APPENDIX D

State and City	Acquired Company	Year of acq.	No. of stores acq.	Sales of acquired stores in 12 mos. prior to acquisition	Acquired sales as est. % of food store sales*	National's % of city market	
						1954	1958
MINNESOTA							
Minneapolis	Gamble-Skogmo	1951	2	$ 854,068	0.54	19.2	13.1
Grand Rapids	"	1951	1	271,568	7.13	31.8	17.3
International Falls	"	1951	1	149,477	4.88	41.5	64.1
NORTH DAKOTA							
Grafton	"	1951	1	173,747	10.23	22.3	11.7
SOUTH DAKOTA							
Aberdeen	"	1951	1	453,941	6.75	21.3	12.9
MINNESOTA							
Duluth	Piggly-Wiggly	1952	6	2,927,000	9.25	17.9	15.3
MICHIGAN							
Detroit	H. A. Smith	1955	1	n.a.	n.a.	1.7	2.8
Mt. Clemens	"	1955	1	n.a.	n.a.	12.4	8.5
MINNESOTA							
Worthington	Tolerton	1957	1	293,743	8.28	8.1	16.5
SOUTH DAKOTA							
Brookings	"	1957	1	548,667	20.07	23.1	29.4
Madison	"	1957	1	266,503	10.29	8.3	14.0
Mitchell	"	1957	1	412,579	11.41	5.4	10.8
Watertown	"	1957	1	482,503	8.24	16.4	15.3
ILLINOIS							
Chicago	Del Farm	1958	12	18,377,687	1.64	9.6	11.1
MICHIGAN							
Kalamazoo	Kalamazoo Mkt.	1958	3	2,158,000	5.65	7.2	9.9
INDIANA							
Indianapolis	Guidone	1958	1	5,200,000	2.98	20.6	20.8
IOWA							
Fort Dodge	Slim's	1958	1	891,023	8.29	10.6	7.5

SOURCE: CX 395-397, 479.
*See note, Appendix B.

IN THE MATTER OF

GENERAL FOODS CORPORATION

ORDER, OPINIONS, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT

Docket 8600. Complaint, September 30, 1963—Decision, March 11, 1966

Order requiring General Foods Corporation, one of the Nation's largest manufacturers of packaged grocery products with headquarters in White Plains, N.Y., to divest itself within one year of all assets and properties of the S.O.S. Company of Chicago, Ill., the dominant manufacturer and distributor of household steel wool, to a purchaser not connected in anyway with the respondent or any of its affiliates or subsidiaries.

COMPLAINT

The Federal Trade Commission has reason to believe that the above-named respondent has acquired the assets of another corporation in violation of Section 7 of the amended Clayton Act (15 U.S.C. Section 18); and, therefore, pursuant to Section 11 of said Act, the Commission issues this complaint, stating its charges in that respect as follows:

PARAGRAPH 1. (a) Respondent, General Foods Corporation, is a corporation organized and existing under the laws of the State of Delaware, with its principal offices located at 250 North Street, White Plains, New York.

(b) Respondent, directly and through its various completely owned subsidiaries, is now and had been for many years prior to December 31, 1957, engaged principally in the manufacture or processing, sale and distribution of packaged grocery products, which are sold by respondent under numerous advertised brand names to retail and wholesale grocery and food outlets, particularly supermarkets.

(c) In the course and conduct of its business, respondent is now and was prior to December 31, 1957, engaged in commerce (as commerce is defined in the Clayton Act, as amended), selling, delivering and shipping its numerous products from its plants and other facilities located in various States of the United States to food stores, supermarkets, restaurants, institutions, and other purchasers located in States other than the State in which such sales and shipments originated.

PAR. 2. (a) Prior to December 31, 1957, The S.O.S. Company (S.O.S.) was a corporation organized on November 9, 1927, doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 7125 West 65th Street, Chicago, Illinois.

(b) S.O.S. was engaged in the manufacture, distribution and sale of household steel wool (the line of commerce involved herein). Said product was sold nationally under the name "S.O.S." for use primarily as a household scouring and cleansing aid. "S.O.S." household steel wool is a high volume, rapid turnover packaged grocery product. S.O.S. also manufactured and sold household steel wool for resale by other companies under their own private label. In addition, S.O.S. produced and sold a small amount of steel wool for commercial use.

(c) In the course and conduct, of its business, S.O.S. was en-

gaged on or about December 31, 1957, and for many years prior thereto, in commerce (as commerce is defined in the Clayton Act, as amended), having sold and delivered or shipped household steel wool from its plants and facilities located in the State of Illinois to food stores, supermarkets, and other purchasers located in States other than the State of Illinois.

