bertelsman 2520-25; 2550-52; Hart 3025-29; Derdivanis 2024-31; Decker 2282, 2288; Mello 2458-63, Finerman 2467-70, 2477-78; Morris 2894-97; Schultz 3103; Mayberry 3172-76; Garner 1926-29)

By acquiring access to extensive acreage of suitable lettuce land through its acquisitions, and by its ability to obtain renewals of its leases as well as to acquire access to additional land at higher costs than can be afforded by most of its competitors or any would-be entrants into the lettuce industry, respondent's entry by acquisition has in fact raised the barrier to entry represented by the difficulty of obtaining suitable lettuce land at reasonable cost.

#### Product Differentiation

The ability to brand-differentiate a product and, through advertising and promotion, to achieve a consumer preference and a premium price for such product is a competitive advantage that may also constitute a barrier to new entry (Faris 3406). Because of respondent's efforts to differentiate its lettuce through the use of the "Chiquita" trademark, product differentiation is an issue in this case.

Regarding product differentiation, the parties agree, and the record confirms, that:

Before respondent's entry, the lettuce industry was an industry in which product differentiation was minimal. Approximately 5 percent of the lettuce was shipper-wrapped, which is a form of product differentiation. Three grower-shippers did most of the lettuce wrapping. There was no consumer advertising to promote a particular brand; interest was in promoting western lettuce. There was little or no awareness on the part of consumers concerning the brand names of particular grower-shippers. (CXs 70 B, 89 M, 157 C, 158 D, 246; Houseberg 1860-62; Derdivanis 2086; Faris 3421-22)

Respondent entered the fresh vegetables market with the avowed intention of establishing a national "consumer franchise" through the development of a branded line of produce items. Respondent intended to market a line of fresh vegetables identified by the name "Chiquita." These vegetables were to be of "premium quality" and marketed at a "premium price." It was the goal of the branding program to "subdue the historical variations of the fresh vegetable market, especially in terms of price fluctuations, and to elevate [respondent's] products from the commodity category by establishing a consumer demand for the Brand." Consumer demand was to be created and the premium price justified by means of advertising "designed to register the product superiority of the Brand." (CXs 137 B, 147 A)

Respondent planned to package and brand lettuce, celery, celery hearts, and cauliflower and also to develop a package for broccoli (CX 70 A). Its objective was to market a line of branded produce, modify or alter existing distribution channels to fit this requirement, and to convey to the consumer and the trade a plausible justification of this action (CX 85 A). Branding was designed to provide respondent more "freedom in price determination than would otherwise be possible." Company literature for employees pointed out:

Without brands or other distinguishing marks on products, the market determines the price \* \* \*. There is little or no opportunity for one firm to sell at higher prices than other firms.

Exercising some degree of control over the market and prices is valuable in assuring a continuing profitable market for a product and justifying the capital invested in production facilities. (CX 111 Z-32; see also CXs 137 B, 147 A; Fox 1457-58)

Lettuce was to be the first step in establishing respondent as a leader in perishable product marketing (CX 117 A). An extensive—and expensive—marketing test was initiated and enjoyed a degree of success. A price differential was established between wrapped Chiquita lettuce and both other wrapped lettuce and unwrapped lettuce. (CXs 128 B, 317 A; Bull 1527-31; Faris 3427-28) <sup>21</sup>

<sup>21</sup> Respondent's extensive research and market-test activities are outlined in CPF, Pars. 36-48, pp. 15-21, Pars. 59-64, pp. 25-28.

From respondent's own documents it is clear that the branding program was designed to establish for respondent an impregnable position of leadership in the lettuce market and thereafter in markets for other fresh vegetables.

The branding program was abandoned in 1970, and respondent's officials have testified that there is no intention of renewing it. Respondent's explanation is—

that because of differing weather, soil, growing, harvesting, packing and shipping conditions, it proved impossible to produce and sell lettuce that had a consistent year-round quality; that after a short test program in certain test markets, respondent decided its Chiquita lettuce branding program was a commercial failure, and abandoned same for the following reasons: (a) a consistent quality could not be maintained throughout the year nor guaranteed on any given day or for any period of time; (b) the consumer housewife who can see and feel the lettuce at the retail market made her own decision as to quality and placed no dependence or reliance on the brand name; (c) buyers of lettuce for resale also made their own determination of lettuce quality and placed no dependence or reliance on the Chiquita brand insofar as quality was concerned, and found there was no consumer demand for a particular lettuce brand. (RPF, Par. 210, pp. 172-73)

However, there is substantial support in the record for a finding that there remains a potentiality, if not a likelihood, that respondent may renew its branding program. Despite the remarkably abject confession by respondent's officials of the failure of the branding program and related marketing plans (RPF, Pars. 43-50, pp. 24-45), the factors that may have motivated abandonment in 1970 may be overcome in the future.

Although there is no evidence that the pendency of this proceeding motivated the abandonment of the Chiquita branding program for lettuce, the fact is that abandonment took place after respondent was on notice that the Commission intended to issue a complaint challenging the acquisitions. Thus, evidence of this post-acquisition change of marketing strategy may properly be viewed with some skepticism. In addition, respondent concedes that as a result of the contract signed in mid-1970 with the Chavez union, respondent encountered difficulty in controlling the harvesting crews and, consequently, the quality of the lettuce that was packed (Mason 3882-83). This is not necessarily a permanent disability.

One major factor that led to the abandonment of the branding program in 1970 was the lack of a sufficient market share to support the advertising and promotion program required for successful brand differentiation (CX 158 F-G, P-Q; Fox 1498). Obviously, if respondent is permitted to retain the acquired companies, there remains a reasonable possibility that the handicap of limited market share may likewise be

overcome.<sup>22</sup> As a matter of fact, respondent *has* materially increased its market share since the acquisitions (*supra*, p. 39) [p. 1652 herein].

Still another factor that influenced the decision to abandon the Chiquita branding program for lettuce involved questions both as to the appropriateness of such a brand name for non-tropical produce and also the possible adverse effect on the Chiquita brand for bananas if poor-quality lettuce were sold under that brand name (RPF, Pars. 40-41, pp. 23-24).

Despite respondent's emphasis on problems associated with source-wrapped lettuce, the fact remains that not only respondent, but also a growing number of its competitors, continue to ship source-wrapped lettuce. Moreover, the record shows that at least five lettuce shippers not only wrap their lettuce before shipment but also identify it by brand name, although they do not advertise such brands to the consumer. (Sherwin 4053-54; CX 291 F-G, J-K; Bradshaw 3941-42, 3985-86; CXs 291 F-G, J-K, 403 Z-8) Assuming, as respondent insists, that a successful branding program depends on sufficient quantities of consistently high-quality lettuce (compare CRB, Par. 308, pp. 22-23), these shippers presumably have been able to do this to the point that they do not consider it a business risk for their lettuce to bear a brand name. There is no reason to believe that respondent cannot achieve the same results. (See CX 88 A-B.)

Thus, it is clear that the problems encountered by respondent in its program of branding lettuce and seeking a consumer franchise for it are by no means insurmountable. In assessing the likelihood of a renewal of the branding program, it is fair to examine respondent's experience with the Chiquita branding program for bananas. The record demonstrates that respondent encountered and continues to encounter difficulties in maintaining a consistent quality of bananas, but the program has nevertheless been successful in the banana industry (Mason 3888-95; see CX 44A-B).<sup>23</sup> One of respondent's officials recognized that some of the problems associated with wrapped and branded produce might be overcome by the establishment of "cold storage warehouses adjacent to major markets or clusters of major markets," to which produce might be shipped in bulk and then held and wrapped on order from local chains (CX 124 A-B).

On the witness stand, respondent's officials, for the most part, summarily repudiated the validity of all the research that preceded the

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<sup>22</sup> A management memorandum in September 1968 referred to a market share of 25 percent as "needed in order to support an adequate national advertising program" but this volume was "considerably reduced \* \* \* because of anti-trust considerations" (CX 158 Q).

<sup>23</sup> The branding program and related practices in respondent's banana business are summarized in CPF, Pars. 15-33, pp. 6-13. These proposed findings have not been challenged by respondent.

initial adoption of the branding program, but it is nevertheless clear that brand differentiation remains a course of action open to respondent. Despite the problems associated with the source-wrapping of lettuce, respondent continues to engage in pre-wrapping, and it is but a short step to add a brand name and to accompany such branding by extensive advertising and promotion. Moreover, the testimony that respondent has no intention of resuming the branding program must be discounted in the light of the fact that the chairman and chief executive officer of United Fruit Company, in November 1970, advised all employees as follows:

The Chiquita branded program will be pursued vigorously with a re-emphasis on many of our old strengths and a concentration on new approaches that will keep United Fruit in front—ahead of its competitors in the marketplace. We will never go back to the old commodity approach in our business. (CX 234 B)

And, as noted elsewhere, branding is emphasized in respondent's meat business. Respondent is clearly consumer-brand oriented.

Respondent's argument that product differentiation through branding is not likely to constitute a barrier to entry in the lettuce industry must accordingly be rejected.

#### Price Inelasticity of Demand

Reference has been made previously to the price inelasticity of demand that characterizes the lettuce industry (*supra*, p. 24) [p. 1640 herein], and it need not be repeated here. Similarly, the fact that such inelasticity constitutes an entry barrier requires no citation of either legal authority or economic authority.

It is apparent that with respondent having displaced six relatively small, independent grower-shipping enterprises, the entry barrier of price-demand inelasticity has been raised. Would-be entrants would be aware of respondent's share of the market, of its price leadership, of its power to cause market gluts, and of its deep-pocket capability to withstand the resulting low-price markets (Faris 3411-15, 3432-35).

The fact that the inelasticity of demand for lettuce does constitute a barrier to entry was recognized by respondent at the same time that it was arguing otherwise. If respondent had been able to enter the lettuce industry *de novo* by growing lettuce on land not now in lettuce that it contends is available and if it had done so on the same scale represented by its acquisitions (annual production of 7 million cartons), respondent notes:

Such incremental or excess volume superimposed on top of an already existing oversupply situation would have been disastrous (Bradshaw 3950), that is, it would have caused further depressed prices and losses (RPF, Par. 132, p. 107; see Faris 3607-10).

Thus, with respondent obviously in a position to create or aggravate an "oversupply situation," the prospects would not appear favorable to a would-be entrant.

#### Risk and Financing

Two of the other principal barriers to entry that have been raised by the challenged acquisitions are so closely related that they may be treated together. These are (1) risk and (2) financing problems. Both, in turn, are related to the price inelasticity of demand just outlined.

If there is one aspect of this case that respondent does not dispute, it is that lettuce is a high-risk crop<sup>24</sup> because both supply and price are extremely variable, so that the industry has been periodically plagued by oversupply, low prices, and either low profits or losses. Hardly an attractive prospect for a would-be entrant unless he were blessed with eternal optimism or a deep pocket or both.

Thus, we begin with an existing barrier to entry. Add to this the presence in the industry of a giant corporate conglomerate, with both market power and a deep pocket, and the result is obvious: The existing entry barrier is raised appreciably. Prospective entrants, whether already engaged in some phase of the lettuce industry or looking in from the outside, are not likely to find the prospect inviting.

There is an obvious relationship between this risk factor and the matter of financing in the lettuce business. Complaint counsel's economic expert outlined the problem this way:

Commercial credit sources recognize the riskiness of a crop such as lettuce. A typical credit institution restraint was that at least half of the farmer's acreage must be in field crops which are characterized by relatively stable prices. This serves as security against low prices for fresh vegetables such as lettuce \* \* \*. Commercial credit institutions prefer to make loans based on the physical assets. Consequently, larger shippers are more able to obtain larger amounts of production credit than are the small growers. The grower-shippers can enter into various contracts with the growers and will provide some of the production capital and inputs needed. Thus, for the same amount of available funds, a grower-shipper can ship more lettuce as well as spread some of the risk associated with uncertain prices. The financial limitations placed on the growers and grower-shippers serve as a barrier to large annual expansions of vegetable crops such as lettuce. (Paris 3420-21; see also pp. 24-25, *supra*; CX 274, pp. 6, 8)

Complaint counsel have cited little or no definitive record information as to the cost of entry into the lettuce business but contend that capital requirements constitute a relatively high entry barrier (CPF, Par. 129, p. 88). Their economic expert testified that to become a grower-shipper requires a "considerable amount of capital;" but obviously fatigued at the end of two days of cross-examination, he was unable to give either a

<sup>24</sup> "The element of economic risk in lettuce production is among the highest in agriculture" (RX 1 I).

specific amount or a range of amounts (Faris 3632-33). One witness estimated \$100,000 for entry in a "very small way," but acknowledged that this was a "kind of a guess" (Crosetti 2345-46, 2349). Land costs and growing costs have increased, but packing costs may be lower than they were before the advent of vacuum cooling (Crosetti 2349-50; see Derdivanis 2020-21; Antle 2723-24). Because of financing, this witness viewed the entry of United Brands with "some concern" (Crosetti 2351).

With the financing of a high-risk crop like lettuce already a problem, there is evidence that the presence of respondent in the industry injected a further risk factor for bankers to take into account. An Arizona shipper, now out of the business, testified that "It's almost impossible to go to a bank to get financed on speculative crops such as produce." The company did not have the funds to continue in the produce business any longer. This shipper attributed his exit from lettuce and from fresh produce at the door of the conglomerates generally. He stated:

\* \* \* I feel that is the farming business as a whole, conglomerates are going to end up in the field of agriculture, and I don't think there's room for the small farmer. They seem to be able to fund themselves in a better manner than we can \* \* \* I know we can't bump heads with them if we stay in business. That's why we're getting out. (Eaton 3277-79)

Another former lettuce operator, with production in both California and Arizona, indicated that his bank was concerned about conglomerates getting into lettuce and possibly causing low markets in which the small operator could not survive. This witness indicated his bank was concerned "with large corporations getting involved in [the] lettuce business and ultimately creating long periods of low market because of their high volume and for a small operator such as myself, that didn't have the financial resources to carry through long periods of low market \* \* \* ." (Henning 3041-44). Complaint counsel claim too much, however, when they propose a finding that respondent's activities were the cause of his exit from the industry (CPF, Par. 177, p. 114). Henning was in a loss position before the entry of United Brands (RX 25). Obviously, however, the injection of this new element of risk was a factor.

For those already in the industry with land or land-leases, or joint deals, with "know-how," and with management expertise, capital requirements and current financing requirements pose the principal barrier to their expansion or their entry as new entities (see CRB, Pars. 281-283, pp. 10-11). The difficulty of obtaining new or additional land suitable for lettuce may likewise be a problem (*supra*). To these existing problems respondent has added a new dimension.

Respondent emphasizes (RRB, pp. 14-15) that some of the larger operators, such as Bud Antle, Inc., and Hansen Farms, had substantial indebtedness (RX 35; Hansen 2307); that interest paid both by respondent and by grower-shipper witnesses was slightly above the prime

rate (Henning 3041; Hansen 2307; Derdivanis 2035; Bertelsman 2513); and that some were able to operate without substantial borrowing (Crosetti 2343).

But this does not refute the fact that financing in the lettuce industry, whether for an established enterprise or for a newcomer, is a problem—a barrier either to entry or to expansion (Huffman 2926-27).

On the basis of this record, it is found that capital costs and the requirements for continued financing do constitute a barrier—a barrier that has been raised by the entry-by-acquisition of United Brands.

#### Transfer of Oligopolistic Practices

The record not only demonstrates respondent's size, the diversity of its operations, and its financial strength ("deep pocket"), but it also reflects certain oligopolistic practices on the part of respondent that are characteristic of its participation in oligopolistic industries—practices that are being transferred or that may be transferred to the lettuce industry or, more broadly, to the fresh vegetables industry.

First, in the banana industry,<sup>25</sup> respondent has enjoyed a dominant position, holding a national market share in excess of 50 percent while another company (Standard Fruit) has held a national market share in excess of 30 percent and all others have aggregated a market share of from 9 percent to 15 percent.<sup>26</sup> Respondent's market position and price leadership have been due in part to product differentiation—the development of "Chiquita" brand bananas that have commanded a substantial price difference as compared with both branded bananas of competitors and unbranded bananas. Respondent's market power in the banana industry, including that brought about through product differentiation, also permitted it to introduce a system of advance-order selling, which was coupled with the use of rollers.

Second, product differentiation through branding and advertising continues to be emphasized in the meatpacking segment of respondent's business (John Morrell & Co.) (CX 396, pp. 6-7, 24-25). It is worth noting also that respondent, through its J. Hungerford Smith subsidiary, is a leading manufacturer of beverage bases, fruits, and flavors to the institutional food service and ice cream manufacturing fields and, through its ownership of A & W, holds a major position in the fast food service business, while its subsidiary, Baskin-Robbins Ice Cream Company, enjoys ice cream sales in excess of Howard Johnson (CXs 215 B, 213 A). Respondent's leadership in these fields is due in major part to

<sup>25</sup> These findings are based essentially on the facts and record citations set forth in CPF, Pars. 14-34, pp. 5-13; Par. 189, p. 120, which have not been challenged by respondent.

<sup>26</sup> Although respondent stated in its answer (Par. 8) that under the terms of a final Federal court judgment, its estimated share of the domestic market in the importation and sale of bananas will be only approximately 35 percent, the record is otherwise silent as to this development. In any event, this change in market share does not detract from the impact of the historical background of respondent's position in the banana industry.

aggressive advertising and promotional activities (CX 396, pp. 15-16).

It is fair to consider this background in assessing respondent's entry into the lettuce and other fresh vegetables industries. Respondent has undertaken to transfer to the lettuce industry these same oligopolistic practices, and there is a reasonable probability of their renewal and eventual success (Faris 3428, 3436-37).

#### *Industry Restructuring*

The complaint alleges (Par. 36(4)) that

The structure of the fresh lettuce industry \* \* \* has been transformed or is being transformed, from \* \* \* [an industry] of small independent profitable concerns selling in a competitive market at prices determined by the short term balance of supply and demand into [an industry] dominated by large conglomerate companies selling at stable prices arrived at outside the competitive market by means of such control mechanisms as brand differentiation, preselling of consumers, long term quotes or supply arrangements, and other means.

The findings in the foregoing sections essentially support these allegations. If they are not actualities in all respects, there is at least a dangerous potentiality of anticompetitive restructuring of the lettuce industry along the lines alleged.

This case strongly parallels the situation in *Reynolds Metals Co.*, 56 F.T.C. 743, 774 (1960), 309 F.2d 273 (D.C. Cir. 1962). Here, as in *Reynolds*, all of the enterprises in the lettuce industry were

of a roughly equivalent competitive status, if looked at on a broad scale. In other words, no company was very big and all were relatively small. Some had advantages not shared by all, but they each had about the same competitive capabilities. Also, they were active and aggressive competitors.

Now the balance of power has shifted decisively to respondent, largely due to its overall size, its deep pocket, its competitive advantages, its growing market share, and its price leadership—all this coupled with a reduction in the number of sellers and a consequent increase in concentration ratios, as well as a rise in barriers to entry. These factors are particularly acute in a high-risk industry like lettuce in which there is price inelasticity of demand.

Language used by the Commission in *the Procter & Gamble Co.* case, 63 F.T.C. 1465, 1579 (1963), with appropriate substitutions as to the parties and the industry, is applicable to the "psychological response" of the members of the lettuce industry to respondent as a competitor:

To the extent that [United Brands] is thought by them to be not only a large and affluent firm, but also, a powerful firm, in terms of market power enjoyed in related markets and possibly transferable into the [lettuce] market, its prowess as a competitor gains an added and even sinister dimension in the eyes of its \* \* \* rivals—a factor of considerable importance to the impact of the merger on competition in the [lettuce] industry.

The Supreme Court agreed that there was danger that the

substitution of the powerful acquiring firm \* \* \* may substantially reduce the competitive structure of the industry by raising entry barriers and by dissuading the smaller firms from aggressively competing \* \* \*. *FTC v. The Procter & Gamble Co.*, 386 U.S. 568, 578 (1967).

Thanks to its diversification and its financial resources, United Brands is not as sensitive to market pressures as its competitors. It wants to be insulated from the impact on prices of the law of supply and demand. It wants to "administer" lettuce prices and to avoid being subject to the daily play of market forces. And it has the power to achieve these ends.

It is not necessary to spell out the consequences that are likely to ensue if United Brands is permitted to retain its acquisitions (but see CPF, Pars. 242-245, pp. 141-43). Suffice it to say here that the substitution of United Brands for six relatively small independent enterprises threatens to restructure the lettuce industry in ways that bode ill for its competitive health.

#### Respondent's Special Defenses

In addition to contending that the evidence fails to support the allegations of the complaint as to the probability of competitive injury, respondent also undertakes to defend its acquisitions and its post-acquisition practices on various legal and factual grounds.

In its answer (Par. 40) respondent pleaded as an affirmative defense that "Certain of the alleged acquisitions were of non-corporations and cannot be challenged under Section 7 of the Clayton Act." The reference is to the partnerships known as Toro Farms and Salinas Valley Vegetable Exchange. Respondent ignores the fact that a violation of Section 5 was also pleaded both conjunctively and disjunctively. Respondent has made no issue of this jurisdictional question in its proposed findings and briefs, but it can be briefly resolved by reference to controlling case law. See, for example, *Beatrice Foods Co.*, 67 F.T.C. 473, 724-27 (1965);<sup>27</sup> *Foremost Dairies, Inc.*, 52 F.T.C. 1480 (1956) (Section 5 charges dismissed on other grounds, 60 F.T.C. 944, 1090-92 (1962)). Moreover, it is well settled that actions that conflict with the policy of the Clayton Act, whether or not within its letter, may constitute a violation of Section 5 of the Federal Trade Commission Act, *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966); *Atlantic Refining Co. v. FTC*, 381 U.S. 357, 369-70 (1965); *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 394-95 (1953). And the Commission has ordered divestiture under Section 5, *L.G. Balfour Co.*, Docket 8435 (Final Order, July 29, 1968),

<sup>27</sup> Order to cease and desist issued December 10, 1965, 68 F.T.C. 1003; modified June 7, 1967, 71 F.T.C. 797, pursuant to consent decree, 1967 Trade Cases Par. 72, 124 (9th Cir.).

affirmed in part and reversed in part (on other grounds), 442 F.2d 1 (7th Cir. 1971).

Respondent seems to suggest that the various State and Federal laws permitting farmers to engage in cooperative marketing activities somehow immunize from the antitrust laws respondent's creation, through a series of acquisitions, of an integrated growing and marketing enterprise in the lettuce and fresh vegetables industry (Answer, Par. 43; RPF, Par. 138, p. 109; p. 186 (Par. 10); RRB, pp. 82-83). This argument is so fallacious as to require no explanation of its rejection.

A related contention is that the growing concentration on the selling side of the lettuce industry, including respondent's market power, is a healthy antidote to the concentration on the buying side of the market—that is, the market power of the chain grocery stores (RPF, Pars. 157-158, pp. 118-20). The record contains conflicting viewpoints as to the existence of oligopsony power (CX 278, cited in CPF, Par. 133, p. 90, and RX 3, cited in RPF, Par. 158, pp. 118-20). Assuming, without deciding, that oligopsony is present in the lettuce market, this nevertheless does not invoke the law's blessing on consolidations, corporate or noncorporate, that are otherwise illegal. The concept of "countervailing power" is not a valid defense in this case.

Respondent further contends that the the complaints of its competitors concerning the effect of respondent's entry into the lettuce industry by acquisition were prompted because of respondent's refusal to engage in violations of the antitrust laws (CPF, Par. 3(8), pp. 3-4, Pars. 102-119, pp. 83-101; Answer, Par. 42). According to respondent, it refused to join in concerted price-fixing or such price-fixing arrangements as agreed limitations on lettuce production. There is no substantial evidence in this record to permit such a finding—either as to the existence of such combinations and conspiracies or the existence of such motivation on the part of the complaining witnesses (see CRB, Pars. 288-298, pp. 14-18). At most, there is testimony suggestive of occasional effort of some lettuce sellers to halt a price decline by limitations on harvesting or on shipments. Even if the record supported or tended to support the existence of price-fixing activities, this would not justify a series of acquisitions that are violative of Section 7 of the Clayton Act or Section 5 of the Federal Trade Commission Act.<sup>28</sup>

<sup>28</sup> Respondent complains of the "hostility" of some of the grower-shippers who testified. It attributes such hostility to their resentment because of respondent's refusal to join in certain allegedly illegal practices and also because respondent had signed a contract with the Cesar Chavez farm workers' union (RRB, p. 54; RPF, Par. 203, pp. 162-65). Whatever hostility there may have been on the part of some witnesses, the undersigned finds no basis for rejecting their testimony generally. To the extent that some of the testimony as to respondent's pricing was based on hearsay, it has been considered in the light of the circumstances and in the context of the entire record. Respondent has not pointed to any specific testimony that should be discredited. Such a generalized objection must be rejected.

On a related subject, respondent contends that its former practice of announcing to the trade that it was "rolling" and consigning lettuce unsold at the shipping point was required by the provisions of the Robinson-Patman Act (RPF, Par. 3(8), pp. 3-4; Pars. 102-110, pp. 83-89). There is no occasion for the undersigned to make any definitive determination as to the applicability of the Robinson-Patman Act to rollers or consignments. It may be noted in passing, however, that the terms of the statute are such as to make questionable respondent's argument (CRB, Pars. 285-286, pp. 12-13). But this is not an issue in this case as such and need not be resolved.<sup>29</sup>

#### CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondent United Brands Company ("United Brands" or "respondent").

2. The complaint states a cause of action, and this proceeding is in the public interest.

3. During 1968 and 1969, United Brands acquired all of the capital stock of the following corporations:

Earle Myers Co.

Demco Farms, Inc.

Nunes Brothers of California, Inc.

Monterey County Ice & Development Company

and the business and certain assets of the following corporations:

Peter A. Stolich Co., Inc.

Jerome Kantro Enterprises

Consolidated Growers, Inc.

Since both United Brands and each of the listed corporations were in commerce, the acquisitions, whether of stock or of assets, are subject to Section 7 of the Clayton Act.

4. In addition, United Brands purchased certain assets of the following partnerships:

Toro Farms

Salinas Valley Vegetable Exchange

Since United Brands and these partnerships were engaged in commerce, the asset acquisitions are subject to Section 5 of the Federal Trade Commission Act.

5. For purposes of assessing the legality of these acquisitions, the line of commerce (the product market) that has been analyzed is the production and sale of lettuce. Although the findings have been limited

<sup>29</sup> If respondent were charged with predatory pricing through its former practice of announcing to the trade the availability of rollers and consignments, a showing of a good-faith belief that the practices were required by the Robinson-Patman Act might conceivably be a defense. But we have already seen that complaint counsel have disclaimed any intent to charge respondent with predatory pricing.

to lettuce, this limitation does not preclude the drawing of inferences as to a corresponding impact on the growing and shipping of other vegetables associated with the production and sale of lettuce, such as celery and cauliflower, and thus on the fresh vegetables industry generally. Respondent has insisted that it is engaged in the fresh vegetables industry and that there is a relationship between lettuce and each of the other crops that it and its competitors produce and sell. Thus, the effects here found in the lettuce industry may be translatable to the fresh vegetables industry as a whole. In other words, the findings as to the impact of respondent's acquisitions on the lettuce industry warrant an order dealing with the broader segment of the market of which lettuce is a part. The lettuce industry is the microcosm from which the macrocosm may be deduced.