(d) On or about December 31, 1957, in exchange for 349,410 shares of its common stock, valued at approximately $17,500,000, respondent acquired all of the assets of The S.O.S. Company, including its wholly owned subsidiary, Tuffy of Canada, Limited. As of July 31, 1957, the book value of the assets of S.O.S. amounted to approximately $6,000,000.

Pursuant to the acquisition agreement, respondent acquired the exclusive right to the trademark "S.O.S." Following the acquisition, The S.O.S. Company was dissolved and the production and distribution of "S.O.S." household steel wool has been continued through a newly formed division of respondent.

PAR. 3. Respondent is one of the leading packaged grocery products manufacturers in the United States. Directly and through its completely owned subsidiaries, respondent maintains and operates more than 30 plants for the manufacture, processing and distribution of its products in the United States. In addition, respondent engages in foreign manufacturing and marketing of packaged grocery products similar to those manufactured and marketed in the United States.

PAR. 4. During the fiscal year ending March 31, 1957, the last complete fiscal year prior to the acquisition challenged in this complaint, respondent's net sales were $985,953,000. As of said date, respondent had total assets of $410,000,000. By the year ending March 31, 1962, respondent's net sales had increased to approximately $1,189,000,000 and its total assets to approximately $602,000,000.

In the ten year period from 1953 to 1962, respondent increased its net sales, net earnings and net assets approximately as follows:

	1953	*1962*
Net Sales	$701,055,000	$1,189,483,000
Net Earnings	24,807,000	72,244,000
Net Assets	200,031,000	418,755,000

PAR. 5. A large number of respondent's present products were acquired through the acquisition by respondent of the assets or stock of existing producers of such products. Between the date of

its incorporation and March 31, 1962, respondent made about 69 such acquisitions including that of the S.O.S. Company.

PAR. 6. Respondent manufactures and sells a broad line of packaged grocery products. Based on the 1954 Census of Manufacturers, respondent accounted for the following percentages of total United States value of shipments in the following product classifications:

A. Over Fifty (50) Percent:

Baking Power (consumer) Powdered beverage bases, desserts (ready-to-mix)
Concentrated coffee (powdered with added carbohydrates)
Coconut
Pectin
Edible Gelatins, (excluding ready-to-mix desserts)
Bluing

B. Twenty-five—Fifty (25–50) Percent:

Frozen beans
Frozen broccoli
Frozen cauliflower
Frozen peas
Other frozen vegetables
Wheat breakfast foods
Desserts (ready-to-mix, cornstarch base)
Other ready-to-mix desserts
Sweetening syrups and molasses
Concentrated coffee (powdered, pure coffee extract)
Other frozen vegetables and prepared foods

C. Ten—twenty-five (10–25) percent of fourteen additional products.

PAR. 7. At the time of its acquisition, and for many years prior thereto, S.O.S. was the largest producer and marketer of household steel wool in the United States, and "S.O.S." household steel wool was a well-known and accepted item in the American home. S.O.S.'s sales of household steel wool were $14,571,758 in 1957, which represented approximately 51% of all household steel wool sold in the United States.

As of December 31, 1957, in addition to S.O.S. there were only four other producers of household steel wool in the United States. In 1957, the number two producer had sales of $13,628,606 amounting to approximately 47.6% of the market, the number three producer had sales of $343,800 amounting to approximately 1.2% of the market, the number four producer had sales of $63,-

850 amounting to approximately 0.2% of the market, and the fifth producer had sales of $160 which amounted to less than .05% of the market.

For the year ending December 31, 1957, S.O.S. spent approximately $2,100,000 in advertising household steel wool. The number two producer of household steel wool was the only other producer that advertised its product to any significant degree. Also, prior to the acquisition of S.O.S., consumer promotions were not used to any significant degree by any producer in the household steel wool industry.

Since the acquisition, respondent has increased materially the amount of advertising devoted to "S.O.S." household steel wool. Additionally, respondent has re-oriented the methods and media used in advertising "S.O.S." household steel wool; particularly through substantially greater use of television, and the commencement of the use of consumer promotions on a large scale.

PAR. 8. By virtue of the acquisition of S.O.S., respondent has entered a market in which it was not a customer, supplier or competitor. In so doing, respondent replaced the dominant factor in the household steel wool industry and immediately became the largest producer and marketer of household steel wool in the United States. Also, respondent, with annual net sales of over one billion dollars, has entered into an industry which at the time of the acquisition, was comprised of five relatively small companies, none of whom had annual sales of over seventeen million dollars.

Additionally, "S.O.S." household steel wool now has the backing of respondent's substantial financial resources, economic power, and demonstrated merchandising expertise and ability to advertise, promote and sell high volume, rapid turnover packaged grocery products. Said acquisition has upset and realigned adversely, and threatens to upset and realign further, the competitive structure of the household steel wool industry. Through its economic power, merchandising prowess and extensive advertising and promotion respondent has increased the "S.O.S." share of the household steel wool market substantially, from approximately 51% at the date of the acquisition to approximately 57% as of December 31, 1961. Thus, to the detriment of competition, respondent has further substantially enhanced the dominant position it acquired as the largest manufacturer and marketer of household steel wool in the United States.

PAR. 9. Respondent is a recognized leader in the merchandising of high volume, rapid turnover, packaged grocery products. The vast majority of respondent's products and "S.O.S." household

steel wool are sold in grocery stores and supermarkets. Consumer acceptance of said products, which is vital in order to obtain critically short and valuable shelf space in retail grocery stores and supermarkets, is obtained largely through extensive advertising and promotion. In 1956, respondent was the sixth largest advertiser of all products in the United States. In 1957, the year prior to said acquisition, respondent spent approximately $69,000,000 for advertising, including various consumer promotions which respondent utilized successfully in promoting the sale of its packaged grocery products. Subsequent to the acquisition, respondent has employed consumer promotions extensively in promoting the sale of S.O.S. household steel wool.

By 1962, respondent had become the third largest advertiser in the United States, spending approximately $105,000,000 and utilizing all media to advertise and promote its products. By virtue of these vast expenditures, respondent receives sustantial discounts in the placement of its advertising.

As a result of the acquisition, "S.O.S." household steel wool now has the benefit of respondent's ability to acquire valuable and difficult to obtain grocery store shelf space which is to the disadvantage of other household steel wool producers, none of whom possesses the expansive line of packaged grocery products that are so widely advertised, promoted and sold by respondent.

PAR. 10. In the following ways, among others, the effect of respondent's acquisition of S.O.S. has been, or may be, substantially to lessen competition or to tend to create a monopoly in the manufacture, distribution and sale of household steel wool, the relevant line of commerce involved herein, throughout the United States, the relevant geographical market involved herein:

1. Actual and potential competition generally in the production and sale of household steel wool has been or may be substantially lessened.

2. Potential competition in the production and sale of household steel wool has been eliminated by reason of respondent's acquisition of the dominant producer, with whom it would have had to compete had it entered the household steel wool business through internal development rather than through acquisition.

3. The S.O.S. Company has been permanently eliminated as an independent competitive factor in the household steel wool industry.

4. The dominant producer and marketer of household steel wool has been absorbed into and combined with one of the na-

tion's largest producers and marketers of packaged grocery products which is also one of the largest advertisers and merchandisers in the United States.

5. Other household steel wool producers, as well as potential producers, have been, or may be precluded from competing with respondent due to any one, or more, or all of the following factors:

(a) Respondent's dominant market position;

(b) Respondent's financial resources and economic power;

(c) Respondent's advertising ability and experience;

(d) Respondent's merchandising and promotional ability and experience;

(e) Respondent's comprehensive line of packaged grocery store products;

(f) Respondent's ability to command consumer acceptance of its products and of valuable grocery store shelf space;

(g) Respondent's ability to concentrate on one of its products or on one selected section of the country, the full impact of its advertising, promotional and merchandising experience and ability.

6. Concentration in the production and sale of household steel wool, which was already high, has been, or may be further increased.

7. Respondent has acquired the manufacturing facilities and the dominant market position, which, when combined with its own overwhelming economic power, give it the capacity and ability to monopolize or tend to monopolize the household steel wool market.

8. Competition between and among brokers, wholesalers and retailers of household steel wool has been, or may be, substantially lessened or eliminated.

9. Entry into the household steel wool industry has been or may be discouraged and inhibited.

PAR. 11. The foregoing acquisition, acts and practices of respondent, as hereinbefore alleged and set forth constitute a violation of Section 7 of the Clayton Act (U.S.C., Title 15, Sec. 18) as amended and approved December 29, 1950.

Mr. David J. McKean, Mr. James A. Morgan supporting the complaint.