6. The relevant geographic markets include the United States as a whole and the principal producing-shipping areas in California and Arizona.

7. At the time of its first acquisition, United Brands was not a competitor of any of the acquired companies. Once it was in the business, subsequent acquisitions technically involved competitors. But neither the complaint nor complaint counsel have viewed this situation as creating a series of "horizontal" acquisitions.

8. United Brands was a potential competitor in the fresh vegetables industry, including its lettuce segment, but it did not constitute a substantial competitive factor in those lines of commerce. There is no evidence that United Brands had the intent of entering the lettuce industry or the fresh vegetables industry other than by acquisition; in fact, the evidence is to the contrary.

9. By its acquisitions, United Brands eliminated competition among the grower-shippers that it acquired and substituted for them and for a formerly independent cooler operation a giant conglomerate corporation which, because of its deep pocket and its ability to subsidize its lettuce operations out of a corporate treasury drawn from a variety of other business operations, gave the new integrated operation (Inter Harvest, Inc.) decisive competitive advantages over competitors. In an industry with a declining number of sellers, the acquisitions further reduced the number of competitors.

10. Whereas the lettuce segment of the fresh vegetables industry has been a traditionally small-business operation, atomistic in structure, with prices determined by supply and demand, the entry of United Brands has contributed and may contribute to increasing concentration and a restructuring of the industry, with a dominant United Brands exercising price leadership and otherwise impeding competition. The record makes clear its aim to escape the rigors of competition. The

record makes clear its aim to escape the rigors of competition—to stabilize prices—to subdue price fluctuations. And this is reflected throughout its briefs, with numerous references to an “over-abundance of competition” (e.g., RPF, Par. 3(4), p. 2; Par. 134, p. 108) and to “ruinous” or “destructive” competition (RRB, pp. 78, 81–83).

11. Barriers to entry have been and may be raised through United Brands' present control over a substantial acreage of lettuce-producing land and its ability to obtain control over additional acreage; its capability for and its exercise of price leadership; its opportunities to enjoy certain economies in operations and in purchasing supplies and services as a result of its size and power; its potentiality for achieving product differentiation; and its power to introduce into the lettuce industry oligopolistic practices from the oligopolistic banana industry. United Brands' entry raised existing entry barriers such as the price inelasticity of demand and the high risks and uncertainty that characterize the lettuce industry, with corresponding limitations on financing.

12. In summary, United Brands has become the dominant company in shipping lettuce throughout the year. With United Brands accounting for nearly 11 percent of total U.S. lettuce shipments, its entry substantially raised “top-two” concentration on a national basis. Concentration has likewise increased in each of the areas in California and Arizona where United Brands is one of the four largest grower-shippers.

13. The effect of respondent's acquisitions, individually and collectively, has been or may be substantially to lessen competition or to tend to create a monopoly or to restrain competition in the fresh lettuce industry and in the fresh vegetables industry, in violation of Section 7 of the Clayton Act, (to the extent applicable) and also in violation of Section 5 of the Federal Trade Commission Act.

#### Rationale of the Order

The undersigned has adopted in substance the form of order\* that the Commission indicated “should issue if the facts are found to be as alleged in the complaint” (Complaint, p. 12).

The order is designed to implement the “congressional judgment in favor of atomized markets reflected in the Celler-Kefauver Antimerger Act”<sup>30</sup> (*Ford Motor Co. v. United States*, 405 U.S. 562, 578, n. 12 (1972)).

\*The proposed order issued with the complaint is not published herein. However, it is available for inspection at Legal and Public Records, Federal Trade Commission, Washington, D.C.

<sup>30</sup> Respondent scoffs at the “nostalgic desire to see a market composed of many small companies, each with less than 1 percent of the market,” and argues that “that structure cannot survive against a buyer market that is composed of fewer and fewer companies with larger and larger market shares” (Answer, Par. 49). “For these reasons,” respondent says, “the complaint is contrary to economic theory in alleging the benefits of a lettuce market composed of numerous small farmers who all are at the mercy of the buyers, and in attempting to retard the natural trend towards larger farms because of efficiency demands.”

This affirmative defense advanced by respondent has three major flaws. First, of course, it flies in the face of the “congressional judgment” quoted in the text.

(Continued)

The divestiture requirement does not provide for simply divesting the stock and assets acquired. Since the land leases are the basis for respondent's participation in the lettuce industry and other segments of the fresh produce industry, the order requires that respondent "effectively terminate each and every lease of land that has been used, is used, or is intended to be used for the production of fresh produce" or, in the alternative, "assign such leases, subject to the prior approval of the Federal Trade Commission, to at least seven unaffiliated individuals or concerns, each having less than \$20,000,000 of business sales annually."

In requiring distribution of the leases to entities that do not enjoy annual sales of more than \$20 million, the order is designed to exclude all concerns of such a size as to possess the competitive advantages that United Brands holds in the industry. By providing for plural distribution to the approximate number of the companies that respondent acquired, such divestiture would reverse the increase in concentration at major shipping points, increase the number of sellers there, and generally reduce barriers to entry.

United Brands is required also to "divest each and every acquired facility providing supplies or services to the fresh produce industry (including post-acquisition additions or improvements), subject to the prior approval of the Federal Trade Commission," and is barred for ten years from participating in any manner in the fresh produce industry in relation to the divested lands and facilities.

Paragraph I of the order is orthodox in providing for divestiture, the customary remedy in merger cases, although the manner of divestiture has its novel aspects.

However, Paragraph II of the order appears to be unprecedented in Federal Trade Commission merger proceedings in prohibiting United Brands, for a period of ten years, "from engaging in the United States, directly or indirectly, in the fresh vegetables<sup>31</sup> industry, without the prior approval of the Federal Trade Commission."

There is, however, strong recent precedent for such an extraordinary

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(Continued)

Second, although there may be indications of oligopsony power in the fresh vegetables industry (*supra*, p. 58) [p. 1668 herein], this doctrine of "countervailing power" cannot overcome the public policy in favor of preserving atomistic markets. The answer is not to promote additional bigness and concentration through the introduction of corporate farming but to apply the antitrust laws to the fullest extent against oligopsony power where it exists.

Finally, respondent's argument concerning the "natural trend towards larger farms because of efficiency demands" is belied, interestingly enough, by its defense against allegations that it enjoyed economies of scale and low prices on supplies and services because of its mass purchasing power. According to respondent, its "overall costs were higher than those of smaller grower-shippers," including overhead and labor costs (RPF, Par. 231, p. 181; see CPF, Pars. 255-257, pp. 147-49).

<sup>31</sup> The notice order contained in the complaint would have made the prohibition applicable to the "fresh produce industry." However, complaint counsel requested that the term "fresh vegetables" be substituted for "fresh produce" in this part of the order (CPF, p. 149). They have made no explanation for the change. It appears to be in recognition of the fact that the record is essentially limited to vegetables.

remedy. In the *Ford Motor Co.* case, *supra*, the Supreme Court upheld a District Court decision that not only required Ford to divest assets constituting the domestic spark plug business of Electric Autolite Co., but also prohibited Ford, for a period of ten years, from entering the spark plug business on its own. This ancillary relief was upheld by the Supreme Court on the ground that it was necessary to correct the anticompetitive effects of Ford's unlawful acquisition. It was designed primarily to restore, to the extent possible, the *status quo ante*—to give the divested spark plug enterprise an opportunity to re-establish its competitive position.

The prohibition contained in Paragraph II of the instant order may be justified on the same basis as in the *Ford* case—that is, to insure the viability of the enterprises that acquire from United Brands the assets here ordered to be divested.

However, complaint counsel go beyond this rationale and forthrightly recognize that a “prohibition on acquisitions would not be sufficient, because the numerous competitive advantages 4\* \* \* enjoyed by United Brands over other grower-shippers in the Salinas Valley, the Imperial Valley and Arizona derive not from the means of entry into the industry but from United Brands' presence in the industry” (CPF, Par. 254, pp. 146-47). That is to say that, given the structural element of inelasticity of demand that marks the lettuce industry, coupled with high risks and uncertainty, the anticompetitive effects attributable to United Brands “exist independent of the means of entry” (*id.*).

Thus, it is not sufficient simply to require divestiture and to prohibit similar acquisitions in the future. If United Brands entered the industry *de novo* in any major way, the probable result would be the same as that occasioned by its entry by acquisition. The probabilities are that United Brands would still enjoy the competitive advantages outlined herein; that barriers to entry would be raised; that the industry would be or might reasonably be expected to be restructured; and that United Brands would have the power and the opportunity to transfer from the oligopolistic banana industry the oligopolistic practices there existing.

A prohibition against *de novo* entry, or entry by internal expansion, flies in the face of the established view that this is not illegal even though, as here, the anticompetitive effects might be the same, *United States v. Ford Motor Co.*, 286 F. Supp. 407, 441 (D.C.E.D. Mich. 1968).

In determining that the relief in this case should include not only divestiture but a prohibition against *any* entry by United Brands into the fresh vegetables market (Complaint, p. 12), the Commission evidently recognized that divestiture is only a start toward restoring the pre-acquisition situation. The relief here ordered is designed to be “effective to redress the violations” and “to restore competition”

(*United States v. duPont & Co.*, 366 U.S. 316, 326, (1961)). Just as the District Court is clothed with "large discretion" to fit the decree to the special needs of the individual case," as the Supreme Court said in the *Ford Motor* case, *supra*, 405 U.S., at 573, the Commission likewise is vested with a large measure of discretion in fashioning its orders in the public interest.

The ban on any entry for ten years without advance Commission approval is necessarily founded on a determination that in the light of the findings herein, it would be an unfair method of competition and an unfair act or practice, in violation of Section 5 of the Federal Trade Commission Act, for United Brands to inject its power into the traditionally small-business fresh vegetables industry, as exemplified by the lettuce segment thereof.

In *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972), the Supreme Court gave an expansive reading of the Commission's discretion in defining the unfairness standard. It emphasized that the Commission has the same broad discretion as a court of equity in determining what is "unfair." At the least, the Commission is bound to consider the public values "enshrined in the letter or encompassed in the spirit of the antitrust laws." Both the letter and the spirit of the amended Section 7 reflect a public policy in favor of our traditionally small-company competitive economy. This was a "congressional judgment in favor of atomized markets" and demonstrated the congressional intent "to promote competition through the protection of viable, small, locally owned businesses." Moreover, "Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization" (*Ford Motor Co. v. United States*, *supra*, 405 U.S., at 578, citing and quoting from *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962)).

In the *Ford* case, *supra*, the majority, responding to the dissent of Chief Justice Burger, stated that the "suggestion that antitrust 'violators may not be required to do more than return the market to the *status quo ante*' \* \* \* is not a correct statement of the law" (405 U.S., at 573, n. 8). The Court emphasized that the relief that can be afforded under the antitrust laws "is not limited to the restoration of the *status quo ante*" but "must be directed to that which is 'necessary and appropriate in the public interest to *eliminate the effects* of the acquisition offensive to the statute,' *United States v. DuPont & Co.*, 353 U.S. 586, 607 \* \* \* or which will '*cure the ill effects* of the illegal conduct, and assure the public freedom from its continuance.' *United States v. United States Gypsum Company*, 340 U.S. 76, 88" [emphasis added by the *Ford* court].

In a case in which the removal of respondent as a potential competitor was part of the original theory of the case, it is admittedly anomalous to fashion an order that prevents United Brands from exercising the role of a potential competitor. However, even aside from the fact that complaint counsel have receded from that initial position (*supra*, pp. 26-27) [p.—herein], such an anomaly did not deter the District Court and the Supreme Court from enjoining Ford from the role of a potential competitor, despite the fact that the potential competition aspect was one of the key elements of that case.

This is not a case where the Commission, by arbitrary fiat, determines that a company should not be permitted to enter a given industry *de novo*. Here we have a record establishing a basis for a determination of the anticompetitive effects flowing from the presence in the lettuce industry, or more broadly, the fresh vegetables industry, of a giant corporate complex like United Brands. This record has demonstrated the power of United Brands to restrain commerce and to suppress competition. This power was exercised by means of an unlawful combination of previously competing enterprises. But to permit United Brands to re-enter the industry by internal expansion would be to permit the same anticompetitive effects achieved by the acquisitions. Cf. *Northern Securities Co. v. United States*, 193 U.S. 197, 357 (1904). Even under the *Gratz* doctrine (*FTC v. Gratz*, 253 U.S. 421, 427 (1920)), such a result is actionable because it involves practices “against public policy because of their dangerous tendency unduly to hinder competition or create monopoly.” For United Brands to re-enter the lettuce industry or the fresh vegetables industry would have such a dangerous tendency and would, therefore, constitute an unfair method of competition and an unfair act or practice, in violation of Section 5 of the Federal Trade Commission Act.

Finally, “it is well settled that once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor” (*Ford Motor Co.*, *supra*, 405 U.S., at 575; *duPont*, *supra*, 366 U.S., at 334).

The order follows:

#### ORDER

##### I

*It is ordered*, that within ninety (90) days from the effective date of this order, United Brands Company shall:

- (a) Effectively terminate each and every lease of land that has been used, is used, or is intended to be used for the production of

fresh produce<sup>32</sup> or, alternatively, assign such leases, subject to the prior approval of the Federal Trade Commission, to at least seven unaffiliated individuals or concerns, each having less than \$20 million of business sales annually;

(b) Divest each and every acquired facility providing supplies or services to the fresh produce industry (including post-acquisition additions or improvements), subject to the prior approval of the Federal Trade Commission; and

(c) Cease and desist for ten years from growing, shipping, marketing, or otherwise participating in the fresh produce industry or any phase thereof in relation to the lands and facilities subject to subsections (a) and (b).

## II

*It is further ordered*, That United Brands Company shall cease and desist for ten (10) years from engaging in the United States, directly or indirectly, in the fresh vegetables<sup>33</sup> industry, without the prior approval of the Federal Trade Commission.

## III

*It is further ordered*, That within thirty (30) days following the effective date of this order, and annually thereafter, United Brands Company shall submit a verified report in writing to the Federal Trade Commission setting forth in detail the manner and form in which it intends to comply, is complying, or has complied with the provisions of this order.

## IV

*It is further ordered*, That United Brands Company shall notify the Commission at least thirty (30) days prior to any proposed change in its corporate status, such as dissolution, assignment, or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance obligations arising out of this order.

## APPENDIX

This Appendix contains Commission exhibits showing concentration ratios for the major producing-shipping areas in California and Arizona. CXs 367 A-D cover Monterey Coun-

<sup>32</sup> For the purposes of this order, "fresh produce" shall include each and every vegetable and fruit specifically grown in the United States for sale at retail in fresh form, *i.e.*, not canned, not frozen, or otherwise preserved except for normal refrigeration, such as lettuce, celery, broccoli, cantaloupe, etc. (Complaint, Par. 1)

<sup>33</sup> For the purposes of this order, "fresh vegetables" shall include each and every vegetable specifically grown in the United States for sale at retail in fresh form, *i.e.*, not canned, not frozen, or otherwise preserved except for normal refrigeration, such as lettuce, celery, broccoli, etc. (Complaint, Par. 1)

ty, while CXs 368 A-D are for Imperial County, both in California. The exhibits for each of the Arizona areas are scattered under four exhibit numbers (CXs 370-373). To facilitate comparison, these exhibits have been rearranged in a sequence that brings together the yearly reports for each area and season. For example, the shipment reports for fall lettuce and spring lettuce from the Salt River Valley are grouped together as follows:

<i>Season</i>	<i>Fall Lettuce</i>	<i>Spring Lettuce</i>
1967-68	CX 370 A	CX 370 C
1968-69	CX 371 A	CX 371 C
1969-70	CX 372 A	CX 372 C
1970-71	CX 373 A	CX 373 C

Similarly, the matching alphabetical sub-designations (B, D, E) under each of the same exhibit numbers have been placed together for the other areas.

Lettuce Shipments—Monterey County—1968

Rank	Company	Cartons shipped (number)	Share of shipments <sup>1</sup> (percent)
1	Bud Antle, Inc.	3,031,178	10.70
2	Bruce Church, Inc.	2,235,937	7.89
3	West Coast Farms	1,502,388	5.30
4	Calif. Coastal Farms	1,432,036	5.05
	Subtotal	8,201,539	28.95
5	Nunes Bros. of Calif.	1,403,839	4.95
6	D'Arrigo Bros. of Calif.	1,397,379	4.93
7	Merrill Farms	1,238,121	4.37
8	Salinas Valley Veg. Exchange	1,221,769	4.31
	Subtotal	13,462,647	47.52
9	Admiral Pkg. Co.	1,213,771	4.28
10	Salinas Marketing Co-op	1,184,434	4.18
	Subtotal	15,860,852	55.99
	Total—All 40 companies	28,326,492	100.00

<sup>1</sup> Figures are rounded and will not necessarily add to totals.  
Source: CX 309

Lettuce Shipments—Monterey County—1969

Rank	Company	Cartons shipped (number)	Share of shipments <sup>1</sup> (percent)
1	United Fruit Produce, Inc.	4,266,400	15.60
2	Bud Antle, Inc.	3,049,341	11.15
3	Bruce Church, Inc.	2,096,807	7.67
4	D'Arrigo Bros. of Calif.	1,414,359	5.17
	Subtotal	10,826,907	39.61
5	West Coast Farms, Inc.	1,330,372	4.86
6	Calif. Coastal Farms, Inc.	1,278,750	4.67
7	Admiral Packing Co.	1,256,388	4.59

Rank	Company	Cartons shipped (number)	Share of shipments <sup>1</sup> (percent)
8	Merrill Farms	1,102,695	4.03
	Subtotal	15,795,112	57.78
9	Salinas Marketing Co-op	1,073,476	3.92
10	Salinas Lettuce Farmers Co-op	1,037,850	3.79
	Subtotal	17,906,438	65.51
	Total—All 37 companies	27,331,631	100.00

<sup>1</sup> Figures are rounded and will not necessarily add to totals.  
Source: CX 309

## Lettuce Shipments—Monterey County—1970

Rank	Company	Cartons shipped (number)	Share of shipments <sup>1</sup> (percent)
1	Inter-Harvest, Inc.	4,805,638	16.96
2	Bud Antle, Inc.	3,006,393	10.61
3	Bruce Church, Inc.	2,297,434	8.10
4	D'Arrigo Brothers of Calif.	1,470,318	5.19
	Subtotal	11,579,783	40.87
5	West Coast Farms	1,294,085	4.56
6	California Coastal Farms	1,276,208	4.50
7	Hansen Farms	1,152,892	4.07
8	Freshpick Foods, Inc.	1,152,566	4.07
	Subtotal	16,455,534	58.12
9	Admiral Packing Co.	1,130,716	3.99
10	Merrill Farms	1,123,368	3.96
	Subtotal	18,709,618	66.05
	Total—All 34 companies	28,327,177	100.00

<sup>1</sup> Figures are rounded and will not necessarily add to totals.  
Source: CX 309

## Lettuce Shipments—Monterey County—1971

Rank	Company	Cartons shipped (number)	Share of shipments <sup>1</sup> (percent)
1	Inter Harvest, Inc.	4,745,140	16.31
2	Bud Antle, Inc.	3,614,000	12.42
3	Bruce Church, Inc.	2,236,044	7.68
4	Admiral Packing Co.	1,349,345	4.64
	Sub-total	11,944,529	41.05
5	California Coastal Farms	1,324,630	4.55
6	West Coast Farms	1,298,513	4.46

Rank	Company	Cartons shipped (number)	Share of shipments <sup>1</sup> (percent)
7	D'Arrigo Brothers of Calif.	1,251,862	4.30
8	Hansen Farms	1,157,465	3.98
	Sub-total	16,976,999	58.34
9	Merrill Farms	1,081,046	3.71
10	The Garin Co.	1,011,300	3.48
	Sub-total	19,069,345	65.53
	Total—all 38 companies	29,099,661	100.00

<sup>1</sup> Figures are rounded and will not necessarily add to totals.

Source: CX 309

#### Lettuce Shipments—Imperial County—1968-69 Season

Rank	Company	Cartons shipped (number)	Share of shipments <sup>1</sup> (percent)
1	Bud Antle, Inc.	1,528,378	<del>8.89</del> 8.58
2	Mario Saikhon	1,041,469	<del>6.06</del> 5.84
3	Sam Andrews' Sons	752,985	<del>4.38</del> 4.23
4	William B. Hubbard	682,190	<del>3.97</del> 3.83
	Subtotal	4,005,022	<del>29.32</del> 22.5
5	Bruce Church, Inc.	662,695	<del>3.66</del> 3.72
6	Nunes Bros.	590,994	<del>3.44</del> 3.32
7	Danny Danenberg	544,365	<del>3.16</del> 3.06
8	Ralph Samsel	544,183	<del>3.16</del> 3.06
	Subtotal	6,347,259	<del>36.96</del> 35.7
9	J. J. Crosetti Co.	517,949	<del>3.01</del> 2.91
10	Salinas Valley Veg. Exchange	509,641	<del>2.96</del> 2.86
	Subtotal	7,374,849	<del>42.94</del> 41.42
	Total all <del>61</del> companies	<del>17,171,555</del>	100.00
	63	17,803,962	

<sup>1</sup> Figures are rounded and will not necessarily add to totals.

Source: Commissioner of Agriculture

Desert Produce 610,325 3.43

Villalobos 22,082

#### Lettuce Shipments—Imperial County—1969-70 Season

Rank	Company	Cartons shipped (number)	Share of Shipments <sup>1</sup> (percent)
1	Inter Harvest, Inc.	1,508,540	<del>7.80</del> 7.76
2	Bud Antle, Inc.	1,177,730	<del>6.09</del> 6.06
3	Mario Saikhon	<del>924,780</del> 927,780	<del>4.78</del> 4.78
4	Desert Produce Co.	868,124	<del>4.49</del> 4.47
	Subtotal	<del>4,479,174</del> 4,482,174	<del>23.17</del> 23.07
5	Sam Andrews' Sons	<del>776,662</del> 778,391	<del>4.02</del> 4.01
6	Royal Packing Co.	<del>730,118</del> 729,102	<del>3.78</del> 3.75
7	Admiral Packing Co.	729,442	<del>3.77</del> 3.75

1680 FEDERAL TRADE COMMISSION DECISIONS

Initial Decision

83 F.T.C.

Rank	Company	Cartons shipped (number)	Share of Shipments <sup>1</sup> (percent)
8	Bruce Church, Inc.	728,242	<del>3.77</del> 3.75
	Subtotal	<del>7,443,638</del> 7,447,351	<del>38.50</del> 38.33
9	Ralph Samsel	667,769	<del>3.45</del> 3.44
10	Abatti Produce Co.	<del>579,945</del> 583,142	<del>3.00</del> 3.00
	Subtotal	<del>8,691,352</del> 8,698,262	<del>44.95</del> 44.77
	Total—all 63 companies	<del>19,335,016</del>	100.00
	54	19,428,611	

<sup>1</sup> Figures are rounded and will not necessarily add to totals.  
Source: Commissioner of Agriculture.

Lettuce Shipments—Imperial County—1970-71 Season

Rank	Company	Cartons shipped (number)	Share of Shipments <sup>1</sup> (percent)
1	Inter-Harvest, Inc.	1,979,587	10.48
2	Bud Antle, Inc.	1,782,962	9.44
3	Mario Saikhon	1,249,224	6.61
4	Sam Andrews' Sons	751,173	3.97
	Subtotal	5,762,946	30.51
5	Danny Danenberg	745,589	3.95
6	Bruce Church, Inc.	692,142	3.66
7	D'Arrigo Brothers of Calif.	622,341	3.29
8	Abatti Produce	605,584	3.20
	Subtotal	8,428,602	44.63
9	Joe Maggio, Inc.	583,305	3.08
10	Admiral Packing Co.	561,801	2.97
	Subtotal	9,573,708	50.69
	Total all 43 companies	18,883,503	100.00
	44	18,883,375	

<sup>1</sup> Figures are rounded and will not necessarily add to totals.  
Source: Commissioner of Agriculture

Lettuce Shipments, Imperial County 1971-1972

Rank	Company	Cartons shipped (number)	Share of Shipments <sup>1</sup> (percent)
1	Inter-Harvest, Inc.	1,919,886	9.77
2	Bud Antle, Inc.	1,816,796	9.24
3	Mario Saikhon	1,117,295	5.68
4	Danny Danenberg	895,514	4.56
	Subtotal	5,749,491	29.25
5	Bruce Church, Inc.	858,689	4.37
6	Sam Andrews' Sons	766,702	3.90
7	Abatti Produce, Inc.	752,700	3.83
8	Mapes Produce	632,873	3.22

Rank	Company	Cartons shipped (number)	Share of shipments <sup>1</sup> (percent)
	Subtotal	8,760,445	44.57
9	Admiral Packing Co.	617,776	3.14
10	Royal Packing Co.	616,644	3.14
	Subtotal	9,994,875	50.85
	Total—All 45 Cos.	19,654,528	100.00

<sup>1</sup> Figures are rounded and will not necessarily add to totals.  
Source: Commissioner of Agriculture.