Covington & Burling, by *Mr. Gerhard A. Gesell, Mr. Roberts B. Owen, Mr. Thaddeus Holt, Mr. Franklin J. Okin,* Washington, D.C.; *Mr. Albert L. Cuff* and *Mr. Kendall Cole,* White Plains, N.Y. for respondent.

INITIAL DECISION BY ANDREW C. GOODHOPE, HEARING EXAMINER

DECEMBER 18, 1964

Statement of Proceedings

On September 30, 1963, the Commission issued its complaint against the respondent charging it with violation of Section 7 of the Clayton Act, as amended.[1]

A copy of the complaint and notice of hearing was served upon respondent, and respondent thereafter appeared by its counsel and filed an answer admitting certain of the allegations of the complaint but denying that it had violated Section 7 of the Clayton Act, as amended.

Hearings were thereafter held at which time testimony and documentary evidence were offered in support of and in opposition to the allegations of the complaint. At the close of all the evidence and pursuant to leave granted by the examiner, proposed findings of fact, conclusions of law, briefs and proposed orders were filed by counsel supporting the complaint and counsel for the respondent.

Proposed findings not herein adopted either in the form or substance proposed are rejected as not supported by the evidence or as involving immaterial matters. Having reviewed the entire record in this proceeding, including the proposed findings, conclusions and briefs submitted by both parties, the examiner, based upon the entire record, makes the following:

FINDINGS OF FACT

1. The respondent General Foods Corporation (hereafter called General Foods) is a Delaware corporation with its principal office and place of business located at 250 North Street, White Plains, New York. (Paras. One and Two of Complaint and Answer.)

2. General Foods manufactures and sells its products to wholesale and retail grocery food outlets throughout the United States and is and has been for many years engaged in commerce as that term is employed in the Clayton Act. General Foods is the largest packaged food products manufacturer in the United

[1] The Act, as amended, provides in pertinent part as follows:

Sec. 7. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or . . . assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. (38 Stat. 731; 15 U.S.C.A., Sec. 18)

States, with net sales in the year 1957 (fiscal) [2] of $985,953,000 and in 1963 of $1,054,650,737. (Respondent's Proposed Finding I.1; Counsel for Commission's Proposed Finding 2.) [3]

3. On December 31, 1957, General Foods acquired all of the assets of The S.O.S. Company, a Delaware corporation with its principal office in Chicago, Illinois. The S.O.S. Company was enggaged primarily in the manufacture and sale throughout the United States of two scouring devices for household use, "S.O.S." soap pads and "Tuffy." The acquisition was accomplished by an exchange of General Foods shares for assets of The S.O.S. Company, followed by liquidation of The S.O.S. Company and distribution of the General Foods shares to the former S.O.S. stockholders. By virtue of this arrangement, the owners of S.O.S. received 349,410 shares of General Foods common stock, which then had an approximate market value of $17,500,000. (RPF I.2)

The S.O.S. Company manufactured and sold its products to wholesale and retail grocery food outlets throughout the United States, and at the time of the merger and for many years prior thereto had been engaged in commerce as that term is employed in the Clayton Act. (Answer, Para. Two.)

GEOGRAPHIC MARKET INVOLVED

4. Counsel supporting the complaint and counsel for respondent are in agreement that the entire United States is the proper geographic market in which to measure the effects of this acquisition. The examiner agrees and so finds. (CPF 46; RPF p. 173.)

THE ORGANIZATION OF GENERAL FOODS

5. In the United States, General Foods consists of five operating divisions. These are:

1. Birds Eye Division
2. Jell-O Division
3. Kool-Aid Division (of which S.O.S. became a part)
4. Maxwell House Division
5. Post Division

In addition, these operating divisions are supported by an Institutional Food Service Division, a Distribution-Sales Service Division, and the General Foods Technical Center. (CX 149, pp.

[2] Respondent's fiscal year for 1957 and subsequent years runs from April 1 to the following March 31. Most of the statistical information concerning respondent is on this fiscal basis, and such figures will be used hereafter unless otherwise noted.

[3] Hereafter "RPF" refers to Respondent's Proposed Finding, and "CPF" refers to Counsel for Commission's Proposed Finding. "CRB" refers to Counsel for Commission's Reply Brief.