Fall Lettuce Shipments—Salt River Valley—1967—'68 Season

Rank	Company	Cartons Shipped (Number)	Share of Shipments <sup>1</sup> (Percent)
1	Wood Co., J.A.	242,193	7.83
2	Admiral Packing Co.	227,804	7.38
3	Martori Bros. Distributors	187,880	6.08
4	Growers Exchange, Inc.	175,641	5.69
	Subtotal	833,518	27.00
5	Salinas Valley Veg. Exchange	172,670	5.60
6	Engebretson-Grupe Co.	165,792	5.37
7	Hubbard, William	150,681	4.88
8	Apache Distributors	148,239	4.79
	Subtotal	1,470,900	47.63
9	Mapes Produce Co.	134,969	4.37
10	Eaton Fruit Co., Inc.	132,123	4.27
	Subtotal	1,737,992	56.28
	Total all 50 companies	3,087,516	100.00

<sup>1</sup> Figures are rounded and will not necessarily add to totals.  
Source: CX 289

Fall Lettuce Shipments—Salt River Valley 1968—'69 Season

Rank	Company	Cartons shipped (number)	Share of shipments <sup>1</sup> (percent)
1	Wood Co., J. A.	276,170	9.65
2	Growers Exchange, Inc.	203,913	7.13
3	Apache Distributors	200,798	7.03
4	Admiral Packing Co.	184,352	6.43
	Subtotal	865,233	30.26
5	Hubbard, William B.	172,272	6.01
6	Englund Co., R. T.	153,038	5.35
7	Eaton Fruit Co.	151,912	5.31
8	Cook Produce, Inc.	150,843	5.28
	Subtotal	1,493,298	52.23
9	Antle Inc., Bud	138,697	4.86

## 1682 FEDERAL TRADE COMMISSION DECISIONS

Initial Decision

83 F.T.C.

Rank	Company	Cartons shipped (number)	Share of shipments <sup>1</sup> (percent)
10	Singh Farms, Rala	119,469	4.16
	Subtotal	1,751,464	61.26
	Total all 35 companies	2,858,208	100.00

<sup>1</sup> Figures are rounded and will not necessarily add to totals.  
Source: CX 290

## Fall Lettuce Shipments—Salt River Valley—1969-'70 Season

Rank	Company	Cartons Shipped (Number)	Share of Shipments <sup>1</sup> (Percent)
1	United Fruit Prod., Inc.	446,992	17.26
2	Growers Exchange, Inc.	241,243	9.30
3	Engebretson-Grupe Co.	233,312	8.99
4	Admiral Packing Co.	180,200	6.95
	Subtotal	1,101,747	42.56
5	Norton Co., John R.	163,466	6.29
6	Englund Co., R.T.	157,108	6.06
7	Hubbard, William G.	153,039	5.90
8	Cook Produce, Inc.	147,697	5.71
	Subtotal	1,723,057	66.55
9	Apache Distributors	146,642	5.67
10	Henning, D.W.	133,231	5.13
	Subtotal	2,002,930	77.36
	Total all 26 companies	2,589,495	100.00

<sup>1</sup> Figures are rounded and will not necessarily add to totals.  
Source: CX 291

## Fall Lettuce Shipments—Salt River Valley—1970-1971 Season

Rank	Company	Cartons shipped (number)	Share of shipments <sup>1</sup> (percent)
1	Inter-Harvest, Inc.	456,603	22.16
2	Growers Exchange, Inc.	238,282	11.57
3	Wood Co., J.A.	217,996	10.58
4	Engerbretson Grupe Co.	175,970	8.54
	Subtotal	1,088,851	52.86
5	Englund Co., R. T.	125,908	6.11
6	Hubbard, William B.	103,970	5.05
7	Apache Distributors	100,776	4.89
8	Singh Farms, Rala	83,435	4.05
	Subtotal	1,502,940	72.96
9	Cook Produce, Inc.	78,992	3.83

1614

Initial Decision

Rank	Company	Cartons shipped (number)	Share of shipments <sup>1</sup> (percent)
10	Admiral Packing Co.	76,548	3.72
	Subtotal	1,658,480	80.51
	Total all 26 companies	2,059,889	100.00

<sup>1</sup> Figures are rounded and will not necessarily add to totals.  
Source: CX 324

## Spring Lettuce Shipments—Salt River Valley—1967-'68 Season

Rank	Company	Cartons Shipped (Number)	Share of Shipments <sup>1</sup> (Percent)
1	Wood Co., J. A.	278,872	8.86
2	Hubbard, William B.	237,004	7.53
3	Engebretson-Grupe Co.	203,010	6.45
4	Admiral Packing Co.	187,971	5.97
	Subtotal	906,857	28.83
5	Growers Exchange, Inc.	187,188	5.94
6	Garin Co., The	181,551	5.78
7	Bodine Produce Co.	174,812	5.56
8	Wong Farms, Inc., Lee	160,359	5.08
	Subtotal	1,610,767	51.20
9	Salinas Valley Veg. Exchange	158,916	5.05
10	Eaton Fruit Co.	158,198	5.02
	Subtotal	1,927,881	61.28
	Total all 30 companies	3,145,759	100.00

<sup>1</sup> Figures are rounded and will not necessarily add to totals.  
Source: CX 289

## Arizona 1968-'69

## Spring Lettuce Shipments-Salt River Valley-1968-'69 Season

Rank	Company	Cartons shipped (number)	Share of shipments <sup>1</sup> (percent)
1	Wood Co., J. A.	337,752	11.21
2	Growers Exchange, Inc.	317,738	10.55
3	Hubbard, William B.	248,620	8.26
4	Wong Farms Inc., Lee	225,032	7.46
	Subtotal	1,129,142	37.48
5	Engebretson-Grupe Co.	194,095	6.43
6	Salinas Valley Veg. Exchange	143,010	4.74
7	Henning Produce, Inc.	139,099	4.61

1684 FEDERAL TRADE COMMISSION DECISIONS

Initial Decision

83 F.T.C.

Rank	Company	Cartons shipped (number)	Share of shipments <sup>1</sup> (percent)
8	Englund Co., R. T.	138,753	4.61
	<i>Subtotal</i>	1,744,099	57.88
9	Garin Co., The	137,109	4.54
10	Singh Farms, Rala	134,597	4.48
	<i>Subtotal</i>	2,015,805	66.91
	Total	3,013,078	100.00

<sup>1</sup> Figures are rounded and will not necessarily add to totals.  
Source: CX 290

Spring Lettuce Shipments—Salt River Valley—1969-'70 Season

Rank	Company	Cartons Shipped (Number)	Share of Shipments <sup>1</sup> (Percent)
1	Interharvest, Inc.	461,832	20.61
2	Wood Co., J. A.	245,094	10.93
3	Growers Exchange, Inc.	206,274	9.19
4	Engerbretson-Grupe Co.	199,474	8.87
	<i>Subtotal</i>	1,112,674	49.66
5	Hubbard, William B.	146,272	6.51
6	Englund Co., R. T.	141,358	6.29
7	Garin Co., The	137,926	6.15
8	Tanita Farms	100,167	4.46
	<i>Subtotal</i>	1,638,397	73.09
9	Cook Produce, Inc.	99,193	4.41
10	Singh Farms, Rala	95,956	4.28
	<i>Subtotal</i>	1,833,546	81.83
	Total all 28 companies	2,241,443	100.00

<sup>1</sup> Figures are rounded and will not necessarily add to totals.  
Source: CX 291

Spring Lettuce Shipments—Salt River Valley—1970-1971 Season

Rank	Company	Cartons shipped (number)	Share of shipments <sup>1</sup> (percent)
1	Inter-Harvest, Inc.	553,035	23.27
2	Wood Co., J. A.	254,570	10.71
3	Growers, Exchange, Inc.	252,251	10.61
4	Engerbretson-Grupe Co.	227,020	9.55
	<i>Subtotal</i>	1,286,876	54.15

Rank	Company	Cartons shipped (number)	Share of shipments <sup>1</sup> (percent)
5	Church, Inc., Bruce	213,596	8.99
6	Hubbard, William B.	170,672	7.18
7	Englund Co., R. T.	158,660	6.68
8	Apache Distributors	114,455	4.82
	<i>Subtotal</i>	1,944,259	81.81
9	Garin Co., The	95,253	4.01
10	Tanita Farms	94,917	3.99
	<i>Subtotal</i>	2,134,429	89.81
	Total all 25 companies	2,376,670	100.00

<sup>1</sup> Figures are rounded and will not necessarily add to totals.

Source: CX 324

Fall Lettuce Shipments (Harquahala-Marana-RedRock-Maricopa-Eloy-Aguila-Date Creek-Willcox & Parker-Poston)—1967-'68 Season

Rank	Company	Cartons shipped (Number)	Share of shipments <sup>1</sup> (Percent)
1	Antle Inc., Bud	421,178	14.45
2	Church Inc., Bruce	389,677	13.38
3	Norton Co., J. R.	298,671	10.26
4	Royal Packing Co.	269,492	9.23
	<i>Subtotal</i>	1,379,018	47.33
5	Martori Bros. Distributors	212,478	7.27
6	TRI Produce Co.	172,428	5.90
7	Finerman Co., Inc., Mel	168,375	5.76
8	Arena Co. of Arizona	165,475	5.66
	<i>Subtotal</i>	2,097,774	72.02
9	Hi-Life Farms, S. L.	163,597	5.62
10	Garin Co., The	113,363	3.87
	<i>Subtotal</i>	2,374,734	81.53
	Total all 22 companies	2,913,099	100.00

<sup>1</sup> Figures are rounded and will not necessarily add to totals.

Source: CX 289

## 1686 FEDERAL TRADE COMMISSION DECISIONS

Initial Decision

83 F.T.C.

Fall Lettuce Shipments—1968—'69 Season  
 (Harquahala—Marana—Red Rock—Maricopa  
 Eloy—Aquila Date Creek—Willcox & Parker-Poston)

Rank	Company	Cartons shipped (number)	Share of shipments <sup>1</sup> (percent)
1	Church Inc., Bruce	413,515	13.23
2	Antle Inc., Bud	321,633	10.29
3	Area Co. of Arizona	282,452	9.01
4	Royal Packing Co.	256,289	8.18
	<i>Subtotal</i>	1,273,889	40.71
5	Finerman Co., Inc., Mel	218,707	6.99
6	Hogue Produce Co., F. H.	210,891	6.74
7	Norton Co., John R.	209,941	6.71
8	Hi—Life Farms, Inc.	123,607	3.96
	<i>Subtotal</i>	2,037,035	65.10
9	Tri Produce Co.	122,362	3.89
10	Arakalian Farms Inc., George	117,478	3.73
	<i>Subtotal</i>	2,276,875	72.77
	Total all 27 companies	3,128,829	100.00

<sup>1</sup> Figures are rounded and will not necessarily add to totals.  
 Source: CX 290

Fall Lettuce Shipments (Harquahala—Marana—RedRock—Maricopa—Eloy—Aguila—Date  
 Creek—Willcox & Parker-Poston)—1969—'70 Season

Rank	Company	Cartons shipped (number)	Share of shipments <sup>1</sup> (percent)
1	Antle Inc., Bud	603,478	16.53
2	Royal Packing Co.	326,693	8.96
3	Desert Produce Inc.	264,053	7.23
4	Finerman Co., Inc.	236,452	6.47
	<i>Subtotal</i>	1,430,676	39.23
5	Church Inc., Bruce	232,166	6.36
6	Norton Co., John R.	227,143	6.22
7	TRI Produce Co.	197,886	5.42
8	Arena Co. of Arizona	194,032	5.31
	<i>Subtotal</i>	2,281,903	62.57
9	Hi-Life Farms, Inc.	148,218	4.05
10	FreshPict Foods, Inc.	137,638	3.78
	<i>Subtotal</i>	2,567,759	70.41

UNITED BRANDS CO.

100.

1614

Initial Decision

Rank	Company	Cartons shipped (number)	Share of shipments <sup>1</sup> (percent)
Total all 25 companies		3,646,696	100.00

<sup>1</sup> Figures are rounded and will not necessarily add to totals.  
Source: CX 291

Fall Lettuce Shipments—(Harquahala-Marana-Red Rock-Maricopa-Eloy-Aquila-Date Creek-Willcox-Parker-Poston—1970-1971 Season

Rank	Company	Cartons shipped (number)	Share of shipments <sup>1</sup> (percent)
1	Antle, Inc., Bud	544,851	15.09
2	Church, Inc.	303,941	8.42
3	Royal Packing Co.	292,510	8.10
4	Finerman Co., Inc.	291,931	8.08
<i>Subtotal</i>		1,433,233	39.69
5	Hi-Life Farms	241,216	6.68
6	D'Arrigo Bros.	172,803	4.79
7	Martori Bros. Distributors	165,356	4.58
8	Vessy & Co., Inc.	165,029	4.57
<i>Subtotal</i>		2,177,637	60.31
9	Tri Produce Co.	163,712	4.53
10	Noroian Farms, Nish	159,934	4.43
<i>Subtotal</i>		2,501,283	69.27
Total all 26 companies		3,611,008	100.00

<sup>1</sup> Figures are rounded and will not necessarily add to totals.  
Source: CX 324

Spring Lettuce Shipments (Harquahala-Marana-RedRock-Maricopa-Eloy-Aguila-Date Creek-Willcox & Parker-Poston)—1967-'68 Season

Rank	Company	Cartons shipped (number)	Share of shipments <sup>1</sup> (percent)
1	Antle Inc., Bud	652,755	15.22
2	Royal Packing Co.	437,642	10.20
3	Church Inc., Bruce	420,337	9.79
4	TRI Produce Company	322,388	7.50
<i>Subtotal</i>		1,833,122	42.72
5	Finerman Co., Inc., Mel	293,628	6.85
6	Hi-Life Farms, Inc.	251,847	5.87
7	Garin Co., The	239,435	5.57

## 1688 FEDERAL TRADE COMMISSION DECISIONS

Initial Decision

83 F.T.C.

Rank	Company	Cartons shipped (number)	Share of shipments <sup>1</sup> (percent)
8	Arena Co. of Arizona	235,181	5.47
	<i>Subtotal</i>	2,853,213	66.50
9	Norton Co., J. R.	225,593	5.26
10	Santa Cruz Farms	221,827	5.17
	<i>Subtotal</i>	3,300,633	76.94
	Total all 23 companies	4,290,407	100.00

<sup>1</sup> Figures are rounded and will not necessarily add to totals.  
Source: CX 289

Spring Lettuce Shipments—1968—'69 Season  
(Harquahala—Marana—Red Rock—Maricopa—Eloy)  
(Aquila—Date Creek—Wilcox & Parker-Poston)

Rank	Company	Cartons shipped (number)	Share of shipments <sup>1</sup> (percent)
1	Antle Inc., Bud	1,238,996	22.47
2	Royal Packing Co.	496,346	8.99
3	Norton Co. John R.	326,437	5.91
4	Church Inc., Bruce	318,036	5.76
	<i>Subtotal</i>	2,379,815	43.17
5	Garin Co., The	286,691	5.20
6	Finerman Co., Inc., Mel	284,746	5.17
7	Hi-Life Farms Inc.	250,344	4.53
8	Arena Co. of Arizona	242,105	4.39
	<i>Subtotal</i>	3,443,701	62.48
9	Martori Bros. Distributors	239,837	4.35
10	Tri Produce Co.	236,632	4.29
	<i>Subtotal</i>	3,820,170	69.30
	Total all 32 companies	5,511,744	100.00

<sup>1</sup> Figures are rounded and will not necessarily add to totals.  
Source: CX 290

Spring Lettuce Shipments (Harquahala-Marana-RedRock-Maricopa-Eloy-Aguila-Date  
Creek-Willcox & Parker-Poston)—1969—'70 Season

Rank	Company	Cartons shipped (number)	Share of shipments <sup>1</sup> (percent)
1	Antle Inc., Bud	878,100	15.18
2	Royal Packing Co.	491,510	8.50
3	Church Inc., Bruce	412,830	7.14

Rank	Company	Cartons shipped (number)	Share of shipments <sup>1</sup> (percent)
4	Finerman Co., Inc.	349,005	6.03
	<i>Subtotal</i>	2,131,445	36.86
5	Inter-Harvest, Inc.	320,006	5.53
6	Norton Co., John	303,924	5.25
7	Anthony & Co., Mr.	273,103	4.72
8	Desert Produce, Inc.	254,091	4.39
	<i>Subtotal</i>	3,282,569	56.77
9	Garin Co., The	220,591	3.82
10	Vessey & Co., Inc.	220,494	3.80
	<i>Subtotal</i>	3,723,654	64.40
	Total all 31 companies	5,781,811	100.00

<sup>1</sup> Figures are rounded and will not necessarily add to totals.  
Source: CX 291

Spring Lettuce Shipments—(Marna-Red Rock-Elroy-Maricopa-Harquahala-Aquila-Salome-Willcox-Parker-Poston—1970-1971 Season

Rank	Company	Cartons shipped (number)	Share of shipments <sup>1</sup> (percent)
1	Antle, Inc., Buo	956,090	19.85
2	Finerman Co., Inc.	366,926	7.62
3	Martori Bros. Distributors	362,686	7.53
4	Norton Co., John	287,953	5.98
	<i>Subtotal</i>	1,973,655	40.97
5	Royal Packing Co.	252,955	5.25
6	Admiral Packing Co.	249,648	5.18
7	Hi-Life Farms, Inc.	240,117	4.98
8	Mapes Produce Co.	213,876	4.44
	<i>Subtotal</i>	2,930,251	60.83
9	Inter-Harvest, Inc.	200,932	4.17
10	Church, Inc. Bruce	189,142	3.93
	<i>Subtotal</i>	3,320,325	68.93
	Total all 25 companies	4,816,971	100.00

<sup>1</sup> Figures are rounded and will not necessarily add to totals.  
Source: CX 324

## 1690 FEDERAL TRADE COMMISSION DECISIONS

Initial Decision

83 F.T.C.

## Yuma Winter Lettuce Shipments—1967-'68 Season

Rank	Company	Cartons shipped (number)	Share of shipments <sup>1</sup> (percent)
1	Church Inc., Bruce	983,661	16.47
2	Vukasovich, Inc.	824,169	13.79
3	Pasquinelli, Pete	696,423	11.65
4	Hogue Produce Co., F. H.	425,521	7.13
	<i>Subtotal</i>	2,929,774	49.04
5	Valley Packing Co.	411,223	6.87
6	G & S Produce Co., Inc.	313,903	5.25
7	Englund Co., Inc., R. T.	297,206	4.97
8	Woods Co., The	294,324	4.92
	<i>Subtotal</i>	4,246,430	71.07
9	Barkley Co. of Arizona	284,824	4.77
10	Consaul Co., Inc., Lee A.	282,887	4.73
	<i>Subtotal</i>	4,814,141	80.58
	Total all 19 companies	5,973,775	100.00

<sup>1</sup> Figures are rounded and will not necessarily add to totals.  
Source: CX 289

## Yuma Winter Lettuce Shipments—1968-'69 Season

Rank	Company	Cartons shipped (number)	Share of shipments <sup>1</sup> (percent)
1	Church Inc., Bruce	911,839	13.74
2	Pasquinelli, Pete	847,690	12.78
3	Vukasovich, Inc.	836,945	12.61
4	Hogue Produce Co., F. H.	531,998	8.02
	<i>Subtotal</i>	3,128,472	47.15
5	Merrill Farms	428,644	6.46
6	Barkley Co. Arizona	421,178	6.34
7	G & S Produce Co., Inc.	392,884	5.92
8	Valley Packing Co.	357,001	5.38
	<i>Subtotal</i>	4,728,179	71.27
9	Woods Co., The	333,483	5.02
10	Olberg & Son, J. W.	287,477	4.32
	<i>Subtotal</i>	5,349,139	80.64
	Total all 22 companies	6,633,122	100.00

<sup>1</sup> Figures are rounded and will not necessarily add to totals.  
Source: CX 290

1614

## Initial Decision

## Yuma Winter Lettuce Shipments—1969-'70 Season

Rank	Company	Cartons shipped (number)	Share of shipments <sup>1</sup> (percent)
1	Church Inc.	845,215	12.73
2	Pasquinelli, Pete	706,681	10.65
3	Vukasovich, Inc.	698,673	10.53
4	Hogue Produce Co., F. H.	610,203	9.19
	<i>Sub total</i>	2,860,772	43.13
5	G & S Produce Co., Inc.	528,282	7.96
6	Barkley Co. of Arizona	497,024	7.49
7	FreshPict Foods, Inc.	355,830	5.36
8	Englund Co., Inc., R. T.	324,444	4.88
	<i>Subtotal</i>	4,566,352	68.83
9	Consaul Co., Inc., Lee	314,618	4.74
10	Inter Harvest, Inc.	281,222	4.23
	<i>Subtotal</i>	5,162,192	77.82
	Total all 24 companies	6,633,306	100.00

<sup>1</sup> Figures are rounded and will not necessarily add to totals.  
Source: CX 291

## Yuma Winter Lettuce Shipments—1970-1971 Season

Rank	Company	Cartons shipped (number)	Share of shipments <sup>1</sup> (percent)
1	Church, Inc.	839,682	11.08
2	Pasquinelli, Pete	800,181	10.56
3	G. & S. Produce, Inc.	653,195	8.62
4	Hogue Produce Co., F. H.	605,815	8.00
	<i>Subtotal</i>	2,898,873	38.26
5	Barkley Co. of Arizona	596,643	7.88
6	Vukasovich, Inc.	543,069	7.17
7	Inter-Harvest, Inc.	522,315	6.89
8	Freshpict Foods, Inc.	379,233	5.01
	<i>Subtotal</i>	4,940,133	65.21
9	Consaul Co., Lee A.	371,156	4.89
10	Finerman Co., Inc., Mel	365,229	4.82
	<i>Subtotal</i>	5,676,518	74.93
	Total all 23 companies	7,575,823	100.00

<sup>1</sup> Figures are rounded and will not necessarily add to totals.  
Source: CX 324

## CONCURRING OPINION

BY THOMPSON, *Commissioner*:

I share the views of the Commission as expressed in the Chairman's learned opinion and fully endorse its findings and conclusions, including the order requiring this respondent to file certain reports on its future land acquisitions. My purpose here is thus not to take issue with that opinion but to elaborate briefly on some of the reasons that convince me of its soundness.

I believe very strongly in advertising. As I mentioned in a speech recently: "Just as I think well of the man who has the skill, energy, and imagination to *produce* something needed and desired by his fellow human beings, so I also think well of the one who has the skill, energy, and imagination to *sell* it for him. If production is useful and honorable, then distribution—including advertising—is entitled to the same honorable place in our esteem."<sup>1</sup> The purpose of advertising, as I understand it, is to provide *information* to potential buyers—to tell consumers that a certain product exists, that it has certain properties, that it can be bought at certain times and places, and so forth. This information, in turn, has important effects on the workings of our economic system. First, full information on both the buying and selling sides of the market is essential to what economists call the efficient allocation of resources. A society's total wealth is obviously increased when consumers, thanks to advertising, learn that a better product can be bought at a lower price from seller A than from seller B and thus cause productive labor and capital to be shifted from a high-cost producer to a low-cost one. Informed consumers are thus a key force in providing producers with both the incentive and the wherewithal to develop new and better products and to offer them at the lowest prices consistent with their continued production.

Secondly, advertising makes it possible for business firms to acquire enough volume to achieve the maximum in what economists call "economies of scale." At very low levels of output, costs per unit—and thus consumer prices—tend to be very high. As output expands, unit costs—and prices—start to decline. In economic jargon, advertising efficiency on the size scale and thus get consumer prices down to the minimum level permitted by the industry's existing state of technology.

This kind of advertising, however, is not the kind that is before us in the case at bar. Respondent United Brands came to the lettuce industry not to increase efficiency but to impair it. Its plan, briefly put, was this. United Brands, a large firm with considerable expertise in the use of

<sup>1</sup> "Advertising and the FTC: The Role of Information in a Free-Enterprise Economy," Before Western Region Conference, American Advertising Federation, San Diego, California (October 27, 1973), p. 6.

## UNITED BRANDS CO.

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Concurring Opinion

advertising to create consumer demand for "brand-name" products (e.g., "Chiquita" bananas), sought to bring that skill to the general "produce" industry, particularly its lettuce sector.<sup>2</sup> Prior to respondent's entry, the lettuce industry had been what all concede was a textbook model of "perfect competition." There were many independent firms in the industry, many of them family-owned, with no one firm or group of firms having a sufficiently large share of the market to influence the national price of lettuce. The product was sold as a "commodity" or essentially homogeneous product with consumers being indifferent as to whether they bought the lettuce of grower A versus grower B. Prices were thus kept at minimum competitive levels and were highly flexible in both an upward and downward direction, responding swiftly and sharply to changes in the key factors of supply and demand in the marketplace.

Respondent United Brands deliberately set about to change all this. It wanted to raise the price of lettuce and it wanted to capture a large share of that higher-priced market for itself. In substance, respondent believed that, if it could get as much as 25 percent of the United States lettuce market for itself—a figure later scaled down to 12 percent because of "antitrust considerations"<sup>3</sup>—it could generate enough revenue to support an advertising program that would permit it to *raise the price* of its "Chiquita" brand lettuce from the going market price of about \$2 per carton to approximately \$3 per carton.<sup>4</sup> It was not respondent's purpose to develop a superior head of lettuce or to increase the per-acre yield from the lettuce farms that it bought. On the contrary, United Brands freely concedes that it brought no new "efficiencies" to corporate farming. Its plan was simply to get control of enough lettuce acreage to permit it to "subdue" the short-run forces of supply and demand, *i.e.*, to acquire "some degree of control over the market and prices \* \* \*."<sup>5</sup> The appearance of product superiority that would be needed to justify the "premium" prices it proposed to charge was to be acquired in the straight-forward fashion of simply separating the regular yield from its farms into two parts. The best of the crop would be packaged and sold as "Chiquita" brand lettuce at the 30 percent to 50 percent higher price. The rest of the crop would be left unpackaged and sold at the going market price, the one received by its competitors for their *total* lettuce crop. Respondent's *average price*, in other words, would be substantially higher than its competitors' prices although its *average quality* would admittedly be no better than theirs.

<sup>2</sup> Lettuce is the country's most important fresh vegetable crop, its annual sales at the retail level having been \$667.5 million 1967. CX 158C; ID p. 15. [p. 1633 herein]

<sup>3</sup> CX 158F, 158Q.

<sup>4</sup> CX 134A.

<sup>5</sup> CX 111 Z-32; ID p. 47. [p. 1659 herein]

The issue on efficiency here is admirably clear. The object of economic efficiency is of course to produce lower costs and prices, not higher ones. This respondent, however, writing under the heading of "Economies of Scale" in its appeal brief before us, sums up its position on the point this way: "He [the Administrative Law Judge] starts out with concessions, which are compelled by the record, to the effect that 'farming has severe built-in limitations on size in terms of diseconomies of scale \* \* \*' (I.D. 31) [p. 1646 herein], that respondent enjoyed no real price advantages in the purchase of inputs, such as fertilizer \* \* \*, that complaint counsel's 'effort to show the likelihood of respondent's enjoying lower costs by virtue of the size and scope of its farming operations also proved abortive' (I.D. 32) [p. 1647 herein]\*\*\*" <sup>3</sup> And a similar assurance that respondent had no particular contribution to make in terms of efficient farming was emphasized in its reply brief before this agency.<sup>7</sup> On the contrary, this respondent's forte lies in knowing how to *raise* unit costs at the marketing level and then persuade consumers to go along with a price increase that more than equals that cost hike. The plan, as noted, was to charge \$1 per carton more for "Chiquita" brand lettuce (\$3 versus \$2 for a 24-head carton). In order to get this higher price, each individual head of lettuce had to be wrapped in a piece of cellophane bearing the "Chiquita" brand, an operation that consumed an estimated 40 cents per carton of that \$1 price differential.<sup>8</sup> And then of course there was an advertising bill to be paid (estimated at \$1,589,000 for 1970) and one for other "publicity" efforts (\$657,000),<sup>9</sup> for a total of \$2,246,500 to be spent in 1970 convincing consumers that "Chiquita" lettuce was worth the "premium" price being asked for it.

I have a deep regard for the dynamic processes of a competitive marketplace, one in which the man with a vision of what a product ought to be like invests his energy and capital in the search for a better way of doing or making things. I believe that the rewards of successful research and development ought to be commensurate with its risks and that truthful advertising designed to inform the consuming public of a product's real superiority in terms of price and/or quality plays an important role in keeping our economic system strong and competitive. And I believe very strongly that productive and marketing efficiency—getting goods from the land to the consumer at the lowest per-unit cost—deserve a similarly high reward. I can find little in the way of a redeeming social value, however, in an advertising program designed to make something out of nothing or, as the country folks say,

<sup>1</sup> Respondent's Appeal Brief (June 4, 1973), p. 23.

Respondent's Reply Brief (August 13, 1973), p. 10: "Complaint counsel concede that respondent did not benefit from economies of scale in the precise economic sense \* \* \*."

CX 158E.

CX 136L.

a "silk purse out of a sow's ear." Making an expensive "brand-name" product out of something that has been previously sold in a low-cost "commodity" market is, in my view, a practice that is plainly incompatible with the maintenance of an effectively competitive market economy. The resources of this country's great corporations should be bent to the task of producing *lower* costs and prices for the consuming public, not higher ones as this respondent seems intent on doing.

Respondent United Brands failed in its efforts to convert the lettuce industry from a competitive to a non-competitive market. For the moment, then, that threat has been removed from this nearly \$1 billion industry. It is not clear, however, that it will not return as soon as the Commission's hand is off respondent's shoulder, an uncertainty that is of course reflected in the Commission's order requiring respondent to file periodic reports designed to let us know if it starts to acquire the kind of acreage needed to undergird a new lettuce "branding" program. While I support this requirement, perhaps there is a still more effective way of solving this problem. This respondent could be required, for example, to file a similar report on its future "branding" efforts in the fresh produce industry, if any. Given the admitted *diseconomies* that flow from farming on too large scale, *i.e.*, the inability of United Brands to grow lettuce any better or cheaper than the smallest of its competitors, the potential threat to competition here lies not in respondent's acquisition of more farm land but in the way it has been inclined in the past to *market* the output of its farms. As a farmer, United Brands is a docile and competitively harmless steer. It is destructively bullish only when licensed to use its marketing "horns."

No drastic operation would be required to limit this respondent's future "branding" activities. The firm's executives have foresworn all future attempts to introduce such a program in the fresh produce industry.<sup>10</sup> If respondent really has no intention of repeating its effort to introduce product "branding" here, an order to that effect would be no burden on it. I conclude my analysis of this matter with a suggestion for this respondent in its future lettuce farming: Go and brand no more.

#### OPINION OF THE COMMISSION

BY ENGMAN, *Commissioner*:

The Commission's complaint challenged respondent's acquisition of the stock or assets of several firms engaged in the fresh produce industry. After conducting hearings, the administrative law judge (ALJ) issued an initial decision concluding that the acquisitions were in viola-

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<sup>10</sup> See, *e.g.*, Respondent's Appeal Brief, p. 9, noting that "the three top executives of respondent testified that the branding program was a complete failure and respondent had no intention of resuming same \* \* \*." (Emphasis added.)

tion of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. He ordered respondent to divest all acquired assets which provide supplies and services to the fresh produce industry and to terminate all land leases to be used for producing fresh produce. His order also barred respondent from engaging in the fresh vegetable industry for ten years without the prior approval of this Commission. Respondent has appealed.

## I. BACKGROUND

### Respondent

United Brands Company (hereinafter sometimes referred to as "United"), which had annual sales of approximately \$1.5 billion in 1971, has a decided interest in the food industry. It was formed in 1970 by the merger of United Fruit Company, a major banana producer, and AMK Corporation, which had acquired a controlling interest in United Fruit in 1969.<sup>1</sup> The United Brands family presently consists of numerous food-related concerns. In addition to United Fruit's extensive banana operations, for example, respondent controls a sugar refinery, a producer of food products for the fast-food industry, the Baskin-Robbins ice cream chain, the A & W drive-in restaurant franchisor, a floriculture operation, John Morrell & Co. (the third largest full-line meat producer in the United States), and Inter Harvest, a lettuce producer.

### The Acquisitions at Issue

United Fruit, which had embarked upon a diversification program long before AMK acquired a controlling interest in it, had acquired many of the firms and assets presently in the United Brands' organization prior to AMK's takeover. Such was the case with respect to the assets comprising the Inter Harvest division.

After apparently extensive research, respondent commenced a vegetable-firm acquisition program in 1968. In July of 1968, \$20 million was authorized for this purpose, and during the next 12 months respondent acquired the stock or selected assets of six farming operations in the fresh vegetable industry.

In October of 1968 respondent acquired the capital stock of Earle Myers Co. and Demco Farms, Inc. These firms were, in effect, "one entity engaged in the production of fresh vegetables." [I.D. 6] [p. 1626 herein]<sup>2</sup> The Myers operation produced about \$2.6 million worth

<sup>1</sup> In this opinion, the term "respondent" will include not only United Brands but also its predecessor corporations.

<sup>2</sup> The following abbreviations will be used for citations:

I.D.—Initial Decision of the Administrative Law Judge (ALJ)

Tr.—Transcript of Testimony

CX—Commission Exhibits

RX—Respondent's Exhibits

RPF—Respondent's Proposed Findings

of fresh vegetables per year (mainly celery and cauliflower) on several hundred acres of leased land in the Salinas Valley. This land, to which United Fruit gained access via the acquisitions, could produce an estimated 500,000 cartons of lettuce per year.

Respondent next acquired the capital stock of Nunes Bros. of California, Inc. and selected assets of Toro Farms. These firms also constituted one farming entity engaged in growing and shipping fresh vegetables. The acquired assets included leases to land in the Salinas Valley and Imperial Valley, Calif. which could produce an estimated 2.5 million cartons of lettuce per year.

In February of 1969 United Fruit acquired the business and selected assets of Peter A. Stolich Co., Inc., primarily a lettuce producer. The purchase agreement included leases on lettuce-producing land in the Salinas Valley, Imperial, and Brentwood areas of Calif.

It also acquired in February 1969 all the stock of the Monterey County Ice & Development Company. Unlike the other acquired firms, this firm was not engaged in the growing or shipping of lettuce. Instead, it operated vacuum cooling facilities in Salinas and El Centro, Calif.—facilities used in preparing lettuce for shipment.

Jerome Kantro Enterprises was next on respondent's shopping list. In March of 1969 it purchased the business and selected assets of this grower-shipper. In addition, Jerome Kantro agreed to lease his farm land to respondent for ten years. This land is located in Salinas and Brentwood, Calif. and Yuma, Ariz.

In March 1969 United Fruit also acquired the business and selected assets of the Salinas Valley Vegetable Exchange, a partnership engaged in growing and shipping fresh vegetables (primarily lettuce). The partners retained title to the vegetable growing land, located in Salinas, Imperial, and Phoenix, and leased it to respondent.

In its final acquisition, United Fruit purchased the business and selected assets of Consolidated Growers, Inc., which grew mainly lettuce and garlic. Respondent made this purchase, which included over 1600 acres of owned and leased land in Salinas and Brentwood, in July of 1969.

The ALJ succinctly summarized the scope of these acquisitions:

In summary, during 1968 and 1969 respondent purchased, for an aggregate price of about \$17 million, the capital stock or selected assets of six fresh vegetable farm operations in California and Arizona and one cooler operation. The six farm enterprises grew and shipped several varieties of vegetables—predominantly lettuce, with one exception. Total annual lettuce shipments of the acquired companies were more than 7 million cartons in the year prior to acquisition \* \* \*. [ID.9] [p. 1628 herein]

#### Why Lettuce?

Although respondent had an interest in the fresh vegetable industry

in general, it clearly had a penchant for lettuce, as is evidenced by the fact that all but one of the acquired farming enterprises produced considerable amounts of lettuce. It viewed lettuce as an ideal diversification area—a market consisting of:

many small producers fragmented and without the opportunity to provide a cohesive, unified approach to both the retailer and consumer in terms of capitalizing on the increased value that could result due to the Fruit Company's skills in the brand presentation of a perishable commodity. [CX 158C]

In short, respondent considered lettuce ready for its "Chiquita" banana product differentiation techniques which, it hoped, would convince consumers to pay a premium price for Chiquita lettuce. [CX 158D]

Although respondent may have viewed lettuce as an ideal product area, it contends that, for purposes of the Clayton Act and the FTC Act, lettuce is not the relevant market.

## II. RELEVANT MARKET

### The Product Market

Complaint counsel and respondent sharply disagree on the correct market definition. Complaint counsel contend that each item of fresh produce is an appropriate market. Respondent argues that no single fresh vegetable should be designated a separate market because fresh vegetable farmers can shift from one fresh vegetable to another.

The record establishes that some growers and shippers do shift product mix. However, even if we assume easy interchangeability of production facilities, this is but one factor weighing in favor of a broader definition of the market while several other factors tip the scales in favor of singling lettuce out as a submarket. In *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), the Supreme Court recognized that well-defined submarkets may constitute product markets for antitrust purposes. The Court explained that the boundaries of the submarkets should be determined by practical indicia such as:

industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. [At 325]

In the instant case, the ALJ, keying his findings to the *Brown Shoe* criteria, determined that:

within the fresh produce market, there is a fresh vegetables submarket, which, in turn, breaks down into a multiplicity of individual product submarkets, such as lettuce, celery, and cauliflower. [I.D. 12] [p. 1630-31 herein]

In our view, the evidence clearly demonstrates that lettuce satisfies the *Brown Shoe* criteria. We agree with the ALJ's finding that lettuce

is regarded as a separate market by industry and by government (*See, e.g.*, CX 383-386, 248-256, 263-268, 269-271, 239-240, 241-242, 289-291, 324, 295-305, 312, 393, 394), and the record also supports his findings that many grower-shippers specialize in a particular vegetable or group of vegetables. [CX 339] Of particular significance, however, is the fact that little or no cross-elasticity of demand exists between lettuce and other products; *i.e.*, the price of lettuce is unaffected by the price of other vegetables. [Tr. 2080, 1578] Accordingly, lettuce is an appropriate submarket.

We want to emphasize that we shall focus our attention only upon the lettuce submarket because a thorough review convinces us, as it did the ALJ, that the record does not contain sufficient evidence to assess the competitive effect of the acquisitions on other product submarkets or the fresh vegetable industry as a whole.

#### Geographic Market

The ALJ concluded that a national lettuce market exists which, in turn, subdivides into a series of terminal submarkets in major cities. He also found that each principal shipping point in California and Arizona is also a relevant market.<sup>3</sup>

We have no simple formula for defining the relevant geographic market or markets. The Supreme Court has repeatedly announced that: the area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates and to which the purchaser can practicably turn for supplies. [*United States v. Philadelphia National Bank*, 374 U.S. 321, 359 (1963); *United States v. Phillipsburg National Bank and Trust Co.*, 399 U.S. 350, 362 (1970); *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961)]

The record in the instant case amply demonstrates that a national flow of lettuce exists. As the ALJ found: "lettuce is commercially grown and shipped from each major area of the United States \* \* \*." [I.D. 16] [p. 1633 herein] Lettuce is grown commercially in at least 15 states, and substantial amounts are shipped interstate. [CX 248 at 34] In 1972 the Department of Agriculture published a decision with respect to a then proposed marketing agreement and order on lettuce produced in California, Arizona, Colorado, New Mexico, and parts of Texas. That decision noted that lettuce grown in this five-state area:

\* \* \* is so grown, harvested, and packed that virtually any given lot may be, and often is, sold or transported to any market in the United States. The industry's domestic market for lettuce is the entire United States and its members are in daily contact with buyers across the Nation \* \* \*. With modern communication and transportation systems, lettuce prices or supplies in any one location are promptly known elsewhere and have a direct effect on lettuce prices and supplies in all other locations. [RX 1 I]

<sup>3</sup> These principal shipping points are Monterey County, California; Imperial County, Calif.; the Salt River Valley, Ariz.; Marana-Red Rock-Maricopa-Eloy, Ariz.; and Yuma, Ariz. [I.D. 17-18] [pp. 1634-35 herein]

Moreover, a study by the California Department of Agriculture concluded that "[t]he average price level for any one season will usually depend on total United States supplies available and general arrival quality of those supplies." [CX 246 at 6]

This evidence establishes that primary supply and demand forces for lettuce are exerted on a nationwide basis. Many producers have, in essence, a national market; and buyers will look to any part of the country which can ship to the buyer's locale. Accordingly, we hold that the United States is a market for lettuce. Of course, submarkets for lettuce may exist (*e.g.*, major cities, as the ALJ found).<sup>4</sup> However, the record in this case lacks substantial evidence of the competitive effects of the acquisitions at these terminal cities and, accordingly, we do not reach the question of the existence of relevant markets at the city level.

Although a city, state or multistate area may be a relevant geographic market, we disagree with the ALJ's conclusion that the major shipping points in California and Arizona are each a relevant market. These shipping points are, in essence, simply commodity exchanges. Certainly, if a commodity exchange were the only place at which the sellers operated and hence to which the buyers could turn for supplies, the exchange could qualify as the relevant market; but such is not the case with the shipping points at issue here.

#### The Time Element

Generally the relevant market is defined solely in product and geographic terms. In this case, however, commercial realities require that a third dimension—time—also be considered. Lettuce is so perishable that shippers try to sell it the day it is harvested [I.D. 19-20] [pp. 1636-37 herein], and it must be harvested within three or four days before or after the optimum harvest date. [CX 246M] Thus, unlike most products, producers cannot stockpile lettuce or delay the harvest. As a result of the necessarily rapid movement of lettuce once the optimum harvest period is at hand, a head of lettuce which has reached its optimum harvest date can have no effect on the price of a head which reaches its optimum date a short time later. It follows that in assessing supply and demand forces for lettuce harvested in one month, we have no reason to consider the amount and price of lettuce harvested the prior month. Accordingly, we must divide the national market into time segments.

Although an overlap of a few days may exist from one time period to the next (*i.e.*, the potential supply of lettuce which can be harvested on the last day of period 1 could be harvested during the first days of period

<sup>4</sup> In *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966), the Supreme Court held that in addition to a national beer market, a three-state area and even one state constituted relevant geographic markets.

2) and some degree of fuzziness will exist in the selection of the length of the time period,<sup>5</sup> we nevertheless can sharpen our evaluation of supply and demand forces by segmenting the market. For example, annually computed statistics may show that Firm X accounts for 8 percent of national lettuce shipments, hardly an indicator of monopoly power. But a breakdown of shipments on a monthly basis may reveal that all of its shipments occur in January and that they account for 90 percent of January lettuce.

After thoroughly reviewing the record, we conclude that we can adequately assess the contours of the lettuce industry by dividing the national harvest into monthly segments. Although it might be possible to isolate an even shorter time period as the relevant market [See Tr. 2185-2185A], we find that to be unnecessary for purposes of the issues raised in this case.

### III. COMPETITIVE EFFECTS

At the time of respondent's entry, the lettuce industry consisted of many relatively small producers operating in a competitive atmosphere. The industry is noted for its high risks, periodic oversupplies and wide price fluctuations (sometimes as high as 300 percent within one week). Major contributors to this situation are unpredictable weather conditions, uncoordinated planting efforts, inelastic demand for the product, and the perishable nature of lettuce which requires that a head of lettuce be harvested and shipped within a short time of its optimum harvest date.

The production of lettuce can be viewed as consisting of two separate processes: growing and shipping. Some firms grow and ship their own lettuce, but often a shipper, in place of or in addition to growing his own lettuce, will enter into a growing contract, called a "joint deal," with a farmer (who may own the land he farms or lease it from an absentee owner). Under the joint deal, the grower will cultivate the lettuce and the shipper will sell it. The degree to which the shipper will assist in the growing phase and the extent to which risks will be apportioned vary from contract to contract, but generally risks are shared; and often the shipper performs some function in the growing process.

When the lettuce is harvested the shipper immediately sends the produce to a vacuum cooler<sup>6</sup> where it is cooled and prepared for shipment. The shipper sells the lettuce through an elaborate system of brokers and buyers. Some food store chains maintain buyers at the shipping points, and sellers will sell directly to them; but most sales are

<sup>5</sup> The Supreme Court has recognized that some fuzziness is inherent in the process of defining markets. See *United States v. Philadelphia National Bank*, 374 U.S. 321 at 360 n.37.

<sup>6</sup> This device lowers the temperature of the lettuce to 34° which is the optimal temperature for maintaining its freshness.

made through independent brokers. Usually the broker or buyer inspects the lettuce when it arrives at the vacuum cooling plant and places his order after he or his representative inspects the produce. The lettuce is then loaded on a truck or rail car and begins a speedy, refrigerated journey to its destination.

Occasionally the shipper can find no purchaser for his lettuce at the shipping point. Since lettuce is highly perishable, the shipper must either find a consignee at the terminal point or send the lettuce on its way to a terminal with the hope that he will find a purchaser while it is en route.

Although the shipper generally does not wrap each head of lettuce, occasionally a buyer will ask that the lettuce be sealed in a plastic wrapper before it is shipped, a service for which the shipper can achieve a premium price. Source-wrapped lettuce accounts for approximately 5 to 15 percent of total lettuce shipments.

Lettuce is sold as a commodity without any brand differentiation at the consumer level. Some shippers use a particular label for their best lettuce, but these labels have significance only to the trade and apparently do not influence a wholesale buyer's purchasing decisions which are usually based upon visual inspection of the product.

Finally, we note that generally those who venture into the lettuce sweepstakes are persons who have "grown up in the business;" and the development and success of a firm often hinge on the ability of the individual in charge. In a nutshell, at the time of respondent's entry, the lettuce industry was vigorously competitive.

The ALJ concluded " \* \* \* the substitution of United Brands for six relatively small independent enterprises threatens to restructure the lettuce industry in ways that bode ill for its competitive health." [I.D. 57] [p. 1667 herein] In essence, this conclusion is the gravamen of respondent's challenge, and hence the central question before us is whether the record demonstrates that respondent's acquisitions are likely to reduce substantially the industry's competitive vigor. The acquisitions, when viewed as a unit,<sup>7</sup> have the characteristics of a conglomerate acquisition. In evaluating the competitive effects of a conglomerate acquisition, we cannot rely upon quantifiable factors (such as concentration ratios and market shares) to the same extent that we can when evaluating horizontal and vertical mergers. As we said in *Procter & Gamble*, 63 FTC 1465 (1963):

The merger at bar, [a conglomerate product extension merger] because it is not a

<sup>7</sup> Upon acquiring the first lettuce firm, respondent may have become a competitor of the other firms. Thus, when viewed individually, all acquisitions subsequent to the first may have horizontal characteristics. However, we will not evaluate the horizontal effects of each acquisition because complaint counsel have tried the case solely on a conglomerate theory, and the ALJ's opinion did not contain a horizontal analysis.

conventional horizontal or vertical merger, does not afford the tribunal which must decide its legality the ready crutch of percentages. [At 1570]

Nor can we focus *solely* on the size of the acquiring firm, a readily quantifiable characteristic, as "size alone is an insufficient criterion, at least as yet, in the field of conglomerate mergers." [*United States v. Wilson Sporting Goods Co.*, 288 F. Supp. 543, 554 (N.D. Ill. 1968)] Instead we must carefully evaluate, primarily in nonquantifiable terms, the probable effects of the acquisitions on competitive behavior.

Ideally we should measure the probable competitive effects without turning to post-acquisition evidence. However, in the instant case the probable effects, measured at the time of the acquisitions, were so uncertain that we have found it necessary to place considerable emphasis on post-acquisition evidence. (See, *United States v. General Dynamics Corp.*, 42 U.S.L.W. 4368 (March 19, 1974); *Federal Trade Commission v. Consolidated Foods Corp.*, 380 U.S. 592 (1965); *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966).)

We can best evaluate the probable effects of the acquisitions by focusing on each area which the ALJ considered.

#### Deep Pocket

The ALJ concluded that "this record affords a classic example of the competitive advantage enjoyed by an enterprise as the result of the 'deep pocket' of the parent corporation." [I.D. 29] [p. 1644 herein] He based this conclusion on the fact that in 1970 respondent's lettuce division, Inter Harvest, lost \$8,287,000 and was saved by a massive transfusion of funds from the parent. We have no evidence that any other lettuce grower or shipper could take an \$8 million drubbing, but the ability to weather large losses does not, in itself, pose a threat to competition.<sup>8</sup> Had Inter Harvest continued to lose \$8 million a year, we doubt that it would have remained a viable entity in the lettuce industry.

As further evidence of the impact of the "deep pocket," the ALJ found that United made extensive capital expenditures. It purchased or leased nearly \$1 million worth of equipment for its lettuce operation, but the record provides no indication that these expenditures had or are likely to have an anticompetitive effect.

#### Economies and Preferential Prices

The ALJ found no substantial evidence that respondent has obtained inputs at preferential prices, but he indicated that the potential exists. [I.D. 32] [p. 1647 herein] The "potential" may exist, but we are con-

<sup>8</sup> Of course, the ability to incur losses which others cannot incur, coupled with a predatory pricing scheme, may very well pose a serious threat to competition. (See, e.g., *Reynolds Metals Company v. Federal Trade Commission*, 309 F. 2d 223 (D. C. Cir. 1962) The record contains no evidence of predatory pricing [I.D. 30] [p. 1645 herein]; Inter Harvest's losses appear to be the result of simply poor business judgments.

cerned with probabilities; and the record does not demonstrate a probability that respondent will obtain inputs at special prices. Nor does the record establish that United will probably enjoy any economies of scale.

#### Distribution Network

United has a fairly extensive banana sales network through which it intended to sell its lettuce. By so purveying its lettuce, it hoped to break with the traditional industry practice of selling through a broker. This could result in savings of 10 to 15 cents per carton. By all accounts, respondent's attempts to bypass the brokers failed abysmally. The former vice-president for sales in United's Eastern Division (covering northeastern United States) testified that his division attempted to sell lettuce for two years, but he could not remember one lettuce sale. [Tr. 1597] John M. Fox, United's former chairman and chief executive officer, testified that in its attempts to sell lettuce, respondent could not employ the same marketing system and individuals who sold bananas [Tr. 1485] and that the attempt to bypass the broker was a "serious mistake." [Tr. 1476; see also Mason Tr. 3850-3853]

The ALJ concluded that United "*conceivably* might successfully eliminate or substantially reduce the cost of brokerage." [I.D. 33 (emphasis added) [p. 1648 herein] As we stated above, we are concerned here only with probabilities, not possibilities, and we find no evidence in the record to indicate that it is probable that respondent will successfully bypass brokers.

In conjunction with its plan to sell direct, respondent also hoped to introduce a system in which the retailer would order lettuce two weeks in advance of shipment. It even considered the prospect of entering into long-term contracts where possible, but we have no evidence that this contemplated system was more than wishful thinking. [CX 136E & F] As part of the envisioned shipping network, some of respondent's employees considered constructing regional cold storage warehouses [CX 124A & B], but the record does not establish that this idea was ever given serious consideration.

Finally, we note that the ALJ found that the ability of United's regional representatives to handle complaints on the spot and United's direct contacts with top officials of major retail chains conferred additional competitive advantages. They may be advantages, but they are, at most, minor.

#### Price Leadership

The ALJ found that "[r]espondent clearly envisioned for itself the role of 'price leader' in the lettuce industry" [I.D. 33] [p. 1648 herein] and concluded that it has both the intent and power to exercise price leader-

ship. Although he found that in many instances United's prices were not as low as those of grower-shippers who complained of its pricing practices [I.D. 37] [p. 1651 herein], he concluded that "with the volume of lettuce it [respondent] was moving, its prices tended to set the market price or, at least, to have a strong influence thereon." [I.D. 36] [p. 1650 herein] He reasoned:

Large-volume shippers are under pressure to cut prices in order to move their production, and, during periods of depressed markets, are blamed, rightly or wrongly, for low prices. This follows from the inelastic demand for lettuce at the industry level. The larger the quantity under the control of a firm, the more inelastic the demand facing the firm. The firm selling larger quantities of lettuce must lower price more percentage-wise to sell its shipments or else stop harvesting. The largest volume company makes the price on a depressed or slow market because the buyers use that price to "whipsaw" the sellers.<sup>9</sup> [Id. at 36] [p. 1650 herein]

Assuming that respondent is the largest volume company and sometimes does sell at a very low price, this "price-setting" phenomenon appears to be the result of United's response to market conditions—an overabundance of supply. Of course, if it expanded its acreage, respondent could be partially responsible for an overabundance; but given the uncoordinated growing efforts characteristic of the industry and the effect of weather conditions on the size of the harvest, United *cannot accurately predict* the price its lettuce will fetch. However, the essence of price leadership is that the dominant firm sets what it views as the optimum price. (See F. M. Scherer, *Industrial Market Structure and Economic Performance*, 165 (1970).) Generally, in markets subject to dominant firm price leadership, the dominant firm controls at least 50 percent of total industry output—far more than respondent possesses. Moreover, it does not appear from the record that respondent possesses other leverage which would enable it to dictate the prevailing price. Thus, we must conclude that although respondent may have demonstrated an intent to establish price leadership, there is little in the record to indicate it will have a following.

#### Availability of Lettuce Land

The ALJ determined, in essence, that there is a limited amount of suitable lettuce-growing land which can be obtained at "reasonable" cost and that this limitation poses a barrier to new entry. We agree that some of the best land on which lettuce is grown during the summer months, the northern area of the Salinas Valley, is difficult to obtain. [Tr. 2307, 2024, 2026] Respondent, itself, provides support for this conclusion. As one reason for entry by acquisition, a report by a United employee stated:

<sup>9</sup> Inelasticity of demand is discussed *infra* at 18 [p. 1707 herein].

We cannot profitably engage in the growing of lettuce unless we acquire existing growers because there is not sufficient land available for lease or development in the areas required for year-round production. All suitable land is presently under lease (up to five years) to existing growers. [CX 158-0]

The author of this report testified that he was referring only to the northern areas of the Salinas Valley where the prime land is located. [Tr. 2288]

Although the land in the northern sector of the Salinas Valley may be difficult to obtain, other land in the Valley clearly is available. For example, one grower-shipper re-entered the Salinas Valley after an absence of several years and obtained good land simply by "ringing doorbells" [Tr. 2330]; and several other grower-shippers have entered the Salinas Valley in recent years (apparently their first entry into the Valley). [Tr. 2528] Moreover, we note that 300,000 acres of land in the central coastal area of California have been identified by production specialists as capable of relatively high yields of lettuce with costs similar to those of the Salinas Valley or marginally higher. [Tr. 4087] Thus, growers could shift "new" land into lettuce.