30–31) Each of these divisions is managed by a general manager who is responsible to the corporation for the manufacturing, marketing, and promotion of the products made or sold within his division. Each operating division general manager has his own marketing, research, advertising staff, and controller, and reports to an operating executive vice president who is a member of the corporate staff. (Tr. 471)

6. The respondent is basically a manufacturer of packaged grocery food products numbering some 250 items and sold under at least 30 well-known brand names. (CX 40, p. 5; CX 41, back cover; CX 149, p. 32) Over the years, the respondent has made some 69 acquisitions (including foreign companies) as a result of which it has obtained the majority of its products. (Answer, Para. Five) These products are sold to the grocery trade consisting of approximately 300,000 retail grocers throughout the United States. (Tr. 557) Approximately 35,000 of these 300,000 retail grocery stores account for 70 per cent of all retail food store sales. (Tr. 557, 750)

7. The operating divisions of General Foods, with the exception of the Kool-Aid Division, sell their divisional products by means of their own separate division sales force. The Kool-Aid Division sells its products to the grocery trade throughout the United States by means of food brokers located in seventy marketing areas of the United States. (Tr. 707) In supervising the sales of the Kool-Aid Division products, the division manager is assisted by a staff consisting of regional and district sales managers. These managers have no direct selling responsibility but function to supervise and assist the efforts of the brokers through whom the products are actually sold. (Tr. 707–711)

8. At the time of the acquisition, The S.O.S. Company sold S.O.S. soap pads nation-wide through grocery stores, and steel wool soap pads' sales to these accounts amounted to approximately 97 per cent of the total sales of S.O.S. (CX 7, p. 22) The grocery stores to whom S.O.S. sold its soap pads accounted for 95 per cent of all grocery sales in the United States. (RPF III.1) Its products were distributed through selected brokers from public warehouses located throughout the United States, and its products were intensively advertised in various media, including network television, with an annual advertising budget of nearly $2,000,000. The company was competently managed, had shown a steady growth, and was operating at a profit. (RPF III.1; CPF 43, 43)

9. As a result of the acquisition of The S.O.S. Company, General Foods entered a market in which it was not an actual or potential customer, supplier, or competitor. General Foods had not considered the possibility of expanding on its own to the household cleaning product market. Its only non-food product of any kind other than those acquired from The S.O.S. Company was an ironing aid which it purchased from an outside firm and resold. (RPF II.1–2) General Foods, while it had never been a manufacturer or seller of any household cleaning products such as soap, detergents, bleaches or other products, was a substantial and well-entrenched manufacturer of low-cost, rapid turnover food items sold through the grocery trade throughout the United States to the consuming public consisting almost entirely of housewives. (RPF II.2) The soap pad business into which General Foods entered was a similar type of business, since soap pads are a comparatively low-cost item selling in the most popular sizes of 10 (S.O.S.) and 12 (Brillo) pads to a box at 27 to 29 cents, with a rapid turnover and sold through brokers to the grocery trade.

10. Shortly after the acquisition, The S.O.S. Company was Incorporated into the Kool-Aid Division (formerly Perkins Division). (Tr. 483, 502–504) All of the products of the Kool-Aid Division were sold through brokers to the grocery trade rather than direct by respondent's own sales forces as the other General Food products are sold. (Tr. 503) The products of the Kool-Aid Division are as follows:

1. Kool-Aid
2. Twist
3. S.O.S.
4. S.O.ettes
5. Tuffy
6. LaFrance
7. Satina
8. Open Pit Barbecue Sauce
9. Good Seasons Sauce and gravy mixes (Tr. 484)

LINE OF COMMERCE

11. Both counsel in support of the complaint and for the respondent agree that industrial steel wool should not be considered as a part of the relevant product line in this matter. (CPF 50; RPF p. 174) The examiner agrees and so finds. The reasons for this are that industrial steel wool consists of an entirely separate market having different uses, is sold in a different market at dif-

ferent prices, and is not, except to an insignificant degree, competitive with household steel wool.

12. While the parties are agreed, and the examiner finds, that the relevant geographic market in this matter is the national market, they disagree as to the scope of products which must be considered as constituting the relevant functional market or "line of commerce." Commission counsel content that the line should be limited solely to household steel wool. This market, it is urged, consists of steel wool pads which are impregnated with soap in the manufacturing process and commonly called soap pads, and plain household steel wool pads with or without a separate piece of soap. (CPF 47) Counsel for respondent, on the other hand, contend that the relevant product market consists of all household scouring devices which, it is urged, compete as close substitutes for soap pads in the principal function of soap pads; namely, scouring dirty pots, pans and cooking utensils. (RPF V.1–11) While there are a number of other products such as soap and detergents which can conceivably be used to clean dirty pots, pans and cooking utensils, respondent does not contend that they should be included as a part of the relevant product line, but that such line should include all products which have an abrasive surface consisting of a ball or pad of a size to fit a housewife's hand, and which can be used for scouring either along or in conjunction with soap, detergent, or some abrasive material. (RPF V.1–11)

13. The examiner finds that the relevant product line of commerce in which to measure the effects of the acquisition here involved consists of household steel wool. In making this finding, the examiner is relying upon the evidence of record and the decision of the Supreme Court in *Brown Shoe Company* v. *U.S.* 370 U.S. 294 (1964) in which the Court stated at page 315:

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. *United States* v. *E. I. duPont de Nemours & Co.* 353 U.S. 586, 593–595 . . . The boundaries of such a submarket may be determined by examining such practical indicia 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. Because Section 7 of the Clayton Act prohibits any merger which may substantially lessen competition "in *any* line of commerce" (emphasis supplied), it is neces-

sary to examine the effects of the merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition. If such a probability is found to exist the merger is proscribed.

This explicit statement makes it clear that while the "outer boundaries" of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and its substitutes, well-defined submarkets may exist within this broad market, which, in themselves, constitute product markets for antitrust purposes. This and other decisions involving Section 7 recognize that, though a broad product market could conceivably be broken down into many submarkets, only those submarkets which are economically significant in terms of effective competition are relevant "lines of commerce" within the meaning of Section 7.

14. In the largest sense, the market here involved could include all household cleaning aids. Products such as detergents, liquid cleansers, certain types of dish cloths and certain types of brushes are all used in various ways to clean pots and pans and to do other scouring chores in the kitchen. These products are in the same broad market in that they can be used alone or in combination for the same general purposes. While such products might be included to define the outer limits of the market, such a market would be far too broad for purposes of measuring the probable competitive consequences of the acquisition under consideration. Consequently, these products must be disregarded.

15. The problem becomes more difficult when the types of products which respondent contends must properly be considered within the "line of commerce" are reached. The respondent asserts that they compete directly with steel wool pads in their principal function, scouring dirty pots, pans and cooking utensils. In support of its contention, counsel for respondent has offered and the record contains physical examples of such products. (RX 1–6; RX 1A–6A) [4] These products can be described as follows:

(a) 14 are steel wool pads which counsel in support of the complaint agree are properly includable in the "line of commerce," whether soap impregnated or not.

(b) 13 items are plastic mesh balls or pads, some of which have a sponge inside the ball or mesh, but none of which are soap impregnated. Respondent's product "Tuffy" is in this group.

[4] RX 1–6 are six large display boards affixed to which are 50 samples of scouring aid products. RX 1A–6A are photographs of these boards in the exhibit binder.

(c) 14 items are basically plastic or cellulose sponges with an abrasive surface joined to one side of the sponge. Minnesota Mining and Manufacturing Company's "Rescue" is in this group and is soap impregnated.

(d) 7 items are pads of metal mesh made of metal other than steel wool, but none of which are soap impregnated.

(e) 2 items are fiber dish cloths coated with an abrasive substance, neither of which is soap impregnated.

16. A study of the physical characteristics of these products and the testimony concerning them in the light of the *Brown Shoe Company* case compels the examiner to conclude that these products must likewise be excluded from the relevant "line of commerce" in this matter, except for the 14 steel wool products described above.

17. Household steel wool pads are produced by a shaving process in which a specially manufactured steel wool wire is drawn through a machine containing a series of cutting knives. As the wire is drawn against the knives, strands of steel wool with triangular cross-sections are shaved off and collected in ribbons. Thereafter, these ribbons are formed into balls or pads, the majority of which are impregnated with soap, dried, and packaged for sale. (Tr. 826–827) The steel wool cutting machines are comparatively large, complicated machines, not generally available on the open market, but are custom-made to the manufacturer's specifications. (Tr. 847, 888–890, 908–909) A German manufactured machine is available but cannot produce steel wool as efficiently as American-made machines. (Tr. 847–848) The technology of steel wool production is complex and requires considerable "know-how" not readily available. (CX 7, pp. 11, 23, 75) These steel wool cutting machines can be used for no other function than the production of steel wool. Wool manufactured from materials other than steel are impractical because of the high cost of the raw materials. (Tr. 828–829)