Furthermore, shippers and growers apparently have little difficulty obtaining access to land in other areas. For example, in the Imperial Valley, which produces lettuce in the winter, not all land commercially suitable for lettuce is used every year. Imperial Valley lettuce producers planted over 48,000 acres in lettuce in 1970, but in 1971 they cut back to 34,800 acres. Perhaps in another year that 13,200 acres will re-enter, or an additional 20,000 acres will be shifted to lettuce. It is also worth noting that some authorities contend that lettuce can be commercially grown in the Imperial Valley on twice the land presently in lettuce. [Tr. 4088]

We are thus led to conclude that aside from prime lettuce land in the northern sector of the Salinas Valley, land suitable for the commercial production of lettuce is not difficult to obtain. However, the key question is whether respondent's presence has in any way *raised* whatever land-availability entry barriers existed prior to its acquisitions. The ALJ concluded:

[b]y acquiring access to extensive acreage of suitable lettuce land through its acquisitions, and by its ability to obtain renewals of its leases as well as to acquire access to additional land at higher costs than can be afforded by most of its competitors or any would-be entrants into the lettuce industry, respondent's entry by acquisition has in fact raised the barrier to entry represented by the difficulty of obtaining suitable lettuce land at reasonable cost. [I.D. 46] [p. 1658 herein]

Respondent took no land out of the supply of available land; it merely took the place of the acquired firms. It follows that respondent's acquisition of access to this acreage did not, in itself, increase the difficulty of

obtaining land. Nor should its ability to obtain lease renewals have a restrictive effect on land availability because, presumably, the acquired firms would have obtained similar renewals.

This conclusion applies to the land in the northern part of the Salinas Valley as well. Some of the acquired firms may have had access to this premium lettuce land, but we have found no evidence that United has taken any action or threatened any action which would further restrict the availability of that land. In fact, the record shows this land is difficult to obtain because it "is pretty well controlled by the *old established shippers*." (emphasis added) [Tr. 2307]

Of course, respondent could restrict availability if it paid an exorbitant price for its renewals. But the record provides no indication that it would pay an abnormal price to renew its present leases. Also, United clearly could heighten barriers to entry if it acquired access to so much land that the price of the remaining land rose substantially. At this point, we simply note that the acquisition of access to *any additional* land poses serious entry barrier problems associated with product differentiation attempts discussed *infra* at 23-28 [pp. 1711-1715 herein]. We conclude that the mere substitution of respondent for the acquired firms has not, in itself, restricted the availability of land.

#### Price Inelasticity of Demand

At present aggregate production levels, the industry faces an inelastic demand curve. [Tr. 3415] That is, an increase in total output will result in a proportionately greater decrease in unit price and a consequent decrease in the total industry revenue. We presume that this inelasticity exists in every monthly market.

Inelasticity of demand would probably pose a substantial barrier to a large scale entrant. It is noteworthy that respondent carefully considered this problem—in fact one of its officers admitted that had respondent entered *de novo* on the same scale as its acquisitions (7 million cartons), the result "would have been disastrous." [Tr. 3950] On the other hand, industry inelasticity of demand, by itself, poses no more than a minimal problem for the small entrant whose market share is too small to have a significant effect on the market.<sup>10</sup>

The ALJ concluded that respondent's presence has raised whatever entry barriers flow from the inelasticity of demand. His theory, in essence, is that respondent's entry would heighten *perceived risks* because would-be entrants would fear that United could glut the market and, given the inelastic aggregate demand, drive prices down. How-

<sup>10</sup> Consider a potential entrant who would produce 48,000 cartons (4,000 cartons in every month market for 12 months—about .05 percent of industry total). This is probably not a large enough quantity of lettuce to affect significantly the price of lettuce—it would cause the price of lettuce to fall perhaps by  $\frac{1}{10}$  of one percent [Tr. 3411-12] (e.g., if lettuce sells for \$2.50 a carton, this would represent a decrease in price of  $\frac{1}{4}$  of a cent).

ever, as is discussed immediately below, the record contains little support for the assertion that risks, real or perceived, have been significantly altered by United's presence.

#### Risk and Financing

The ALJ concluded that respondent's entry heightened the already high risks involved in producing lettuce. In support of this conclusion, he cited the statements of two former competitors of United who have left the lettuce industry, one of whom was, as the ALJ noted, in a loss position before respondent entered the industry. The record also shows that a lettuce broker testified that he considered becoming a grower-shipper in 1970 but was deterred by the presence of the "conglomerates." [Tr. 2177]<sup>11</sup>

On the other hand, numerous firms greatly expanded their production after respondent entered, hardly the actions of producers preoccupied with a concern for risks. [Tr. 1935-38, 2316, 2327, 2501-02] The record is thus unclear on the question of risks perceived by industry members and potential entrants, and we can draw no general conclusions.

Most grower-shippers rely on commercial financing [Tr. 3429-30], and the amount which the bank will lend a grower-shipper depends, *inter alia*, on the banker's perception of riskiness of the crop and the size of the shipper's physical assets. [Tr. 3420-21] Given the importance of commercial credit and the concern bankers have for risks attendant with the lettuce crop, we could expect a stark limitation on credit (with a consequent adverse effect on the entry of new firms and on the continued existence of firms already in the industry) if bankers perceived respondent's entry as substantially increasing the risks for other industry members. One grower-shipper testified that his banker expressed concern about the impact that large corporations would have on the lettuce industry [Tr. 3044], but we have no record evidence that respondent's presence caused any banker to deny credit to any industry member or would-be entrant or caused a banker to charge higher interest rates. Thus, we cannot conclude that respondent's acquisitions have impeded the ability of new or established producers to obtain commercial financing.

#### Know-How

Complaint counsel contend that know-how is so formidable a barrier to entry that all entrants except respondent were firms or individuals closely associated with the lettuce industry. This assertion may be true, but we fail to see how United's entry has heightened this barrier. There

<sup>11</sup> However, he added that by 1972 United's presence no longer served as a deterrent to his entry. [Tr. 2181]

appears to be a substantial reservoir of persons who have the requisite know-how to become grower-shippers (or to be hired by others who wish to enter the industry). Moreover, before entering *any* industry, the successful entrant must obtain some background about the industry and the product; and less homework may be required of the lettuce entrant than of entrants in industries based upon higher technology. Thus, we cannot conclude that know-how constitutes a significant barrier to entry.

#### Concentration

As we stated earlier, market share data does not occupy as determinative a position in analyzing conglomerate acquisitions as it does in analyzing horizontal or vertical acquisitions where an increase in concentration or market foreclosure can readily be measured. Market share data, however, has been a major consideration in assessing the probable competitive effects of numerous conglomerate mergers (*e.g.*, (1) where the acquired firm was an industry leader [usually in a concentrated market] and it was probable that the acquisition would entrench its leadership position or further rigidify an oligopoly,<sup>12</sup> (2) where the acquiring firm was a potential entrant into a concentrated industry in which the barriers to entry were high,<sup>13</sup> or (3) where reciprocal buying arrangements involving a substantial share of the market were likely to result from the acquisition.<sup>14</sup>)

The instant case, however, substantially differs from these cases. Unlike the cases involving entrenchment of a dominant firm or the rigidifying of an oligopoly, in not one of the monthly lettuce markets does an oligopoly exist. Although Inter Harvest is the largest firm in several of those markets, it has neither the market share nor the established leadership role of the acquired firms in the entrenchment cases.

Reciprocity and potential competition also are not considerations in this case. The ALJ concluded that the record is devoid of reciprocal sales arrangements between respondent and its customers; and a potential competition charge, although pursued below, has not been raised on appeal.

Moreover, in the instant case the market share data is too incomplete to be of more than minimal probative value. In very general terms, it

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<sup>12</sup> *E.g.*, *Federal Trade Commission v. Proctor & Gamble*, 386 U.S. 568 (1967)—acquisition of leading firm in concentrated industry; *United States v. General Foods*, 386 F. 2d 936 (3rd Cir. 1967)—acquisition of member of duopoly; *United States v. Wilson Sporting Goods Co.*, 288 F. Supp. 543 (N. D. Ill. 1968)—acquisition of leading firm in concentrated industry (order granting preliminary injunction).

<sup>13</sup> *Federal Trade Commission v. Proctor & Gamble*, 386 U.S. 568 (1967).

<sup>14</sup> *Federal Trade Commission v. Consolidated Foods Corp.*, 380 U.S. 592 (1965).

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appears that after respondent entered, concentration ratios and respondent's market share increased but that by 1971 they leveled off in several monthly markets (and may even have declined in some). <sup>15</sup>

<sup>15</sup>

Year	National Monthly Concentration		Respondent
	4-Firm	8-Firm	
	January and February		
1968	Insufficient Data		
1969	18	29	.09
1970	18	29	6.17
1971	24	36	8.51
	March		
	Insufficient Data		
	April		
	Insufficient Data		
1968			
1969	16	25	--
1970	19	28	6
1971	16	23	5
	May		
1968	21	29	--
1969	22	32	8
1970	30	42	12
1971	28	40	11
	June		
1968	24	33	--
1969	33	48	12
1970	34	49	14
1971	35	50	14
	July		
1968	22	30	--
1969	30	44	11
1970	31	44	13
1971	30	43	12
	August		
1968	21	28	--
1969	30	43	11
1970	29	41	13
1971	32	45	12
	September		
1968	21	28	--
1969	32	46	12
1970	31	44	13
1971	33	47	13
	October		
	Insufficient Data		
	November		
1968	13	19	--
1969	14	22	4

(Continued)

The record contains even less data on concentration at the growing level. In fact, we can ascertain merely that approximately half of California's lettuce is grown by a large number of small farmers under contract with shippers. [CX 274, at 3]

We also have examined the record to obtain a rough idea of the total number of lettuce growers and shippers, but here, too, the evidence is incomplete (perhaps due to difficulty in obtaining such data). At most we can infer from the record that every monthly market has dozens of shippers but that the number is declining—substantially in some.<sup>15</sup>

#### Product Differentiation

In the early 1960s, United Fruit launched a program to brand differentiate its bananas at the consumer level. It adopted the Chiquita trademark and affixed this mark to its premium bananas. In addition, it engaged in an extensive consumer advertising campaign designed to develop a consumer franchise for Chiquita bananas.

The record shows that United Fruit regarded the program as a success and that it wanted to repeat the Chiquita banana story with lettuce. Respondent's employees felt that a lettuce branding program held great promise as a means by which it could "subdue historical

<sup>15</sup> (Continued from preceding page)

<i>Year</i>	<i>4-Firm</i>	<i>8-Firm</i>	<i>Respondent</i>
1970	14.5	25	4
1971	Insufficient Data		
	December		
1968	18	29	.09
1969	18	29	6.17
1970	24	36	8.51
1971	Insufficient Data		

These figures have value only in that they provide a rough approximation of national monthly concentration and respondent's market share. The figures are imprecise because the record contains individual firm shipping information solely for the State of Arizona and a few designated counties in California, and this scant data was presented on a seasonal basis rather than a monthly basis. To obtain an approximation of market shares on a monthly basis, it was necessary to combine, where possible, the production figures for areas shipping at the same time. To arrive at the national monthly figure, we then computed the share of total national production for a given month attributable to the growing areas for which we computed the concentration ratios. The concentration ratios were then multiplied by the percentage which the shipping areas compose of the total national shipments on a monthly basis. The resulting percentage provides a rough approximation of national monthly concentration. This procedure is premised on two assumptions:

1. Shippers tend to ship over an entire growing season so their percentage of the total is evenly distributed; and
  2. The largest shippers do not have substantial shipments from other areas for which shipping data is unavailable.
- To the extent that either assumption is incorrect, concentration figures are understated.

<sup>16</sup> *E.g.*, approximately 77 firms shipped lettuce in the period covered by the December 1968-January-February 1969 markets. One year later, 34 shippers left these markets, and eight entered for a net decrease of 25. It should be noted that the eight who entered in 1970-71 were strong competitors, accounting for approximately 9 percent of the shipments during December-February. In view of the relative stability of concentration ratios, many of the exiting firms may have been weak fringe competitors. In any event, a substantial number of shippers remain in every monthly market.

variations of the fresh vegetable market, especially in terms of price fluctuations," and could establish "a non-pre-emptable position as leader in fresh and semi-processed salad products." [CX 96A] It is thus apparent that the branding program was a major, if not *the* major, reason why United Fruit entered the lettuce industry.

Soon after respondent made its lettuce firm acquisitions, it embarked upon an ill-fated campaign to test its ability to brand differentiate its best lettuce under the "Chiquita" trademark. This program, which lasted approximately nine months, consisted of media advertising of Chiquita brand lettuce in several selected metropolitan areas. To identify this lettuce, respondent wrapped each head in plastic film carrying the Chiquita trademark.

United's officials did not share a unanimous view about the degree of success which the program achieved. Barkley Bull, former produce manager and director of marketing services, concluded that the branding experiment indicated that the program should be expanded. [Tr. 1528] However, Mr. Bull's enthusiasm for the program may be partly attributable to the fact that he was responsible for its development. In support of his view that the program should be expanded, Mr. Bull noted that respondent obtained 70 to 90 cents more per carton for its branded lettuce than it did for its unbranded lettuce. [Tr. 1529] However, the fact that it obtained more for branded lettuce does not establish the program's success: United affixed its best lettuce with the Chiquita trademark, and it is possible that even without the Chiquita mark, its best lettuce would have fetched a higher price on the market than its lesser quality lettuce. If we had evidence that respondent obtained a higher price for Chiquita lettuce than its *competitors* obtained for their best lettuce, we could attribute some measure of success to the experiment, but the record lacks such evidence.

John M. Fox, former chief executive officer, had little praise for the branding experiment. He testified that "it was a complete mistake" to think they could brand lettuce [Tr. 1472-73] and he felt that entering the lettuce industry was his "biggest mistake." [Tr. 1497] Eli Black, chairman of the board and president, also concluded that the program failed [Tr. 1728-30] as did William Mason, head of the diversified products group [RX 89, Tr. 3863] and M. William Decker, manager of lettuce harvesting for Inter Harvest. [Tr. 2291]

Of course, one could hypothesize that respondent discontinued the program in response to the investigation then underway by the Commission's staff and that, as the ALJ pointed out, one could view United's action with some skepticism. However, we need not attribute this motive to respondent as there appear to be numerous market factors

which contributed to the program's failure. First, consumers select lettuce on the basis of its appearance and feel, and the buyers of lettuce for resale do likewise. [RPF Par. 210, pp. 172-73; Tr. 1729, 4040-41]

Secondly, United discovered it could not sufficiently differentiate its lettuce to make its brand attractive to the housewife. [Tr. 1474, 3859] In particular, it failed to exercise adequate quality control. An official of a large food chain, Carlyle Sherwin, contended that a grower-shipper cannot control the quality of lettuce so well that it can consistently supply his chain with good quality lettuce [Tr. 4042]; and respondent's own officials echoed this same concern. [Tr. 1492-93, 1478, 1473, 1728-29; RX 89] Although quality control poses a major problem, United may be able to reduce this problem somewhat. For example, the ALJ noted that temporary labor difficulties may have contributed to lack of quality control. [I.D. 49] [p. 1660 herein] Also, quality control may be improved if respondent were to build a network of cold storage warehouses, but the record contains no proof that United has given this proposal serious consideration.

Probably the most crucial factor which led to the failure of the brand differentiation program was insufficient quantities of raw product. Respondent simply did not produce enough lettuce to glean a sufficient quantity of *high quality* lettuce (1) to provide retailers with a continuous supply and (2) to pay the advertising costs essential for a branding program—a problem recognized by respondent's officials. [Tr. 1491-2, 1534; CX 158 F-G, P-Q] Prior to entering the market, United Fruit's employees estimated that a successful national branding program would not be financially feasible unless they shipped approximately 25 million cartons annually (due to the need to generate sufficient sales to pay for the advertising campaign). [CX 158Q] They also computed that United would have to ship 15 million cartons a year in order to provide customers with high quality lettuce on a consistent basis. However, they recommended that this goal be scaled down to 10 to 12 million cartons "because of antitrust considerations." [CX 158Q] They estimated that at the ten-million-carton level respondent might be able to mount an effective *regional* branding program. Later, the estimate of the number of lettuce shipments required to support a national branding effort was revised to 12 million cartons. [CX 136C]

The record shows that United produced 9,231,000 cartons in 1970, the year that the branding experiment was in high gear. [CX 403 Z8] In view of respondent's inability to ship adequate amounts of high quality lettuce to selected regional testing points during this period,<sup>17</sup> it ap-

<sup>17</sup> There were substantial periods in 1970 when United shipped no Chiquita lettuce. [CX 1] [See also Tr. 3860]

pears that at the 9-10 million carton level United *does not consistently have sufficient high quality lettuce to support a regional or national product differentiation campaign*; and thus it needs a larger share of the market before it can succeed with even a regional product differentiation program.

We have no proof that respondent could produce 12 to 15 million cartons on the land to which it had access as of the date of this complaint. In fact, in a financial study made in connection with the acquisitions, respondent estimated it could produce only 10,500,000 cartons on the acquired lands [CX 171C; Tr. 1744-46]; and its 1971 production was close to that figure—10,811,000 cartons. [CX 405 Z20] We note that one witness, Dr. Edwin J. Faris, an agricultural economist, estimated that respondent could achieve the 15 million carton level on its “current land or through leases” [Tr. 3431, emphasis added], but he did not testify that it could reach this figure solely by using the land to which it acquired access via the acquisitions in issue here.

We thus are led to conclude that as long as United does not acquire access to additional land, it probably cannot achieve a successful branding program. On the other hand, if respondent continues to acquire more land suitable for the commercial production of lettuce, it is probable that, at some point, it will have the capability of producing sufficient amounts of high quality lettuce to support a branding program. The introduction of a successful branding program into an industry in which brand differentiation is non-existent could pose a grave threat to competition. For this reason, we would view in the most serious light further attempts by United to expand its access to lettuce-producing land.

Accordingly, we today are requiring respondent, pursuant to our authority under Section 6 of the Federal Trade Commission Act, to notify the Commission of *any* increases, commencing from the date of the issuance of the Complaint in this matter, February 11, 1971, of its access,<sup>18</sup> or the access of any subsidiary corporation, to land commercially suitable for the production of lettuce.

Although additional acquisitions by respondent may pose a threat to competition, we cannot conclude, on the basis of the record before us, that the acquisitions in issue violated Section 7 of the Clayton Act or Section 5 of the Federal Trade Commission Act. An appropriate order will be entered vacating the order issued by the administrative law judge and dismissing the complaint.

<sup>18</sup> “Access” may exist by virtue of various transactions, including but not necessarily limited to, purchasing land, acquiring the stock of a firm which is the owner or lessee of land, acquiring a lease of land, or contracting with a grower for the production of lettuce.

## ORDER REQUIRING FILING OF SPECIAL REPORT

Pursuant to the opinion of the Commission in the matter of United Brands Company, Docket No. 8835, attached herewith and made a part hereof, you, United Brands Company, are required to file with the Commission, within sixty (60) days of receipt of this order, a Special Report informing the Commission of any increase, since February 11, 1971, in the access of United Brands or any subsidiary corporation, to land commercially suitable for the production of lettuce. You are further required to file with the Commission every six months, commencing six months after the filing of the initial Special Report, a Special Report informing the Commission of any future increase in access to land commercially suitable for the production of lettuce.

Please note that "access" to land may exist by virtue of various transactions, such as, but not necessarily limited to, purchasing land, acquiring the capital stock of a firm which is the owner or lessee of land, acquiring a lease of land, or contracting with a grower for the production of lettuce.

Said reports must be subscribed and sworn to by an official of the reporting company.

You are advised that penalties may be imposed under applicable provisions of Federal law for failure to file special reports or for the filing of false reports.

## FINAL ORDER

This matter having been heard by the Commission upon the appeal of respondent from the administrative law judge's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission, for the reasons stated in the accompanying opinion, having concluded that the administrative law judge's initial decision should be set aside and that the complaint should be dismissed:

*It is ordered,* That the administrative law judge's initial decision be, and it hereby is, set aside.

*It is further ordered,* That the complaint be, and it hereby is, dismissed.

Commissioner Hanford not participating.

IN THE MATTER OF  
PEPSICO, INC.

*Docket 8856. Interlocutory Order, May 14, 1974*

Order denying respondent's motions for dismissal or withdrawal of complaint for reason that events subsequent to its issuance have eliminated the public interest in continuing proceedings.

*Appearances*

For the Commission: *Thomas R. Hefty, William D. Henderson and Raymond L. Hays.*

For the respondent: *Kaye, Scholer, Fierman, Hays & Handler, New York, N.Y.*

ORDER DENYING MOTION TO DISMISS OR WITHDRAW COMPLAINT

Respondent moves that the Commission dismiss or withdraw the complaint in the above-captioned matter because events subsequent to its issuance have eliminated the public interest in continuing these proceedings. Complaint counsel oppose this motion and, by order of April 1, 1974, the administrative law judge certified it to the Commission.

Respondent advances four grounds for dismissal: (1) The complaint was issued on the unfounded assumption that elimination of territorial restraints on bottlers would lower the prices of branded soft drink products; (2) complaint counsel lack faith in the case as evidenced by the changes they have made in witnesses and documents; (3) the case raises policy questions best left to Congress, which has already shown its intention to act in this area; and (4) the legal issues remaining in this case, after the others were abandoned by complaint counsel do not warrant continuation of these proceedings.

The above are factors that the Commission would consider in determining whether there was reason to believe that a person, partnership or corporation has violated the law and whether a Commission proceeding against that party would be in the public interest. Only in the most extraordinary circumstances, not shown here, will the Commission review either of these determinations once a complaint has issued. Accordingly,

*It is ordered,* That the aforesaid motion be, and it hereby is, denied.

Commissioner Thompson concurs in the result reached by the majority, but would stay these proceedings for 120 days pending congressional action on legislation regarding the substance of this complaint.

## IN THE MATTER OF

## DAVID M. ROBERTSON TRADING AS ROBERTSON INVESTMENT COMPANY, ETC.

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

*Docket 8936. Complaint, July 30, 1973—Order, May 14, 1974*

Order requiring a Springfield, Va., seller, distributor and installer of carpeting and floor coverings, among other things to cease misrepresenting the nature or status of his business or the size of his facilities; misrepresenting the nature or character of merchandise offered for sale; misrepresenting "sale" prices; misrepresenting the amount of savings accorded customers; failing to maintain records to substantiate savings claims; and misrepresenting quantity or merchandise in stock.

*Appearances*

For the Commission: *Everette E. Thomas, Richard F. Kelly, Alice C. Kelleher, and Maureen McGill.*

For the respondent: *Pro se.*

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that David M. Robertson, an individual, trading and doing business as Robertson Investment Company and Beltway Park Apartments Warehouse, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent David M. Robertson, is an individual trading and doing business as Robertson Investment Company and Beltway Park Apartments Warehouse. His principal office and place of business is located at 7970 Forbes Place, Springfield, Va.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale, distribution and installation of carpeting and floor coverings to the public.

PAR. 3. In the course and conduct of his business as aforesaid, respondent has caused, and now causes, the dissemination of certain

advertisements concerning the aforesaid carpeting and floor coverings, by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers of interstate circulation for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of respondent's said merchandise.

In the further course and conduct of his business, as aforesaid, respondent purchases for resale carpeting and floor coverings from a number of suppliers located throughout the United States. Respondent has caused, and now causes, these products, when purchased by him, to be transported from the place of manufacture or purchase to his places of business located in the States of Virginia, Maryland and Pennsylvania. Thus, respondent maintains and at all times mentioned herein has maintained a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of his aforesaid business, and for the purpose of inducing the purchase of his carpeting and floor coverings, respondent has made, and is now making, numerous statements and representations by repeated advertisements inserted in newspapers of interstate circulation, and by oral statements and representations of his salesmen to prospective purchasers with respect to his products and services.

Typical and illustrative of said statements and representations, but not all-inclusive thereof, are the following:

RUG SALE

LARGE APT. DEVELOPMENT has HUGE surplus of NEW RUGS.

\* \* \* \* \*

RUGS-RUGS

BONANZA

OUR ANNUAL FALL RUG SALE IS HERE AGAIN

COME JOIN THE CROWD FOR GREAT SAVINGS

One of the Nation's largest rug outlets has huge supply and selection of area rugs, now selling to the public as well as apartment complexes and home developers. Get lost in our gigantic warehouse and 'Pick a Winner.'

\* \* \* \* \*

WE NEVER SELL FREIGHT LIQUIDATION OR DAMAGED MERCHANDISE.  
ALL FIRST QUALITY. SATISFACTION GUARANTEED.

\* \* \* \* \*

RUGS LIQUIDATION

\* \* \* \* \*

CARPET LIQUIDATION

\* \* \* \* \*

1717

Complaint

RUGS LIQUIDATION SALE

\* \* \* \* \*

Large Selection, all sizes and Colors.

\* \* \* \* \*

RUGS  
FINAL NOTICE  
TRUCKLOAD  
LIQUIDATION

\* \* \* \* \*

BELTWAY PARK APARTMENTS WAREHOUSE

\* \* \* \* \*

PAR. 5. By and through the use of the above-quoted statements and representations, and others of similar import and meaning but not expressly set out herein, separately and in connection with the oral statements and representations of respondent's salesmen to customers and prospective customers, respondent has represented, and is now representing, directly or by implication, that:

1. By and through the use of said name "Beltway Park Apartments Warehouse," separately or in connection with the foregoing statements and representations or by said statements and representations alone, that he is engaged in the sale or disposition of surplus merchandise originally purchased by him for the use of his apartment development.

2. By and through the use of said name "Beltway Park Apartments Warehouse," separately or in connection with the foregoing statements and representations or by said statements and representations alone, that the facility at which the said merchandise is being offered for sale is a warehouse used primarily for storage in connection with respondent's apartment development.

3. By and through the use of the words "Rugs Liquidation," "Rugs Notice Truckload Liquidation," and other words of similar import and meaning not set out specifically herein, that the advertised rugs are salvage, distress or surplus merchandise, and are therefore being offered for sale at prices below those usually and customarily charged at retail.

4. By and through the use of the word "SALE," and other words of similar import and meaning not set out specifically herein, that said rugs may be purchased at special or reduced prices, and purchasers are thereby afforded savings from respondent's regular selling prices.

5. All sizes and colors of rugs are available for the prospective customer's selection.

## PAR. 6. In truth and in fact:

1. Respondent is not engaged in the sale or disposition of surplus merchandise originally purchased by him for the use of his apartment development. Instead, respondent is in the business of purchasing the advertised merchandise from manufacturers or suppliers and selling it at retail to the purchasing public.

2. The facility at which the said merchandise is being offered for sale is not a warehouse used primarily for storage in connection with respondent's apartment development. Instead, such facility is used primarily for the display and retail sales of merchandise.

3. The advertised rugs are not salvage, distress or surplus merchandise, and they are not being offered for sale at prices below those usually and customarily charged at retail.

4. Respondent's products are not being offered for sale at special or reduced prices. To the contrary, the price respondent regularly advertises and his so-called advertised "sale" price are identical and are used to mislead prospective customers into believing there is a saving from a bona fide regular selling price.

5. All sizes and colors of rugs are not available for the prospective customer's selection. To the contrary, respondent has available only standard size area rugs in a limited selection of colors.

Therefore, the statements and representations as set forth in Paragraphs Four and Five, hereof, were and are false, misleading and deceptive.

PAR. 7. In the course and conduct of his aforesaid business, and at all times mentioned herein, respondent has been, and now is, in substantial competition in commerce, with corporations, firms and individuals in the sale and distribution of rugs, carpeting and floor coverings and service of the same general kind and nature as those sold by respondent.