18. Steel wool pads make a particularly effective abrasive. The three exposed cutting edges perform much in the same manner as a knife abrasing by cutting or shaving the surface to which the steel wool is applied. (Tr. 432, 628–629, 839, 939, 978–979) As a result, the metal surfaces are polished, particulary the surfaces of aluminum pots and pans. With the addition of soap to facilitate its abrasive action, steel wool makes a highly effective scouring and cleaning agent. (Tr. 839, 978–979) The steel wool pad is soft and pliable, lends itself well to almost any surface, and is

able to reach into dirty corners and crevasses with ease. (Tr. 844, 939) The primary use for steel wool soap pads is for cleaning dirty pots, pans and other cooking utensils. The record contains an estimate that at least 80 percent of the total volume of soap pads are used for this purpose. (Tr. 759) Other uses described as periphery uses are for cleaning dishes and tableware, white wall tires, golf clubs, aluminum doors and windows, and barbecue grills. (Tr. 424, 759)

19. The manufacturers of the majority, if not all, of the products appearing on RX 1–6 make claims in advertising and on packaging that the products are scouring aids whose principal function is to scour dirty pots, pans and cooking utensils. Reliable testimony of record does not support these claims. The president of The S.O.S. Company prior to its acquisition by General Foods testified that the housewives complained during World War II when the manufacture of steel wool was curtailed and at least some of these products were available. He further testified that during this period of time The S.O.S. Company tested a variety of other materials including plastics and other metals, but that attempts to find a substitute for steel wool convinced his company that nothing could perform as well as steel wool soap pads. (Tr. 428–431) a former general manager of the S.O.S. Division of General Foods subsequent to the acquisition, testified that tests on these types of products were made and compared with the performance of steel wool. The results of such tests showed that none of the other products performed as well as the S.O.S. steel wool pads. (Tr. 626) This witness likewise testified that the respondent's product "Tuffy" which respondent argues is within the "line of commerce" was not intended for the same use as steel wool soap pads, but that it was intended primarily for cleaning dishes and light-duty uses comparable to a dish rag. (Tr. 626; See also, Tr. 761)

20. Only two of the products which respondent contends are properly within the "line of commerce" contain any soap, Minnesota Mining and Manufacturing Company's product "Rescue" and "Glit Whopper Scrubber." These two products, particularly "Rescue," appear to be the closest comparable items to steel wool soap pads. However, none of these plastic or mesh pads or balls, abrasive surface sponges, metal mesh pads, or abrasive coated cloths are able to perform the wide range of household cleaning jobs as well as household steel wool. (Tr. 430–431, 839–841, 937–939, 1276–1277) While manufacturers of these products have been

making claims of their superiority over household steel wool, the sales of these products have not reflected such superiority. (Tr. 428–431) This is best evidenced by the constantly rising sale of household steel wool to be discussed hereafter.

21. The most popular size of steel wool packages (10 pads for S.O.S.; 12 pads for Brillo until Jan., 1961, and thereafter 10 [Tr. 630, 780, 1091]) retail at approximately 27 to 29 cents per package in the grocery store or supermarket. An examination of the retail pricing of the other non-steel wool products makes it apparent that the manufacturers of such products have priced their products in such a manner that they will sell in the grocery store at fairly closely competitive prices to steel wool soap pads, taking into consideration the claims of life expectancy and efficiency of such scouring aids. (RPF, p. 24) However, this does not detract from the fact that steel wool soap pads are the basic competitive factor in the scouring device field. Steel wool soap pads were the first such product on the market and undoubtedly established the approximate price at which other scouring devices must sell if they are to remain in the retail stores. (See CPF 66, RPF V.2)

22. Officials of the five manufacturers of household steel wool, including respondent's former division manager, testified that they paid little or no attention to the pricing of products other than steel wool products, and that in arriving at the prices to be charged for their steel wool products, they relied upon the going market price of competitive household steel wool soap pads. None of these manufacturers considered the non-steel wool scouring devices to be serious competition. (Tr. 624–626, 841, 897–898, 937–938, 973–974) The four manufacturers competitive with respondent each testified that as far as he was concerned his competition was with those companies in the industry who manufactured household steel wool and not products of materials other than steel wool. (Tr. 897–898, 933–935, 974) Respondent itself has recognized that the competition offered by the non-steel wool products is at best "indirect." Prior to acquiring S.O.S., respondent made a detailed study of the soap pad business and its competition. In part this study stated:

> The normal business hazards exist. Direct or indirect competition may cut prices or embark on costly promotion. We can make no predictions here. However, Brillo, the only significant direct competition, has been in the field for years without retarding S.O.S. We are unaware of any new inventions or products which would jeopardize the S.O.S. market. S.O.S., through Tuffy, is setting up its own indirect competition. Other indirect competition includes

abrasive sponges and bronze or stainless steel scouring pads, S.O.S. has an opportunity to introduce such items as new products under its own label. (CX 7, p. 10)