PAR. 8. The use by respondent of the aforesaid false, misleading and deceptive statements, representations, acts and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and complete, and into the purchase of substantial quantities of respondent's products and services by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY MILES J. BROWN, ADMINISTRATIVE LAW  
JUDGE

JANUARY 7, 1974

This proceeding was commenced by the issuance of a complaint on July 30, 1973, charging David M. Robertson, an individual, trading and doing business as Robertson Investment Company and Beltway Park Apartments Warehouse, with unfair and deceptive acts and practices and unfair methods of competition in commerce, in violation of Section 5 of the Federal Trade Commission Act by making certain false, misleading and deceptive claims in connection with his business in the advertising, offering for sale, sale, distribution and installation of carpeting and floor coverings to the public.

At the prehearing conference held on September 25, 1973, respondent was represented by counsel, Ronald Willoner, Esq., College Park, Md. At that conference the administrative law judge was advised that the complaint had actually been served on respondent on September 20, 1973. Accordingly, October 20, 1973, became the due date for the filing of respondent's answer. By order dated September 25, 1973, the initial adjudicative hearing date in this matter was scheduled for December 17, 1973.

By letter dated October 16, 1973, addressed to the Secretary of the Federal Trade Commission, Mr. Willoner advised that he was no longer representing respondent and advised that he wished to withdraw his appearance. Mr. Willoner stated that respondent had decided to represent himself in this matter.

By letter dated October 19, 1973, also addressed to the Secretary of the Federal Trade Commission, respondent requested an extension of thirty (30) days to allow him ample time to answer. By order dated October 24, 1973, the time in which respondent was to file his answer was extended to and including November 19, 1973.

The initial adjudicative hearing was convened as scheduled on December 17, 1973. As of that date respondent had not filed an answer to the complaint. In addition, respondent did not appear at the adjudicative hearing, although an employee of the Federal Trade Commission had personally delivered to respondent's residence a subpoena requiring such attendance (Tr. 5).<sup>1</sup> Furthermore, respondent did not make any request to either the administrative law judge or counsel supporting the complaint to be excused from the operation of the subpoena or to have the hearings postponed.

At hearing of December 17, 1973, the administrative law judge ruled

<sup>1</sup> The official records in Docket No. 8936 reveal that proper service of all relevant documents has been made on respondent pursuant to the requirements of Section 4.4 of the Commission's Rules of Practice.

that respondent was in default and counsel supporting the complaint was instructed to advise the witnesses who had been subpoenaed to testify on December 18 and 19 that they were excused. In addition, the hearings scheduled for December 18 and 19 were cancelled (Tr. 6-7).

On December 19, 1973, respondent telephoned the administrative law judge inquiring about the hearings in this matter. Respondent was advised that on December 17 he had been adjudged to be in default and that subsequent hearings had been cancelled.

It is clear that respondent is in default under Section 3.12(c) of the Commission's Rules of Practice. By reason of such default, respondent has waived his right to appear and contest the allegations of the complaint and the administrative law judge, under said Section 3.12(c), is authorized, without further notice to respondent, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions, and order.

#### FINDINGS

1. Respondent David M. Robertson is an individual trading and doing business as Robertson Investment Company and Beltway Park Apartments Warehouse. His principal office and place of business is located at 7970 Forbes Place, Springfield, Va.

2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale, distribution and installation of carpeting and floor coverings to the public.

3. In the course and conduct of his business as aforesaid, respondent has caused, and now causes, the dissemination of certain advertisements concerning the aforesaid carpeting and floor coverings, by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers of interstate circulation for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of respondent's said merchandise.

In the further course and conduct of his business, as aforesaid, respondent purchases for resale carpeting and floor coverings from a number of suppliers located throughout the United States. Respondent has caused, and now causes, these products, when purchased by him, to be transported from the place of manufacture or purchase to his places of business located in the States of Virginia, Maryland and Pennsylvania. Thus, respondent maintains and at all times mentioned herein has maintained a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. In the course and conduct of his aforesaid business, and for the purpose of inducing the purchase of his carpeting and floor coverings,

respondent has made, and is now making, numerous statements and representations by repeated advertisements inserted in newspapers of interstate circulation, and by oral statements and representations of his salesmen to prospective purchasers with respect to his products and services.

Typical and illustrative of said statements and representations, but not all-inclusive thereof, are the following:

RUG SALE LARGE APT. DEVELOPMENT has HUGE surplus of NEW RUGS.

\* \* \* \* \*

RUGS-RUGS  
BONANZA

OUR ANNUAL FALL RUG SALE IS HERE AGAIN  
COME JOIN THE CROWD FOR GREAT SAVINGS

One of the Nation's largest rug outlets has huge supply and selection of area rugs, now selling to the public as well as apartment complexes and home developers. Get lost in our gigantic warehouse and "Pick a Winner."

\* \* \* \* \*

WE NEVER SELL FREIGHT LIQUIDATION OR DAMAGED MERCHANDISE.  
ALL FIRST QUALITY. SATISFACTION GUARANTEED.

\* \* \* \* \*

RUGS LIQUIDATION

\* \* \* \* \*

CARPET LIQUIDATION

\* \* \* \* \*

RUGS LIQUIDATION SALE

\* \* \* \* \*

Large Selection, all sizes and Colors.

\* \* \* \* \*

RUGS FINAL NOTICE TRUCKLOAD LIQUIDATION

\* \* \* \* \*

BELTWAY PARK APARTMENTS WAREHOUSE

\* \* \* \* \*

5. By and through the use of the above-quoted statements and representations, and others of similar import and meaning but not expressly set out herein, separately and in connection with the oral statements and representations of respondent's salesmen to customers and prospective customers, respondent has represented, and is now representing, directly or by implication, that:

a. By and through the use of said name "Beltway Park Apartments Warehouse," separately or in connection with the foregoing statements and representations or by said statements and representations alone, that he is engaged in the sale or disposition of surplus merchandise originally purchased by him for the use of his apartment development.

b. By and through the use of said name "Beltway Park Apartments Warehouse," separately or in connection with the foregoing statements and representations or by said statements and representations alone, that the facility at which the said merchandise is being offered for sale is a warehouse used primarily for storage in connection with respondent's apartment development.

c. By and through the use of the words "Rugs Liquidation," "Rugs Notice Truckload Liquidation," and other words of similar import and meaning not set out specifically herein, that the advertised rugs are salvage, distress or surplus merchandise, and are therefore being offered for sale at prices below those usually and customarily charged at retail.

d. By and through the use of the word "SALE," and other words of similar import and meaning not set out specifically herein, that said rugs may be purchased at special or reduced prices, and purchasers are thereby afforded savings from respondent's regular selling prices.

e. All sizes and colors of rugs are available for the prospective customer's selection.

6. In truth and in fact:

a. Respondent is not engaged in the sale or disposition of surplus merchandise originally purchased by him for the use of his apartment development. Instead, respondent is in the business of purchasing the advertised merchandise from manufacturers or suppliers and selling it at retail to the purchasing public.

b. The facility at which the said merchandise is being offered for sale is not a warehouse used primarily for storage in connection with respondent's apartment development. Instead, such facility is used primarily for the display and retail sales of merchandise.

c. The advertised rugs are not salvage, distress or surplus merchandise, and they are not being offered for sale at prices below those usually and customarily charged at retail.

d. Respondent's products are not being offered for sale at special or reduced prices. To the contrary, the price respondent regularly advertises and his so-called advertised "sale" price are identical and are used to mislead prospective customers into believing there is a saving from a bona fide regular selling price.

e. All sizes and colors of rugs are not available for the prospective

customer's selection. To the contrary, respondent has available only standard size area rugs in a limited selection of colors.

Therefore, the statements and representations as set forth in Findings 4 and 5, hereof, were and are false, misleading and deceptive.

7. In the course and conduct of his aforesaid business, and at all times mentioned herein, respondent has been, and now is, in substantial competition in commerce, with corporations, firms and individuals in the sale and distribution of rugs, carpeting and floor coverings and service of the same general kind and nature as those sold by respondent.

8. The use by respondent of the aforesaid false, misleading and deceptive statements, representations, acts and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and complete, and into the purchase of substantial quantities of respondent's products and services by reason of said erroneous and mistaken belief.

#### CONCLUSIONS

1. The aforesaid acts and practices of the respondent, as herein found, were and are all to the prejudice and injury of the public and of respondent's competitors, and such acts and practices constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

2. The Federal Trade Commission has jurisdiction of and over respondent and the subject matter of this proceeding.

3. The complaint herein states a cause of action and this proceeding is in the public interest.

#### ORDER

*It is ordered,* That respondent David M. Robertson, an individual, trading and doing business as Robertson Investment Company and Beltway Park Apartments Warehouse, or under any other name or names, and respondent's agents, representatives, and employees, successors and assigns, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of carpeting and floor coverings, or any other article of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the words "Apartment," "Warehouse" or any other word or words of similar import or meaning in or as part of respondent's retail merchandise business or trade name or names; or misrepresenting, orally or in writing, directly or by implication, the

nature or status of respondent's business or the size, description or classification of any of respondent's physical facilities.

2. Representing, directly or indirectly, orally or in writing, that any merchandise offered for sale is bankrupt, salvage, distrained, distress or transportation company surplus merchandise; or misrepresenting, in any manner, the source, character or nature of the merchandise being offered for sale.

3. Using the word "Sale," or any other word or words of similar import or meaning not set forth specifically herein unless the price of such merchandise being offered for sale constitutes a reduction, in an amount not so insignificant as to be meaningless, from the actual bona fide price at which such merchandise was sold or offered for sale to the public on a regular basis by respondent for a reasonably substantial period of time in the recent, regular course of his business.

4. (a) Representing, orally or in writing, directly or by implication, that by purchasing any of said merchandise, customers are afforded savings amounting to the difference between respondent's stated price and respondent's former price unless such merchandise has been sold or offered for sale in good faith at the former price by respondent for a reasonably substantial period of time in the recent, regular course of his business.

(b) Representing, orally or in writing, directly or by implication, that by purchasing any of said merchandise, customers are afforded savings amounting to the difference between respondent's stated price and a compared price for said merchandise in respondent's trade area unless a substantial number of the principal retail outlets in the trade area regularly sell said merchandise at the compared price or some higher price.

(c) Representing, orally or in writing, directly or by implication, that by purchasing any of said merchandise, customers are afforded savings amounting to the difference between respondent's stated price and a compared value price for comparable merchandise, unless substantial sales of merchandise of like grade and quality are being made in the trade area at the compared price or a higher price and unless respondent has in good faith conducted a market survey or obtained a similar representative sample of prices in his trade area which establishes the validity of said compared price and it is clearly and conspicuously disclosed that the comparison is with merchandise of like grade and quality.

5. Failing to maintain and produce for inspection or copying for a

period of three (3) years, adequate records (a) which disclose the facts upon which any savings claims, sale claims and other similar representations as set forth in Paragraphs Three and Four of this order are based, and (b) from which the validity of any savings claims, sale claims and similar representations can be determined.

6. Representing, directly or indirectly, orally or in writing, that respondent has all sizes and colors of rugs in stock; or misrepresenting, in any manner, the colors, patterns, size, kind or quantity of carpeting or other merchandise in stock and available for sale, delivery or installation.

*It is further ordered,* That respondent shall maintain for at least a one (1) year period, following the effective date of this order, copies of all advertisements, including newspaper, radio and television advertisements, direct mail and in-store solicitation literature, and any other such promotional material utilized for the purpose of obtaining leads for the sale of carpeting or floor coverings, or utilized in the advertising, promotion or sale of carpeting or floor coverings and other merchandise.

*It is further ordered,* That respondent, for a period of one (1) year from the effective date of this order, shall provide each advertising agency utilized by respondent and each newspaper publishing company, television or radio station or other advertising media utilized by respondent to obtain leads for the sale of carpeting, floor coverings and other merchandise, with a copy of the Commission's news release setting forth the terms of this order.

*It is further ordered,* That respondent shall forthwith distribute a copy of this order to each of his operating divisions.

*It is further ordered,* That respondent deliver a copy of this order to cease and desist to all present and future personnel of respondent engaged in the offering for sale, sale of any product, or in any aspect of preparation, creation, or placing of advertising, and that respondent secure a signed statement acknowledging receipt of said order from each such person.

*It is further ordered,* That respondent promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

#### FINAL ORDER

The administrative law judge filed his initial decision in this matter on January 7, 1974, finding respondent to have engaged in the acts and practices as alleged in the complaint and entering a cease-and-desist

order against respondent. A copy of the initial decision and order was served on the respondent on February 7, 1974. No appeal was taken from the initial decision; and on March 8, 1974, the Commission entered an order staying the effective date thereof until further order of the Commission.

The Commission having now determined that the matter should not be placed on its own docket for review, and that the initial decision should become effective.

*It is ordered,* That the initial decision and order contained therein shall become effective as of the date of service of this order.

*It is further ordered,* That respondent shall, within sixty (60) days after service of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with the order contained in the initial decision.

IN THE MATTER OF

AVALON INDUSTRIES, INC., ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5  
OF THE FEDERAL TRADE COMMISSION ACT

*Docket 8925. Complaint, Apr. 13, 1973—Order, May 20, 1974.*

Order requiring a Brooklyn, N. Y., seller and distributor of toy, gift, and hobby products to jobbers and retailers, among other things to cease deceptively packaging its products in oversized containers or otherwise misrepresenting their dimensions or quantities.

*Appearances*

For the Commission: *Herbert S. Forsmith, Alan Rubinstein and Armando Labrada.*

For the respondents: *Martin Greene of Aberman, Greene & Locker, New York, N. Y.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Avalon Industries, Inc., a corporation, and Morton R. Berman, individually, and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Avalon Industries, Inc., is a corporation organized, existing and doing business under and by virtue of the laws

of the State of New York, with its principal office and place of business located at 95 Lorimer Street, Brooklyn, N.Y.

PAR. 2. Respondent Morton R. Berman is an individual and is president of the corporate respondent, and formulates, directs and controls its acts and practices, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 3. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of toy, gift and hobby products to jobbers and retailers for resale to the public.

PAR. 4. In the course and conduct of their business, respondents now cause, and for some time last past have caused, said products, when sold, to be shipped from their place of business in the State of New York to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Among the products which are offered for sale and sold by the respondents are a number of toy, gift and hobby products. Through the use of certain methods of packaging, respondents have represented, and have placed in the hands of others the means and instrumentalities through which they might represent, directly or indirectly, that certain of the above products, as depicted or otherwise described on the exteriors of packages, corresponded in their lengths and widths, or their lengths, widths and thicknesses, with the boxes in which they were contained and that others of such products were offered in quantities reasonably related to the size of the packages or containers in which they were presented for sale.

PAR. 6. In truth and in fact, such products often have not corresponded with their container or package dimensions and are often not offered in quantities reasonably related to the size of the containers or packages in which they are presented for sale purchasers of such a product are thereby given the mistaken impression that they are receiving a larger product or a product of greater volume than is actually the fact.

Therefore, the methods of packaging referred to in Paragraph Five hereof were and are unfair and false, misleading and deceptive.

PAR. 7. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of products of the same general kind and nature as the products sold by the respondents.

PAR. 8. The use by respondents of the aforesaid unfair, false, misleading and deceptive methods of packaging has had, and now has, the

capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the quantum or amount of the product being sold was and is greater than the true such quantum or amount, and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of the respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY DONALD R. MOORE, ADMINISTRATIVE LAW  
JUDGE

APRIL 3, 1974

PRELIMINARY STATEMENT

The respondents in this proceeding are Avalon Industries, Inc., and Morton R. Berman, individually and as an officer (president) of the corporation. They are charged with violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. § 45), in the sale of toy, gift, and hobby products. The complaint, which was issued by the Federal Trade Commission on April 13, 1973, makes the following allegations:

Through the use of certain methods of packaging, respondents have represented, and have placed in the hands of others the means and instrumentalities through which they might represent, directly or indirectly, that certain \* \* \* products, as depicted or otherwise described on the exteriors of packages, corresponded in their lengths and widths, or their lengths, widths and thicknesses, with the boxes in which they were contained and that others of such products were offered in quantities reasonably related to the size of the packages or containers in which they were presented for sale.

In truth and in fact, such products often have not corresponded with their container or package dimensions and are often not offered in quantities reasonably related to the size of the containers or packages in which they are presented for sale. Purchasers of such a product are thereby given the mistaken impression that they are receiving a larger product or a product of greater volume than is actually the fact.

The use by respondents of the aforesaid unfair, false, misleading and deceptive methods of packaging has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the quantum or amount of the product being sold was and is greater than the true such quantum or amount, and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief. (Complaint, Pars. Five, Six, and Eight)

Respondents filed answer on May 24, 1973, admitting certain factual allegations of the complaint but denying generally any violation of law. In addition, respondents averred, as affirmative defenses, that before

the commencement of this proceeding, the corporate respondent redesigned certain of its toy craft products and discontinued the sale of certain products in boxes or other containers which might have caused the impression that the dimensions or the quantities of such products were appreciably greater than the fact, and that the use of certain containers is necessary for the efficient packaging of toy craft products, and the corporate respondent has made all reasonable efforts to prevent any misleading appearance or impression from being created by such containers.

After various prehearing procedures, hearings were held from Nov. 12 to 19, 1973, and on Dec. 4, 1973, in New York, N. Y.

At these hearings, testimony and other evidence were offered in support of and in opposition to the allegations of the complaint. The testimony and evidence presented have been duly recorded and filed. The parties were represented by counsel and were afforded full opportunity to be heard, to examine and to cross-examine witnesses, and to introduce evidence bearing on the issues.

Complaint counsel's case-in-chief consisted primarily of the introduction into evidence of more than two dozen of respondents' products as packaged for sale to consumers, but in their proposed findings, they challenge as deceptive only 17 of such products. The record also contains packages of similar products sold by competitors of Avalon. Complaint counsel's only witness in their case-in-chief was the individual respondent, Morton R. Berman, president of Avalon.

Respondents' defense consisted of the testimony of Gerald Grey, chief of product development for Avalon; Edward Hertzberg, vice president of sales for Avalon; and Robert I. Goldberg, offered as a packaging expert. In rebuttal, Donald Doran testified as a packaging expert for complaint counsel.

After the presentation of evidence, proposed findings of fact and conclusions of law and a proposed form of order were filed by counsel supporting the complaint and by counsel for respondents, together with supporting briefs and reply briefs. The proposed findings of the parties not adopted, either in the form proposed or in substance, have been rejected as lacking support in the record or as involving immaterial matters.

Having heard and observed the witnesses and having carefully reviewed the entire record in this proceeding, together with the proposed findings and briefs filed by the parties, the administrative law judge makes the following findings of fact, enters his resulting conclusions, and issues an appropriate order.

As required by Section 3.51(b)(1) of the Commission's Rules of Practice, the findings of fact include references to the principal supporting

items of evidence in the record. Such references are intended to serve as convenient guides to the testimony and to the exhibits supporting the findings of fact, but they do not necessarily represent complete summaries of the evidence considered in arriving at such findings. Where references are made to proposed findings submitted by the parties, such references are intended to include their citations to the record unless otherwise indicated.

References to the record are made in parentheses, and certain abbreviations are used as follows:

CPF—"Proposed Findings, Conclusions of Law, Arguments in Support Thereof, and Order" filed by counsel supporting the complaint.

CRB—Reply Brief of counsel supporting the complaint ("Complaint Counsel's Exceptions to Respondents' Proposed Findings, Conclusions of Law and Arguments in Support Thereof").

CX—Commission Exhibit.

RPF—Respondents' "Proposed Findings, Conclusions of Law, Arguments in Support Thereof, and Order."

RRB—Respondent's "Reply Brief and Exceptions."

RX—Respondent's Exhibit.

TR—Transcript. (References to testimony sometimes cite the name of the witness and the transcript page number without the abbreviation "Tr."—for example, Berman 123.)

#### FINDINGS OF FACT

##### Respondents and Their Business

1. Respondent Avalon Industries, Inc. ("Avalon") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 95 Lorimer Street, Brooklyn, N.Y. (Admitted by Respondents' Answer, Par. 1). Avalon is a closely-held family-owned corporation (Tr. 44, 327-28).

2. Respondent Morton R. Berman has been president and chief executive officer of the corporate respondent since 1966 (Tr. 47, 50-51).

3. In respondents' answer and in other documents, Mr. Berman denied formulating, directing, and controlling the acts and practices of Avalon and in his testimony he minimized his role in packaging activities (Tr. 61-69, 74-78, 131). But the record leaves no doubt that, as controlling stockholder and as president, he formulates, directs, and controls the acts and practices of the corporate respondent. Mr. Berman acknowledged that he has "ultimate responsibility" as president of Avalon; that he controls Avalon as executive officer and stockholder; that he is

“responsible for formulating the policy” of the company; and that he directs the actions and practices of the company, the “same as any other firm” (Tr. 48-49, 54, 61-63, 68-71, 211-12).

4. The fact that Mr. Berman delegated certain of his executive functions, including those relating to product development and packaging decisions, does not relieve him of responsibility. Even though packaging decisions may have been made by majority vote of a 6-member committee, on which Mr. Berman had one vote (Berman 63-68, 76-78, Grey 221-24, 232-41; Hertzberg 730-31), the ultimate responsibility for such decisions and actions was his.

5. Respondent Morton R. Berman has held a controlling interest in the stock of the corporate respondent and of one more predecessor corporations since 1947. Individually, Mr. Berman does not own a majority of the common stock of Avalon, but he and his wife own nearly 5200 shares of the 7750 shares outstanding. With the addition of the shares held by his children, the Berman family owns 7500 shares. (Berman 43-47, 50-52, 187-88, 202-05, 211-12, 327-328; Respondents' Admissions dated October 1, 1973.)

6. Mr. and Mrs. Berman constitute a majority of Avalon's board of directors (RPF, Par. 2, p. 3). It is noteworthy that Mr. Berman was not sure whether there was a fourth member of the board of directors (Tr. 47-48, 50).

7. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale, and distribution of toy, gift, and hobby products to jobbers and retailers for resale to the public (Respondents' Answer, Par. 3; Respondents' Admissions dated October 1, 1973).

8. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their toy, gift, and hobby products, when sold, to be shipped from their place of business in the State of New York to purchasers thereof located in various other States of the United States, and maintain and at all times mentioned have maintained, a substantial course of trade in such products in commerce, as “commerce” is defined in the Federal Trade Commission Act (Respondents' Answer, Par. 4; Respondents' Admissions dated October 1, 1973). The corporate respondent currently realizes gross sales of between \$7,000,000 and \$10,000,000 annually (Berman 188).

9. In the course and conduct of their business, at all times mentioned, respondents have been in substantial competition in commerce with corporations, firms, and individuals in the sale of products of the same general kind and nature as the products sold by the respondents (Respondents' Answer, Par. 7; Respondents' Admissions dated October 1, 1973).

10. Respondents' packages are offered to a cross-section of the buying public through a variety of retail outlets, including large department stores, chain stores, and discount stores, which obtain such products directly from respondents or from respondents' jobber customers (Berman 57-58, 140-41; Grey 254).

11. The toy, gift, and hobby products displayed, offered for sale, and sold by customers of respondents have been and are substantially identical, both as to packaging and contents, to the products prepared and shipped by the respondents (Respondents' Admissions dated October 1, 1973).

#### Respondents' Packaging Practices

12. The products involved in this proceeding consist of craft toys and activity toys. Generally, they are purchased by adults as gifts for children (Berman 139, 145; Grey 234, 257-59; Goldberg 401-02). The extent to which children may purchase the products or influence the purchasing decisions of adults is not established by this record, but it is obvious that children are involved in the purchase of respondents' products (Berman 138-39; see Par. 10, *supra*).

13. Respondents' products are not advertised to consumers, on children's television programs or otherwise, so that the packages themselves must constitute a selling tool in showing the nature of the products and the manner of their use (Berman 78; Grey 233; Hertzberg 757-58). Additionally, because respondents' packages are customarily sealed in a plastic film ("shrink-wrapped"), the purchaser does not ordinarily inspect the contents of a package prior to purchase (Berman 79-80, 123-24, 135; Grey 230; CX 37; CPF, Par. 15, pp. 13-14; RPF, Par. 19, p. 19). (The suggestion that a purchaser may ordinarily do so (Berman 124-26) is not persuasive.) Thus, the necessity for attractive package graphics—photographs or artists' renditions—is one of the factors that influence package size (Berman 83-84, 145, 179-80; Grey 222-23, 260-63, 282-83, 291-94; Goldberg 395-96, 403-04, 410, 416-19, 428-29, 434-39, 461, 660-64; Hertzberg 757; Doran 859-60, 883). Purchases are generally made after very brief examination of a package (Grey 222-23, 221-63).

14. There are no government packaging standards for this industry (Doran 856-57), and the Commission has found toys exempt from the coverage of the Fair Packaging and Labeling Act, 80 Stat. 1296, 15 U.S.C. § 1451 (16 CFR 503.2, 503.5).

15. Complaint counsel did not present any consumer testimony to show consumer understanding as to the relationship between the size of a container and the size or quantity of the products contained therein. However, Mr. Berman ultimately conceded that a buyer at retail ex-

pects a package offered to be filled with merchandise in a way proportional to the size of the package. His qualification was that the consumer expected a package to be proportionately filled "within a reasonable amount." (Tr. 95-96; cf. Tr. 96-101.)

16. Respondents' packaging expert did not directly answer a question as to the understanding of purchasers and prospective purchasers of toys and craft products as to the relationship between the size of the package and the size or the quantity of its contents.<sup>1</sup> Dr. Goldberg stated:

I think that size is tied to factors such as the required space for communication of the message that must be communicated to express the content and the play value of a hobby item.

\* \* \* I don't know if there is really a difference in a consumer's mind when he gets a large package if he is going to get a lot of things in that package, or if he gets a small package. He doesn't buy that way. He buys play value, he buys a gift, and he buys the communications on the package.

Size is a secondary factor. (Tr. 700-02; see also Tr. 648, 653-56)

17. A "Toy Packaging Evaluation Guide" (RX 35) prepared by Dr. Goldberg contains no specific reference to the relationship between the size of a package and the size or the quantity of its contents. The guide does suggest that photographs or illustrations should be "honestly reflective of the toy within" (No. 22). Interestingly enough, an accompanying article by Dr. Goldberg on the reverse of the guide states as follows:

We have in marketing today a concept I've always called the package/product concept. You don't just have a package, you have a packaged product. The toy and the package should be one \* \* \*. What the manufacturer is doing is communicating to the consumer this totality.

Both in this article and in his testimony (Tr. 654), Dr. Goldberg called for smaller packages.

18. In any event, complaint counsel's case is essentially predicated on the proposition that consumers expect that the contents of a package will be reasonably related in dimensions, or in quantities, or in both, to the size of the package or container in which the products are presented for sale. Stated another way, the gravamen of the complaint is that when a product is packaged in a container that is oversized in relation to its contents, purchasers are misled into the belief that they are receiving a larger product or a product of greater volume than is actually the fact.

19. Complaint counsel rely on the well-established principle that the

<sup>1</sup> Although Mr. Doran, who testified in support of the complaint, was recognized as an expert in the technology of packaging, an objection to his lack of expertise on consumer understanding, etc., in the toy field was sustained, so that he did not testify on this subject (Tr. 793-804).

Commission may “predicate a finding of deception on its own visual examination of the alleged means of deception, unassisted by ‘consumer testimony’ ” (*The Papercraft Corp.*, 63 F.T.C. 1965, 1991 (1963)). As surrogate for the Commission, the administrative law judge is likewise authorized to make such a determination. The Commission has delegated to its administrative law judges the “initial performance of its adjudicative fact-finding functions” (Statement of Organization, Section 14).

20. Thus, the determination whether certain packages are actionably deceptive, as alleged in the complaint, is based primarily on the inspection and measurement of the containers and their contents. The undersigned has taken into account the observations and opinions of both of the expert witnesses<sup>2</sup> and of the officials of the corporate respondent, including the individual respondent Morton R. Berman, but such observations and opinions are not necessarily controlling.

21. The cardboard boxes in which respondents package some of their toy, gift, and hobby products are of a size and capacity greatly in excess of that required to package the quantities and sizes of products contained therein. Through such packaging, respondents have represented, and have placed in the hands of others the means and instrumentalities through which they might represent, directly or indirectly, that certain products, as depicted or otherwise described on the exteriors of packages, corresponded in their lengths and widths, or their lengths, widths, and thicknesses, with the boxes in which they were contained and that others of such products were offered in quantities reasonably related to the size of the packages or containers in which they were presented for sale.

22. The products listed below do not correspond with their container or package dimensions or are not offered in quantities reasonably related to the size of the containers or packages in which they are presented for sale. Such packaging methods have the capacity and tendency to create in purchasers the mistaken impression that they are receiving a larger product or a product of greater volume than is actually the fact.

(a) CX 4—This a toy craft product entitled “Link Together Charm Jewelry Set.” The contents comprise two transparent envelopes. One of

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<sup>2</sup>Complaint counsel sought to discredit the testimony of respondents’ packaging expert by challenging certain statements in his *curriculum vitae* (CX 73 A–B), as well as in published biographical data, and by questioning the validity of his Ph.D. degree from Philathea College, a Canadian institution (CPF, p. 57; RRB, p. 13; Tr. 472–622, 666–700; CXs 65B, 69A—72D; RXs 36–46). However, in the opinion of the administrative law judge, such discrepancies, as may have existed are not such as to impeach Dr. Goldberg’s credibility, and his testimony has been accorded appropriate weight in the light of the whole record. Similarly, respondents’ suggestion of bias on the part of complaint counsel’s packaging expert (RPF, Par. 41, p. 38) is rejected, as is respondents’ charge that Dr. Goldberg was “intimidated” by complaint counsel’s inquiry (RPF, Par. 40, pp. 36–38).

them, 5½" x 3", contains 16 three-hole links and 32 two-hole links. The other envelope, which is 3" x 3", contains 15 assorted charms.

These products are packaged in a box 9" x 9¼" x 1¼", with a one-inch platform inside the box. The box top states that the product is for girls aged 5 to 12 and depicts a young girl wearing a charm necklace and a charm bracelet. She is pictured in the process of assembling another charm necklace. A printed legend plainly discloses the number of links of each type and the number of charms.<sup>3</sup> However, the charms pictured number about half again as many charms as are contained in the package, and the depiction exaggerates their size.

Complaint counsel's packaging expert, Donald Doran, was of the opinion that CX 4 was not filled in a way proportional to its size (Tr. 794-96). The undersigned agrees; the contents of this box could be packaged in a box approximately one-third to one-half of the size of the present container. The graphics also suggest a greater quantity than is the fact, and the explicit disclosure of the contents does not overcome the impression created by the size of the package in conjunction with the illustration.

Mr. Berman conceded that the contents could be packaged in a smaller box, but he testified that CX 4 was part of an assortment of several related items and that from a merchandising and display standpoint, it was desirable that the boxes be of the same size. Additionally, he said, as part of an assortment, the box must be of a uniform size so as to fit into standardized shipping cartons. He stated further that the box needed to be big enough to permit graphics that show the nature of the product and what might be done with it. (Tr. 177-80)

Respondents' packaging expert, Dr. Robert I. Goldberg thought that the box could not be materially smaller and that it was not deceptive (Tr. 394-403). He also referred to it as part of an assortment requiring package uniformity (Tr. 424-27).

The justification offered is not persuasive. The other product in the assortment (CX 49<sup>4</sup>) is also packaged in an oversized box (Doran 807; see *infra*).

The Charm Jewelry Set was withdrawn from the Avalon line in late 1971 (Hertzberg 721, 741-42).

(b) CX 5—This package is entitled "So Easy Sewing Cards." The box is 10" x 15" x 1¼" and contains a 1⅜" platform. Positioned atop the platform are 8 sewing cards, each measuring 6¾" x 4¾", two cards in

<sup>3</sup> Although the contents legend lists 16 charms, the package contained only 15 (Tr. 644-47). However, a single discrepancy of this nature, which respondents characterize as "obviously due to an assembly line malfunction" (RRB, p. 2), does not constitute proof of a practice of misstating the contents of packages.

<sup>4</sup> The specific reference was to CX 28, which was withdrawn from evidence as duplicative of CX 49 (Tr. 450-51).

each corner of the box. In the upper right hand corner of the box is a rectangular outline approximately the size of the sewing cards. Part of this rectangle has been cut away to provide a "window" through which may be seen a portion of one of the cards. Another "window" makes visible the colored wool laces that are used with the cards. A cartoon type figure of a boy is shown holding one of the cards, and the proportion—approximately 4 to 1—is such as to suggest that the cards are larger than they actually are. A cartoon figure of a girl purports to be handling one of the laces. Although complaint counsel contend that the little girl "appears to be holding rope rather than thread" (CPF, Par. 18, p. 16), this impression is occasioned by a shadow outline, and the juxtaposition of the pictured yarn with the actual yarn visible through a "window" satisfies the undersigned that this is not an actionable misrepresentation.

The product is represented on the package as intended for boys and girls aged 3 to 7. In the lower left hand corner of the top of the box the contents are plainly disclosed as consisting of "8 Large Sewing Cards" and "8 Wool Safety Tipped Colorful Laces."

The contents of this box could be packaged in a box 25 percent to 50 percent of the size of the present container. To complaint counsel's expert, CX 5 was not proportionately filled with merchandise; the box was at least 50 percent too large (Doran Tr. 832-33).

The packaging and the graphics have the capacity and tendency to deceive the purchasing public as to the size of the sewing cards.

Respondents' defense of this package was not persuasive. Mr. Berman insisted that the sewing cards were "large" in trade usage (Tr. 126-28), and Avalon's chief of product development testified that they were "standard" for children aged 3 to 7 (Grey 266-67). Mr. Berman defended the packaging as conforming to customary practices in the industry (Tr. 132-35, 210).

Dr. Goldberg's testimony regarding CX 5 was equivocal and contradictory. On direct examination, he characterized the package as well designed and efficient, without any capacity to deceive a substantial number of consumers with respect to the quantity of its contents. He indicated that if the package were reduced in size, the result would not be consistent with good and efficient packaging technique. (Tr. 404-05) On cross-examination, he first testified that the size of the sewing cards was indicated by the rectangular outline in the upper right hand corner. After conceding that the package could have contained sewing cards corresponding to the dimensions of the box, he also suggested that the "window" might have been enlarged to show the actual dimensions of the sewing cards. He did not know whether people might reasonably believe that the sewing cards were larger than they actually were. As

far as the graphics were concerned, he described the lack of proportion between the size of the children depicted and the size of the sewing cards as "artistic license"—intended "to be cute, to be playful, to be humorous" rather than to deceive a prospective purchaser. (Tr. 641-44)

(c) CX 6—This is a kit for teenagers and adults designated as "Bottle 'n Jug Cutting & Decorating Kit." The box is 12" x 15" x 3¼". The contents are listed in the lower right hand corner of the box top, as follows: "Bottle and Jug Cutter, Candle, Emery Polishing Paper, Supply of Colored Decorative Tissue, Glaze, Tube of Bonding Adhesive, Supply of Genuine Lead Strips, Brush, Complete Illustrated Instructions." All such contents are included. The box top depicts the bottle-cutting mechanism, as well as a number of objects that can be made with the kit. There was testimony that the box contained sufficient material to cut and decorate all the bottles depicted on the front panel (Berman 105, Grey 264-65).

The bottle cutter measures 8" x 3¾" x 3¼". The last dimension is its height, and this determines the depth of the box. The remainder of the box holds the other contents through the use of a platform measuring 11¾" x 10¾" x 2⅛".

The box is oversized in relation to its contents. Mr. Doran testified that CX 6 was not proportionately filled with merchandise; that the contents could be packaged in a box one-third the size of CX 6 (Tr. 822-23). Compare CX 7; see Grey 275-79; Doran 823-24. Testimony defending the packaging of CX 6 includes Berman 97-122; Grey 263-66, 275-79; Goldberg 406-12, 655-60.

(d) CX 9(a)—This is a package designated "Tom Sawyer Modeling Clay." The package, measuring 10" x 15" x 1¼", contains two packages of multi-colored clay, each measuring 4" x 5" x 3/16"; 2 plastic molds, each 2" x 2⅝"; 2 "clay doodle" cards, each measuring 5½" x 4⅛"; and a wooden working tool.<sup>4a</sup> The various components in the package are positioned on a ¾" platform, with the packages of clay resting on a 1/16" platform secured in cutouts of the larger platform. All components are visible through a "window" in the box top. The arrangement of the clay is such that a customer might assume that it extended the full depth of the package—that is, that its depth was more than an inch rather than 3/16".

Printed material on the package indicates that the kit is designed for boys and girls of all ages. The contents are listed as follows: "Clay, Molds, Clay Doodles and Wooden Working Tool." The weight of the clay is shown as 7 ounces.

The contents could be contained in a box half the size of the present

<sup>4a</sup> The wooden working tool was not actually contained in the package upon post-hearing examination, but the platform in the package has a cutout designed to hold such an implement. It is assumed that this was lost in the course of trial or in subsequent handling.

package, or perhaps even smaller. The fact that the components are visible does not justify the percentage of empty space.

CX 9(a) was withdrawn from the Avalon line in late 1972 and replaced by CX 33 (Hertzberg 724-27, 745-46). For other testimony concerning this exhibit, see Berman 186-91; Grey 279-84; Goldberg 412-14; Doran 836.

(e) CX 13—This item is entitled "Stickcraft Fun." The package, measuring  $15\frac{5}{8}$ " x  $11\frac{1}{8}$ " x  $1\frac{1}{2}$ ", contains 147 sticks (comparable to popsicle sticks) taped to form 3 bundles of 49 sticks each. Each stick, with rounded ends, is  $4\frac{1}{2}$ " long,  $\frac{3}{8}$ " wide, and  $\frac{1}{16}$ " thick. Other components are 3 plywood squares,  $4\frac{1}{4}$ " x  $4\frac{1}{4}$ "; one cardboard cup (open ended),  $3\frac{7}{8}$ " tall, with a diameter of  $1\frac{1}{4}$ "; and a package of 4 crayons, the container for which measures  $3\frac{7}{8}$ " x  $1\frac{1}{2}$ " x  $\frac{3}{8}$ ". A sheet of instructions is also enclosed.

The box contains a platform  $1\frac{1}{8}$ " high, with each corner cut out to position the sticks, the plywood squares, and the crayons. The plywood squares are positioned on a platform  $\frac{5}{8}$ " high. In the lower right hand corner is a cutout, with a platform  $\frac{3}{4}$ " high, but at the time of post-hearing examination, there was no component positioned there.

The box top depicts a boy and a girl, with the boy holding a completed bowl made from the sticks. Between the boy and the girl is depicted a combination pencil holder and calendar. To the left of the girl, enclosed in colored circles, are depicted a bowl like the one held by the boy; a candy box; and an album. A printed legend in the lower left quadrant states: "Easy to Make! Complete! All Materials Included in This Kit!" The album covers are depicted held together with yarn; the candy box has a bow on its cover; and the pencil holder assembly is depicted with a calendar. None of these components are included in the package. Although respondents urge that it is "far-fetched to contend that a consumer would expect a bow or piece of wool or calendar," noting that a calendar would date the product (RRB, p. 4), their absence, in the face of the specific claim of "All Materials Included," aggravates the deceptive nature of the packaging.

The box is substantially oversized for its contents. It is not proportionately filled; the contents could fit in a container approximately one-sixth the size of CX 13 (Doran 825-26). Aside from the graphics, there is no disclosure of the nature or quantity of the contents, or the number of the pictured projects that can be made with the components included.

CX 13 was withdrawn from the Avalon line in the fall of 1971 (Hertzberg 722, 743-44). Other references to this product are as follows: Berman 191-94; Goldberg 416-19, 647-53.

(f) CX 30—This package is entitled "Boutique Easel-Art," with a

prominent subheading further describing the item as "Miniature Easel-Art Paint-by-Number Set."

The box, which measures 13" x 17¼" x 1½", lists the contents on the cover as follows: "2 Boutique Easels—One 8" x 6" Panel—One 7" x 5" Panel (As Illustrated)—16½ Dram Vials of Oil Paints—Two Artist's Brushes—Instructions." All contents were evidently included, except that at the time of post-hearing examination, one of the easels and one of the paint vials were missing.

The remaining easel is 8" tall, 4¼" wide at the base, and 3" wide at the top. It appears that the other easel was somewhat smaller. The paint brushes are 8½" long, and the paint vials are approximately 1" tall.

Although the components could be packaged in a smaller box, the size of the box is not inherently deceptive. However, the undersigned agrees with complaint counsel (CPF, Par. 18, p. 21) that the graphics on the face of the box exaggerate the size of both the painting panels and the easels. Even though close examination indicates, as noted by respondents (RRB, p. 6), that the easels and paintings are displayed on a table top in relation to a jewelry box, the first impression is that the mounted paintings are displayed in relation to a chest resting on the floor. When this representation is considered in conjunction with the size of the box, there is a capacity and tendency to mislead and deceive that is not cured by the clear disclosure of the dimensions of the painting panels.

The undersigned rejects as irrelevant and immaterial, and also unsupported by the record, complaint counsel's proposed findings as to the description of the paint contents in terms of drams (CPF, Par. 18, p. 21).

CX 30 was withdrawn from the Avalon line, apparently about 1971 (Hertzberg 724). Other testimony includes Grey 299-301 and Goldberg 428-31.

(g) CX 35(d)—This is a "Weaving Loom Set," consisting of a plastic loom 7½" x 7½", 3 small skeins of yarn, and 2 plastic bags of colored loopers.

The box is 18" x 12½" x 1½" and contains a platform ¾" high. All components are visible through "windows" in the box top. One bag of loopers measures 4" x 8", and the other, 3½" x 7". Both are partially visible through "windows" 2" x 5¼", with the result that the quantity of the loopers cannot be determined. Suggested projects depicted include a book cover, a doily or place mat, and a potholder.

Complaint counsel's objections are that the printed words on the package "do not indicate the quantities of components included" or the "quantities or sizes of objects which can be made with this set" (CPF,

Par. 18, pp. 23-24). They also object to the partial visibility of the looper bags.

Mr. Doran testified that CX 35 D was not proportionately filled with merchandise. He characterized the length of the box as 50 percent too large and the width as 10 or 15 percent too large (Tr. 834-35). The excessive size of the box creates the impression of a greater volume of product than is the fact. The partial visibility of the loopers is also a contributing factor.

CX 35 D was withdrawn from the Avalon line in late 1972 and replaced by CX 57 (Hertzberg 728-30, 744-45).

(h) CX 49—This item is designated "Circle 'Round Jumbo Knitter Set" and is designed for girls aged 5 to 12. The top of the box depicts a young girl using the knitter and describes the contents of the box as follows:

Circle 'round Jumbo Knitter, Training hank of yarn. Three inches in diameter

The sides of the box contain the Avalon logotype, the words "Jumbo Knitter Set", together with a diagonal band containing the legend "Circle 3" 'Round."

The box, measuring 9' x 9¼" x 1¼", contains the knitter, which is 3" in diameter, 1¼" high, and 9¾" in circumference; a 5" knitting needle or knitting hook; a small hank of yarn; and the directions. These items are positioned in a cardboard circle 1¾" high, 7" in diameter, and 22¼" in circumference.

CX 49 is not proportionately filled with merchandise. Mr. Doran noted "perhaps better than 60 percent \* \* \* empty dead space" (Tr. 805-06). Dr. Goldberg found nothing essentially wrong with CX 49 (Tr. 632-41).

When the excessive size of the box is coupled with the gross disproportion of the size of the knitting device in relation to the girl pictured, misrepresentation of the contents is the result.

CX 49 was withdrawn from the Avalon line in late 1971 (Hertzberg 721-22).

23. The products listed below are found nondeceptive, either because package dimensions sufficiently correspond to product dimensions or because the package does not have the capacity and tendency to create in purchasers the mistaken impression that they are receiving a larger product or a product of greater volume than is actually the fact, even though the package is larger than necessary. These are "instances in which an oversized container creates no substantial danger of deception" (*The Papercraft Corp.*, 63 F.T.C. 1965, 1993 (1963)).

(a) CX—This package is designated "Magic Paint Brush." Represented as a product for girls and boys aged 3 to 8, the package

contains 4 coloring books, each measuring  $8\frac{1}{4}$ " x 11", plus a 7" paint brush. The box measures 9" x  $11\frac{1}{2}$ " x  $1\frac{1}{2}$ ". The contents are mounted on a  $\frac{7}{8}$ " platform. The depth of the 4 coloring books is about  $\frac{1}{4}$ ".

This package does not list the contents, but respondents later presented an otherwise identical box except for the following imprint in the lower right-hand corner: "4 books. Contents: 64 11" x  $8\frac{1}{2}$ " Pictures to Color. One Paint Brush" (RX 11; Goldberg 451-55). According to respondents, CX 15 was a "misprint" in its omission of a statement of contents (Grey 268-70). Dr. Goldberg considered the contents disclosure on RX 11 to be adequate (Tr. 451-55, 664-65).

Mr. Doran presented testimony suggesting that RX 11 was a "proof" or "sample" rather than a "production setup box" (Tr. 828-32), but this was not further developed in the record. However, CX 37 (p. 7 of blue-colored Avalon catalog for 1971-72) shows a contents legend on the "Magic Paint Brush" package.

Graphics on the box cover display the coloring pages and the paint brush in gross disproportion to the sizes of the children using them.

Whatever vice there may be in the graphics (CPF, Par. 18, pp. 18-19), it does not fit within the boundaries of the complaint's challenge to representations that product dimensions correspond to package dimensions. The length and the width of the box are only slightly larger than the corresponding dimensions of the coloring books. Obviously, the depth of the box does not need to be  $1\frac{1}{2}$ " to accommodate the books and the brush, but, all things considered, including the contents disclosure, this does not appear to constitute an actionable misrepresentation.

(b) CX 22—This package is designated "Tom Sawyer Slate 'n Chalk." It is represented to be for children aged 4 to 10. Underneath the trade name is a printed legend: "Set Includes Slate Board, Chalk, Eraser and Stencils." At the bottom of the box cover the contents are shown as follows: "Slate Board Size 8" x  $9\frac{1}{2}$ ": 8 Colored Chalks. Sponge Eraser. Stencils." The package contains these components. The box measures  $8\frac{7}{8}$ " x  $11\frac{3}{8}$ " x  $1\frac{1}{2}$ ". The components are positioned on a platform  $\frac{3}{4}$ " high. The slate has the dimensions described; the sponge eraser is 4" x  $2\frac{1}{4}$ ", and the card of 7 stencils measures 7" x  $9\frac{1}{2}$ ", with one of the stencils folded over. The 8 chalks are in a box  $3\frac{1}{4}$ " x  $3\frac{5}{8}$ ".

Considering the dimensions of the slate in relation to the size of the package, and taking into account the other components included, in the light of the graphics and the contents disclosures, the undersigned finds no actionable deception. The criticisms of complaint counsel (CPF, Par. 18, pp. 19-20) are ultratechnical. (See Goldberg 439-41.)

(c) CX 27—This is a package of "Nancy Nurse Plasticons." The box is 13" x  $8\frac{1}{2}$ " x  $1\frac{1}{4}$ ", with a platform one inch high. Mounted on this platform is a card  $8\frac{3}{4}$ " x 8" depicting a sickroom scene. There are also two cards

of plasticons, each card measuring 4" x 6" and containing some 35 items, including human figures and various items of a medical nature. These are designed to be affixed to the sickroom scene and are removable. The contents of the package are essentially visible through a partial "window"; the package contains no statement of contents.

Although CX 27 could be packaged in a smaller box, the likelihood of deception stemming from the size of the box is not apparent.

CX 27 was withdrawn from the Avalon line in 1971 (Hertzberg 722-23). Other record references concerning CX 27 include Berman 143-44; Grey 270-72; and Goldberg 421-24.

(d) CX 33—This package is designated "Tom Sawyer Non-Hardening Modeling Clay," with a line underneath stating: "Set Includes Clay, Molds and Tools." The contents are graphically indicated and listed as follows: "5 Bars of Modeling Clay in Assorted Colors, Net Weight 8 ounces—2 Clay Molds—Clay Doodle Card—Clay Modeling Tool." All components are included. The box measures 11¼" x 8¾" x 1½". All the components are positioned on a 1" platform. The clay bars measure in the aggregate 6¾" x 3¾" x ¾". The card of clay doodles measures 6" x 6½"; the so-called tool (a wooden stick like a popsicle stick) is 4½" long. The molds are 2½" x 2". The product is for children aged 3 to 10.

Although the components could be packaged in a smaller box, the undersigned is unable to find that the package size is inherently deceptive within the meaning of the complaint or is made so by the graphics or printed representations. The proposed findings of complaint counsel as to this item (CPF, Par. 18, pp. 21-22) are not persuasive.

CX 33 is the successor product to CX 9(a) Hertzberg 724-27). Dr. Goldberg found CX 33 to be an acceptable nondeceptive package (Tr. 441-42).

(e) CX 35(a)—This item is entitled "Marker Fun Coloring Set, featuring jumbo felt tip water color markers." It is billed as an activity toy for children aged 4 to 9. The contents are accurately listed as follows: "Five Jumbo Water Color Markers and Ten 11" x 9" Pictures to Color." The pictures and the 5" markers are positioned atop a ¾" platform. The box measures 12¼" x 15¼" x 1½". The graphics appear to be a "scale photograph of two children using the components" (RRB, p. 7; Goldberg 431-35).

Complaint counsel's objections (CPF, Par. 18, pp. 221-23) are captious.

Although these components could be packaged differently, the undersigned finds nothing deceptive in the packaging or in the verbal and pictorial representations.

(f) CX 35(c)—This item is designated "creative play with 'Instant'

Paper Maché," represented as for children aged 5 and up. The contents are plainly listed as follows: "65 $\frac{3}{4}$ " x 4 $\frac{1}{2}$ " Pieces of Heavy Cardboard with Press-Out Parts to Assemble Objects. 8 ounces of Instant Paper Maché. 8 Water Color Tablets. 1 Brush. Complete Instructions." All components are included, except that the cardboard pieces are actually 9" x 5 $\frac{3}{4}$ " instead of the dimensions indicated on the package.

The box, measuring 12" x 15" x 1 $\frac{3}{4}$ ", contains a platform 1 $\frac{1}{4}$ " high on which are mounted the cards and the watercolor tablets. The paper maché material is enclosed in a plastic bag and measures 6" x 7 $\frac{1}{2}$ " x 1 $\frac{1}{2}$ ". It is positioned in an insert in the platform. Although not listed, the package also contains a small bottle of a white liquid—presumably the "glaze" referred to in Step 5 in the instructions.

Mr. Doran described the box size as "about 40 percent excessive" (Tr. 826-27), but the undersigned finds nothing deceptive in the packaging. Complaint counsel note that the graphics grossly exaggerate the size of the animal objects that can be made (CPF, Par. 18, p. 23). For example, a giraffe appears to be about as tall as the little girl shown painting the animal. On the other hand, the animals depicted in a panel on the cover of the box are smaller than the cardboard cutouts. Respondents explain that the "graphics are cartoon drawings which everyone realizes are 'fantasy'" (RRB, p. 8; Goldberg 435-39; Berman 181-85).

In the opinion of the undersigned, it would be unreasonably technical to find CX 35(c) to be deceptive on the basis of the graphics.

(g) CX46—This item is designated "Connie 'Magic Lock-Et' Paper Doll." The box, measuring 8" x 15" x 1 $\frac{1}{4}$ ", has a depiction of "Connie" 12" tall, whereas the figure contained in the box is 10" tall. The product is specified as intended for ages 3 to 8.

A legend in the lower left-hand corner of the box top reads as follows:

Complete Sophisticate's Wardrobe

Contents: This Set Contains 1 10" 'Magic Lock-Et' Paper Doll with Plastic Doll Stand, 6 Magic Lock-Ets, and a Complete Set of Dresses and Accessories. No Tabs; No Paste Required.

All components are included in the package. The wardrobe consists of 18 outfits plus a hat, on five sheets of paper, each measuring 7 $\frac{1}{2}$ " x 12". All components are mounted on a platform  $\frac{13}{16}$ " in height.

Complaint counsel object that the printed text on the package does not disclose the sizes and quantities of all product components; that the "graphic depiction of the doll is considerably larger than the doll included;" and that this misrepresentation is not overcome by the disclosure that the doll is 10" tall (CPF, Par. 18, pp. 24-25).

The box top contains, in addition to the 12" depiction of Connie, 9 panels, each measuring 1 $\frac{1}{4}$ " x 2 $\frac{3}{8}$ ", indicating some of the various wardrobe items contained. Respondents note that the actual wardrobe

items contained are more numerous than those depicted and also defend the exaggeration of the size of the doll on the basis that the drawings are "artist's renditions" (RRB, pp. 8-9; Goldberg 447-49).

Although this kit might be packaged in a somewhat smaller container (Doran 836-38), the undersigned is unable to find that the size of the package is deceptive. Neither can he find that the graphic exaggeration of the doll's size amounts to actionable deception.

(h) CX 50—This item is designated "Tom Sawyer Finger Paints," for ages 3 to 12. The box measures 12" x 13" x 2". It contains 7 jars of finger paints, each 1 $\frac{7}{8}$ " high and 2" in diameter across the top; 2 wooden spatulas; 9 sheets of paper 8 $\frac{1}{2}$ " x 11"; and an instruction sheet. The jars are inserted in a platform 1 $\frac{1}{6}$ " high. The box top features a photograph of two children using the set. Only 4 of the 7 paint jars are depicted. In the lower right-hand corner of the box top is an accurate statement of contents, above which is a circle containing the legend "7 Finger Paints."

Although the components could be packaged in a smaller box (Doran 824-25), it is the opinion of the undersigned that, in the light of the clear contents disclosure and the graphics, the package size is not deceptive. See Grey 287-92, 308-11; Goldberg 442-44, 660-64). The objections of complaint counsel (CPF, Par. 18, p. 26) are without substance.

(i) CX 57—This item is designated "Weaving Loom," for ages 6 to adult. A line immediately below the words "Weaving Loom" states: "Set Includes Sturdy Loom, Colored Loopers, Yarn." The box top depicts two children—a girl using the loom and a boy holding a completed potholder. In the lower right-hand corner of the box top are illustrations of a book cover, a table mat, and two potholders, above which is a line stating: "With Contents You Can Make All of the Pieces Shown Here." The contents are listed as follows:

Sturdy 1 Piece Looper and Yarn Loom—Weaving Hook—Supply of Over 300 Assorted Colored Loopers—3 Balls of Assorted Color Yarn—Instructions.

The box measures 12" x 15" x 1 $\frac{1}{2}$ " and contains a platform  $\frac{3}{4}$ " high. The loom, hook, and bag of loopers are inserted in the platform, and 3 small balls of yarn are affixed to it.

These components could presumably be differently packaged, but respondents' method of packaging is not deceptive. Nor do the printed matter and the graphics constitute misrepresentation of the contents of the kit. See Goldberg 445-46; Grey 313-15; compare CX 35(g), which CX 57 replaced in the Avalon line (Hertzberg 729-30); also compare CX 42.<sup>5</sup>

<sup>5</sup> Certain other Avalon products are contained in this record but have not been challenged as deceptive in the proposed findings of complaint counsel. Some were introduced to demonstrate alternative methods of packaging—for example, CXs 7, 12, 16, 17, 20, and 31 (CPF, p. 32). Other Avalon products in evidence have been omitted from complaint counsel's proposed findings, presumably either because they were considered cumulative or nondeceptive.

## Respondents' Defenses

24. Respondents' principal defense is that their packaging methods "do not have the capacity to deceive a substantial portion of the buying public into believing that the quantity of contents in said packages is greater than is the fact, nor do they have the capacity to cause a substantial portion of the buying public to purchase substantial quantities of corporate respondent's products by reason of such belief" (RPF, Par 18, p. 17). This defense is largely based on respondents' theory that the purchase of their products is "motivated by considerations of concept and play value, rather than quantity of contents" (RPF, Par. 13, pp. 11-12). These defenses have been considered and essentially disposed of in Pars. 15-23, *supra*. As has been stated, the individual respondent acknowledged that consumers expect the contents of packages to be reasonably commensurate with the size of the package, and Dr. Goldberg, upon whose testimony the underlying defense theory is primarily based, conceded that package size is a factor in purchasing decisions, although he considered it "secondary" (Pars. 15-16, *supra*).

25. The fact that there is uncontradicted testimony that since 1947 respondents have never received any consumer complaints that their products were packaged in deceptively oversized containers (RPF, Par. 15, p. 13; Berman 206-07) does not establish lack of consumer dissatisfaction, nor does it prevent a finding that certain of respondents' packages are deceptively oversized.

26. Respondents' first affirmative defense is as follows:

Prior to the commencement of this proceeding, corporate respondent redesigned certain of its toy craft products and discontinued the sale of certain of said products in boxes or other containers which might have created the appearance or impression that the width or thickness or of other dimensions or quantity of said products was appreciably greater than was the fact (Answer, Par. 10; RPF, Pars. 37-39, pp. 35-36).

27. The facts respecting the five products whose sale was discontinued are set forth in Par 22(a), (e), (f), and (h) and Par. 23(c), *supra*. The redesign of two packages is covered in Par. 22(d) and (g) and Par. 23(d) and (i), *supra*. These steps were taken for reasons other than concern over the possibly deceptive nature of the packages (Hertzberg 721-30). Four of the discontinued products were found to be deceptively packaged (CXs 4, 13, 30, and 49). In the case of the redesigned packages, both of the former packages (CXs 9(a) and 35(d) were found

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(Continued)

These include CXs 29, 42, 44, 45, and 51. In any event, since neither party has proposed any findings respecting these exhibits, the undersigned has made none. There are also several packages, presumably competitive with those of Avalon, which were referred to by one or more witnesses as illustrative of alternative methods of packaging. These include CXs 11, 18, 19, 34, 35, 53, 54, and 56.

deceptive, whereas the new packages (CXs 33 and 57) were found to be nondeceptive.

28. Respondents' second affirmative defense is as follows:

The use of certain containers is justified by corporate respondent as necessary for the efficient packaging of toy craft products contained therein and corporate respondent has made all reasonable efforts to prevent any misleading appearance or impression from being created by such containers (Answer, Par. 11; RPF, Pars. 25-36, pp. 25-35).

29. With respect to the packages found in Par. 22, *supra*, to be deceptively oversized, the record fails to establish that their size was "necessary for \* \* \* efficient packaging."

(a) The record fails to establish that the size of any challenged package was necessary to protect fragile contents, to meet technological difficulties, to effect economies, or to satisfy other compelling factors. As for fragility, Mr. Doran testified that the greater the amount of empty space in a package, the greater the likelihood of damage in handling (Tr. 806, 826, 835).

(b) Some standardization of package sizes is obviously desirable (RPF, Par. 28, pp. 27-30), but respondents failed to establish any nexus between this consideration and the use of oversized packages. Instead, there was general agreement that a reduction in package sizes could result in economies in manufacturing, storing, shipping, and handling.

(c) Respondents' attempted justification of the size of the challenged packages boils down to a claim that large boxes are necessary for attractive graphics (Pars. 13, 16, *supra*; see RPF, Pars. 16-17, pp. 14-17; Pars. 25-27, pp. 25-27). However, the testimony to this effect was not persuasive; the claim was not proved.

30. In any event, the record does not support the further claim that respondents have "made all reasonable efforts to prevent any misleading appearance or impression from being created by such containers." Respondents have no guidelines as to the relationship between the size of boxes and the size or the quantity of their contents (Berman 76; Grey 241, 323-24), and there was no showing of any effort to provide packages of a size reasonably commensurate with their contents. In fact, Mr. Berman emphasized that respondents' current packaging practices are substantially similar to those in effect when he joined the company in 1947 (Tr. 200-01, 209-10). It appears that respondents' packaging practices have been influenced primarily by company and industry traditions, by the practices of competitors, and by fads (Berman 84-86, 133-35, 144-45, 174, 200-01, 209-10; Grey 231-32, 271-72, 291, 313), with little or no consideration of limiting box sizes so as to avoid any deceptive disproportion between a box and its contents.

31. Respondents and their expert witness appeared to be relying on the exemption of the toy industry from the coverage of the Fair Packag-

ing and Labeling Act (Par. 14, *supra*; Berman 123, 148, 175, 183-84). Dr. Goldberg testified that he had not followed the Commission's legal proceedings regarding slack filling, and that in evaluating respondents' packages, he had not employed the standards relating to deceptive practices under Section 5 of the Federal Trade Commission Act. He even said that he had not heard of Section 5 of the Federal Trade Commission Act, but later testimony suggests some familiarity with Commission activities in the field of packaging. (Tr. 622-26; Par. 17, *supra*) Nevertheless, these are factors that detract from the weight of Dr. Goldberg's testimony in which he generally approved respondents' packaging as efficient and nondeceptive.

#### SUMMARY, ANALYSIS, AND CONCLUSIONS

The basic principle underlying this proceeding is that packaged products should reasonably correspond in size with their container or package dimensions or that the contents should be of a quantum reasonably related to the size of the containers or packages in which they are presented for sale. A corollary principle is that purchasers ordinarily operate on the basis of such a general rule.

Given this predicate—essentially conceded by the individual respondent—that purchasers expect a package to be filled with merchandise of a size or in an amount reasonably proportionate to the size of the package, the administrative law judge, initially, and thereafter the Commission, may by visual inspection determine whether the size of a package is reasonably related to its contents, either in size or in quantity (*The Papercraft Corp.*, 63 F.T.C. 1965, 1991 (1963)).

On this basis, the Commission has consistently ruled over a period of many years that the use of oversized containers, sometimes known as "slack filling," has the capacity and tendency to mislead and deceive the purchasing public (*The Papercraft Corp.*, *supra*, 63 F.T.C. 1965 (1963), and cases there cited). In *Papercraft*, the Commission ruled:

"Slack filling"—broadly, any use of oversized containers to create a false and misleading impression of the quantities contained in them—is an unlawful trade practice. For a seller to package goods in containers which—unknown to the consumer—are appreciably oversized \* \* \* is as much a deceptive practice, and an unfair method of competition, as if the seller were to make an explicit false statement of the quantity or dimensions of his goods. While the Commission is not concerned with requiring standardized or uniform packaging as such, it is concerned with all forms and methods of deceptive packaging of goods in commerce, no less than with false and misleading advertising or labeling of such goods. (63 F.T.C., at 1992; footnote omitted)

That this is sound public policy is demonstrated by the passage in 1966 of the Fair Packaging and Labeling Act, 80 Stat. 1296, 15 U.S.C. S1451. In recommending this legislation, the House Committee on Interstate and Foreign Commerce stated:

When a consumer buys a nontransparent package containing a consumer commodity, he expects it to be as full as can be reasonably expected. He makes his purchase in many instances on the basis of the size of the box \* \* \*. [N]onfunctional slack fill which involves, for example, the use of false bottoms and/or unnecessary bulky packaging is not justified \* \* \*. (H.R. Rep. No. 2076, 89th Cong. 2d Sess. 8 (1966))

The principal argument of respondents is that even though some of their packages may be oversized in relation to their contents, there is no substantial danger of consumer deception. Relying in part on the exemption of toys from the coverage of the Fair Packaging and Labeling Act, they contend that the purchase of craft and hobby toys is motivated primarily by considerations of concept and play value rather than net quantity of contents; that their products are so different from the "consumer commodities" covered by the Packaging Act as to warrant different treatment.

This argument is rejected. Respondents have not established that size and quantity are irrelevant to purchasers of their products so as to create for such products an exception from the general rule against slack filling. The size of toys and craft devices and the quantity of materials supplied for craft projects are obviously factors material to a purchasing decision (CPF, pp. 39-41). In any event, the undersigned has recognized here (Par. 23, *supra*), as did the Commission in *Paper-craft, supra*, 63 F.T.C., at 1993, that there are instances in which an oversized container creates no substantial danger of deception. But there exists no reason to give the toy and hobby craft industry unrestricted license to use oversized containers.

Another argument made by respondents is that their oversized containers do not have the capacity and tendency to deceive "an ordinary person with a common degree of familiarity with industrial civilization" (Respondents' Trial Brief, pp. 18-19). This argument is specious on at least three grounds.

First, the Commission is not bound to use such a standard in assessing the likelihood of deception but may consider its duty to protect the gullible and the credulous, as well as the cautious and knowledgeable (*Charles of the Ritz Dist. Corp.*, 143 F. 2d 676, 679 (2d Cir. 1944) ).

Second, respondents have emphasized the public's lack of familiarity with the products here in question. Under these circumstances, an "ordinary person with a common degree of familiarity with industrial civilization" would expect a reasonable relationship between size of package and size of quantity of contents. He would have no reason to anticipate slack filling.

Third, children play a significant role in purchasing, or in influencing an adult to purchase, respondents' products. This, too, commends a higher standard of care than that espoused by respondents.

Respondents have presented testimony showing or tending to show that respondents consider certain alternative forms of packaging unsuitable (RPF, Pars. 21-24, pp. 21-25; Par. 35, p. 34); that it is traditional in the toy industry to package craft and activity products as gifts in attractive containers (RPF, Par. 26, p. 26); that boxes must be sturdy (RPF, Par. 29, p. 30); that platforms, partitions, and package depth are necessary to protect fragile contents (RPF, Par. 30, p. 31); that equipment available to respondents requires a minimum package depth of 1¼" (RPF, Par. 31, p. 31);<sup>6</sup> and that boxes are designed to provide storage for toy and craft components after purchase (RPF, Par. 32, pp. 31-32). The difficulty is that, contrary to RPF, Par. 36, p. 35, none of these considerations were shown to justify the oversized packages in issue. The suggestion that toy and craft components must be attractively and separately displayed when the package is opened after purchase (RPF, Par. 33, pp. 32-33) is hardly tenable as a justification for oversized packages.

#### The Remedy

The record establishes that respondents have discontinued the sale of four products found herein to have been deceptively packaged and have redesigned two other packages in such a manner as to cure the deceptive nature of the predecessor packages. Thus, only two products currently being sold by respondents (CXs 5 and 6) have been found to be deceptively packaged, compared to eight current packages challenged as deceptive by complaint counsel but found herein to be nondeceptive. Respondents may accordingly argue that there is not such public interest as to require an order (see RPF, Par. 39, p. 36).

However, these circumstances do not establish any lack of public interest in the issuance of a prohibitory order. First, the package withdrawals were for reasons other than their possible deceptiveness. Second, in the absence of an order, respondents would be free to continue the packaging practices herein found deceptive.

This conclusion is reinforced by the fact that predecessor or affiliated corporations have been the subject of prior orders that put respondents on notice as to the Commission's interpretation of the law applicable to oversized packages. The undersigned has taken official notice (Tr. 155) of the fact that two corporations that eventually emerged as Avalon Industries, Inc., were cited in Commission complaints in 1967 for the use of oversized packages and that both signed consent orders in disposition thereof: *Standard Toykraft, Inc.*, Docket No. C-1217, and

<sup>6</sup> We need not undertake to resolve the dispute over minimum package depth (CPF, pp. 65-66; RPF, Par. 31, p. 31; RRB, p. 19). The depth of packages was not generally in issue. The findings of deception (Par. 22, *supra*) relate almost entirely to excessive length or width or both.

*Avalon Manufacturing Corp.*, Docket No. C-1220, 71 F.T.C. 1293 (1967).

The *Standard* case involved a toy craft product designated "Petal Pictures," and the *Avalon* case a similar product designated "Paint on Color Velvet." These complaints were two of ten complaints in which toy craft manufacturers were charged with misrepresenting that the volume of the net contents of packages was commensurate with the capacity of the external container. In each case, the charge was that the "capacity of the external containers [was] substantially in excess of the actual volume of the net contents, thereby creating the mistaken impression that the purchasers \* \* \* [were] in fact receiving more than [was] actually the case." The prohibition in the consent orders was in part as follows:

Packaging said product in a retail container of a size or capacity in excess of that required solely by the physical dimensions of the merchandise itself: *Provided, however*, That it shall be a defense in any enforcement proceeding instituted hereunder for the respondent to establish either:

(a) That retail purchasers, at the time of sale, are as fully aware of the disparity which exists between the size or capacity of the container and the physical dimensions of the merchandise as they would be if the container and the merchandise were displayed side-by-side; or

(b) That the container being employed is not larger in size or capacity than is necessary for the efficient packaging of the merchandise contained therein, and respondent has made all reasonable efforts to prevent any misleading appearance or impression from being created by such container. (71 F.T.C., at 1299)

It is true that each of these cases involved only one product, that the order was correspondingly limited, and that there has been no charge of violation thereof; nevertheless, both the corporate respondent and the individual respondent were on notice that the Commission considered illegal the packaging of a product "in a retail container of a size or capacity in excess of that required solely by the physical dimensions of the merchandise itself" unless the disparity could be justified as specified in the order. There has been no showing of any efforts on the part of these respondents to conform their packaging practices to the principles expressed in the consent orders.

Respondents urge that any order entered in this case should be restricted to toy products (RPF, pp. 39-46) because most of the challenged products were manufactured and sold by the Toycraft Division. Only two originated from the Hobbycraft Division, and none from either the Crayon and Color Division or from the Industrial Division.

The argument is not persuasive, and the precedents cited are inapposite. The practice of slack filling is one that is not limited to any class of products. The order should apply to all products. If the other divisions

of the corporate respondent do not engage in the prohibited practices, there is no cause for concern.

As for any uncertainties that may exist as to the application of this order to any of respondents' products, they may obtain guidance from the Commission's compliance staff or, in appropriate instances, from the Commission. Moreover, it is to be noted that the Commission has under advisement the petition of the corporate respondent for the promulgation of industry guides on the subject matter of this proceeding (Order Denying Stay, etc., October 23, 1973).

Finally, it is urged that any order issued against the individual respondent be limited to him in his official capacity as corporate president, rather than citing him as an individual. This presents a fairly close question in the light of *Flotill Products v. FTC*, 358 F.2d 224, 233 (9th Cir. 1966), *rev'd on other grounds*, 389 U.S. 179 (1967), *Coro, Inc. v. FTC*, 338 F.2d 149, 154 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965), and other cases cited by respondents (Respondents' Trial Brief, pp. 24-26). However, the facts tending to uphold individual liability are stronger here than in either *Flotill* or *Coro* with respect to the *alter ego* theory and personal involvement in the questioned practices. Moreover, the administrative law judge considers himself bound by *Coran Bros. Corp.*, 72 F.T.C. 1, 23-25 (1967), where, with knowledge of the *Flotill* and *Coro* decisions, the Commission found individual liability in circumstances strongly analogous to those presented on this record.

Some changes have been made in the proposed order contained in the complaint; some are substantive additions or deletions, while others are minor editorial changes.

In addition to editorial changes in the first paragraph of the proposed order, a prohibition has been added against "otherwise misrepresenting the dimensions or quantities of such products." Although the use of oversized boxes is the principal practice involved in this proceeding, there were instances in which the graphics contributed to the misrepresentation (Par. 22 (a)-(b), (f)-(h)). The order, as revised, is designed to require that products be "as depicted or otherwise described" on the packages (Complaint, Par. Five).

The final provision in the proposed order appears unduly broad in requiring that copies of the final order issued herein be distributed to all firms and individuals involved in the formulation or implementation of respondents' business policies, and all firms and individuals engaged in the advertising, marketing, or sale of respondents' products.

Such widespread distribution does not appear necessary to ensure compliance. This provision has accordingly been revised.

Although respondents utilize independent box designers and contract for the manufacture of some of their boxes (Berman 72-74; Grey 227),

the responsibility for compliance with this order rests on respondents, not on their consultants or contract manufacturer. It is respondents who must make the ultimate decision regarding packaging practices. No need has been shown for distribution of the order to others outside of the respondents' business organization, such as jobbers or retailers engaged in the marketing of respondents' products.

#### CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents.

2. The complaint states a cause of action, and this proceeding is in the public interest.

3. Through the use of certain methods of packaging, respondents have represented, and have placed in the hands of others the means and instrumentalities through which they might represent, directly or indirectly, that certain toy, gift, and hobby products, as depicted or otherwise described on the exteriors of packages, corresponded, in their lengths and widths, or their lengths, widths, and thicknesses, with the boxes in which they were contained, and that others of such products were offered in quantities reasonably related to the size of the containers or packages in which they were presented for sale.

4. In truth and in fact, such products often have not corresponded with their container or package dimensions and are often not offered in quantities reasonably related to the size of the containers or packages in which they are presented for sale. Purchasers of such a product are thereby given the mistaken impression that they are receiving a larger product or a product of greater volume than is actually the fact.

5. The use by respondents of such unfair, false, misleading, and deceptive methods of packaging, as herein found, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the quantum or amount of the product being sold was and is greater than the true such quantum or amount, and into the purchase of substantial quantities of respondents' products by reason of such erroneous and mistaken belief.

6. The aforesaid acts and practices of the respondents, as herein found, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

7. An order prohibiting such practices is required in the public interest against both respondents.

## ORDER

*It is ordered,* That respondent Avalon Industries, Inc., a corporation, and its officers, and Morton R. Berman, individually and as an officer of such corporation, and respondents' agents, representatives, employees, successors, and assigns, directly or through any corporation, subsidiary, division, or other device, in connection with the offering for sale, sale, or distribution of toy, gift, and hobby merchandise or any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Packaging such products in oversized boxes or other containers so as to create the appearance or impression that the length, width, or thickness or other dimensions or quantity of products contained in such boxes or containers are appreciably greater than is the fact; or otherwise misrepresenting the dimensions or quantities of such products; *Provided, however,* That nothing in this order shall be construed as forbidding respondents to use oversized containers if respondents justify the use of such containers as necessary for the efficient packaging of the products contained therein and establish that respondents have made all reasonable efforts to prevent any misleading appearance or impression from being created by such containers;

2. Providing wholesalers, retailers, or other distributors of such products with any means or instrumentality with which to deceive the purchasing public in the manner described in Paragraph 1, above.

*It is further ordered,* That respondents or their successors or assigns notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporate respondent which may affect compliance obligations arising out of this order.

*It is further ordered,* That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include such respondent's current business address and a statement as to the nature of the business or employment in which he is engaged, as well as a description of his duties and responsibilities.

*It is further ordered,* That the respondents distribute a copy of this order to all operating divisions and subsidiaries of the corporate respondent and to all managerial and supervisory personnel concerned with package design.

*It is further ordered*, That the respondents shall, within sixty (60) days after service upon them of the final order herein, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with such order.

#### FINAL ORDER

The administrative law judge filed his initial decision in this matter on April 3, 1974, finding respondents to have engaged in the acts and practices as alleged in the complaint and entering a cease-and-desist order against respondents. A copy of the initial decision and order was served on the respondents on April 18, 1974. No appeal was taken from the initial decision.

The Commission having now determined that the matter should not be placed on its own docket for review, and that the initial decision should become effective as provided in Section 3.51 (a) of the Commission's Rules of Practice,

*It is ordered*, That the initial decision and order contained therein shall become effective on May 20, 1974.

#### IN THE MATTER OF KELLOGG COMPANY, ET AL.

*Docket 8883. Interlocutory Order, May 29, 1974*

Order denying applications for review and requests for oral argument hereon by respondents General Foods Corporation and Kellogg Company of administrative law judge's orders calling for production of materials considered to be trade secrets.

#### *Appearances*

For the Commission: *Donald E. Purcell, Catherine Winer, William S. Hemsley, Jr., Anthony Joseph, David M. Malone, Lawrence Bernard and Edward M. Shumsky.*

For the respondents: *Bierbower & Rockefeller, Washington, D.C. for Kellogg Company. Clifford, Warnke, Glass, McIlwain & Finney, Washington, D.C. for General Foods Corporation.*

#### ORDER DENYING APPLICATIONS FOR REVIEW

In February 1973, the administrative law judge in this matter issued subpoenas *duces tecum* against the above-named respondents requiring that they produce certain information which they considered to be trade secrets. Following extensive briefing and oral argument, the judge, by order of February 12, 1974, limited the subpoenas in certain respects but, in essence, overruled respondents' objections to disclosure of the trade secrets.

Upon further briefing, the judge, by order of March 20, 1974, provided for disclosure of such information to counsel of record, their supervisory and clerical employees engaged in this litigation and, in certain instances, in-house counsel for respondents and their clerical employees, and experts and economists whose assistance is required by counsel in conducting this litigation.

Respondents General Foods Corporation and Kellogg Company then requested that the judge make a determination, pursuant to Section 3.23 (b) of the Commission's Rules of Practice, which would allow them to apply for Commission review of the orders of February 12 and March 20, 1974. Notwithstanding the judge's refusal to make such a determination, said respondents (hereinafter "Applicants") each apply for review with oral argument of the above orders, including the order of April 23, 1973 refusing to make a determination pursuant to Section 3.23 (b).

Applicants argue that the Commission has the inherent power to review any ruling by an administrative law judge. They argue that review is warranted because the judge has abused his discretion by requiring that respondents exchange trade secrets with their co-respondents who are also their competitors, and by failing to require that complaint counsel demonstrate the relevance of the trade secrets, the need for their disclosure, and the inability to satisfy such need by alternative means.

Applicants apparently concede, as they must, the general rule that confidentiality is not sufficient basis for denial of discovery of material necessary for litigation. *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961). However, they suggest that an exception must be made for this case because respondents are not charged with a conspiracy or any equivalent thereof. The judge properly concluded that there was insufficient basis for such an exception. Protection of applicants' highly sensitive business information is provided by means of a protective order which the judge, in the exercise of his discretion, has concluded is adequate.

As the Commission has held on numerous occasions, the administrative law judge has broad discretion in controlling the conduct of adjudicative proceedings, and his rulings will be reviewed only in cases of clear abuse. *E.g.*, *Warner Lambert Co.*, Docket No 8891, order of September 18, 1973, at 2 [p. 485 herein]. Applicants' argument that the

<sup>1</sup> It appears, however, that there is some merit to Kellogg's contention that certain of the subpoenaed materials should not be disclosed to in-house counsel. From the descriptions contained in the judge's order, these materials appear to be of such a sensitive nature that they should be disclosed only upon a determination by the administrative law judge that disclosure is necessary to a just adjudication. As complaint counsel observe in the second footnote on page seven of their memorandum in opposition to these applications, the judge has not yet ruled on the question of whether such necessity exists; hence Kellogg's complaint of abuse of discretion on this point is premature.

judge failed to require certain showings is belied by the pleadings submitted by complaint counsel and the judge's orders. These documents indicate that he has given ample consideration to respondents' objections and that he has not abused his discretion in rejecting them or in refusing to make a determination under Section 3.23 (b). Accordingly,

*It is ordered,* That the aforesaid applications for review, along with the requests for oral argument, be, and they hereby are, denied.

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IN THE MATTER OF  
BRITISH OXYGEN COMPANY, LIMITED, ET AL.

*Docket 8955. Interlocutory Order, May 29, 1974*

Order placing on Commission's docket for review and upholding the administrative law judge's order of April 23, 1974, which grants four respondents' motion for production of certain documents obtained in Commission investigation of industrial gas industry; and directing administrative law judge to accord confidential treatment to sensitive portions of documents in question as set out in Commission's order.

*Appearances*

For the Commission: *K. Keith Thurman.*

For the respondents: *Paul, Weiss, Rifkind, Wharton & Garrison,*  
New York, N.Y.

ORDER GRANTING APPLICATIONS FOR REVIEW

By order dated April 23, 1974, the administrative law judge granted a motion by respondents, British Oxygen Company, Limited, BOC Financial Corporation, BOC Holdings, Limited, and British Oxygen Investments, Limited (hereinafter BOC), for production, pursuant to Section 3.36 of the Commission's Rules of Practice, of certain documents obtained in a Commission investigation of the industrial gas industry. Pursuant to Section 3.23 (a) (1) of the rules, complaint counsel request that the Commission review this order on the grounds that BOC failed to make certain showings required by Section 3.36. Review is also sought by five companies who voluntarily submitted documents in connection with said investigation, and who are not parties to this matter but are participating with the permission of the administrative law judge.

The rulings of an administrative law judge on issues of this kind are entitled to great weight and will be reviewed only upon a showing that he has abused his discretion. *Warner Lambert Co.*, Dkt. 8891 (September 18, 1973) [p.485 herein]. We find no such abuse of discretion in the law judge's ruling on the instant motion to produce and it will be affirmed. We are concerned, however, that the maximum protection