The majority of the products which respondent now urge are "close substitutes" were in existence and on the market at the time of this study. (Tr. 843–844) Moreover, the present general manager of respondent's Kool-Aid Division never saw and was apparently unaware of the existence of many of the products on RX 1–6 until they were sent to him by respondent's brokers shortly before he testified. (Tr. 794, 816)

23. To bolster its claim that these non-steel wool products must properly be considered part of the "line of commerce," respondent relied primarily upon advertising claims made on behalf of such products, some consumer attitude surveys made by or for the respondent, and the apparent success of Minnesota Mining and Manufacturing Company in test marketing its "Rescue" scouring aid in three markets and anticipated success in additional markets. The advertising claims of these so-called competitors can be given little or no weight by the examiner in view of the testimony and exhibits in the record already discussed, nor can any great weight be attributed to respondent's consumer attitude surveys since they are at best inconclusive and contradictory of other evidence in the record, particularly the evidence demonstrating steel wool soap pads have increased their sales at least as fast as population growth to be discussed hereafter. The introduction of "Rescue" within the last year and the claimed success in obtaining distribution in test market areas (one of which, Eugene, Oregon, was a failure) provides little basis for including all of the products which respondent urges must be included within the "line of commerce." The examiner is not impressed that the introduction of this product will in any way effect either respondent's, or its principal competitor Brillo's, sale of steel wool soap pads.

EFFECT ON COMPETITION AND TENDENCY TOWARD MONOPOLY

24. Since the effective date of the merger of S.O.S. into General Foods was December 31, 1957, the record contains a substantial amount of evidence as to what the post acquisition effects of the merger have been. The following table gives the total sales and market share of the five manufacturers engaged in the household steel wool industry for the years 1955 through 1962, covering a span of years commencing three years before the acquisition and five years subsequent to the acquisition:

*TOTAL MANUFACTURER'S HOUSEHOLD STEEL WOOL SALES** [5]
(in thousands of dollars)

Year	S.O.S.		Brillo		Durawool		American		Alloy		Total
	Sales	%	Sales	%	Sales	%	Sales	%	Sales	%	Sales
	(000)		(000)		(000)		(000)		(000)		(000)
1955	$12,749	52.8	$11,043	45.7	$ 52	.2	$311	1.3	$—	—	$24,155
1956	14,343	52.7	12,486	45.8	49	.2	358	1.3	—	—	27,237
1957	14,600	51.0	13,629	47.6	64	.2	344	1.2	—	—	28,637
1958	15,044	50.4	14,387	48.2	85	.3	327	1.1	4	—	29,848
1959	15,159	49.4	14,948	48.7	122	.4	253	.8	215	.7	30,687
1960	18,102	54.0	14,983	44.7	134	.4	211	.6	117	.3	33,547
1961	18,966	57.0	13,751	41.3	205	.6	208	.6	175	.5	33,304
1962	19,170	56.0	14,305	41.8	425	1.3	265	.8	43	.1	34,208

*The above sales figures represent total sales by the manufacturers to their customers. It does not represent the total amount realized at the retail store level when the products in question are resold to consumers. (Tr. 1018, CX 20A–2, 20B–2, 20C, 118B, 130, 136, 137A, 150, 157, 169). S.O.S. sales for 1963 are *in camera*, CX 119.

[5] Appendices A, B & C are further charts showing the market shares of S.O.S. and Brillo based on number of pads sold by each company as well as a graphic showing of the market shares of S.O.S. and Brillo.

25. As the above tabulation demonstrates, there are five manufacturers of household steel wool with S.O.S. and Brillo occupying dominant positions in the industry accounting for approximately 98 percent of the total shares of household steel wool. The small manufacturers Durawool, Incorporated, Alloy Metal Wool Products Corporation, and American Steel Wool Manufacturing Co., Inc., while selling their own label of steel wool soap pads, are principally engaged in manufacturing private label soap pads for other companies (Tr. 832–834, 924, 933); whereas, the bulk of S.O.S. and Brillo sales are under the S.O.S. and Brillo labels. (Tr. 720, 722; CX 124) These three companies must sell their products at prices lower than S.O.S. and Brillo, or else sell larger package sizes, in order to even attempt to compete with S.O.S. and Brillo. (Tr. 972) These companies are so small as to be almost insignificant in comparison with S.O.S. and Brillo.

26. Both S.O.S. and Brillo have had national distribution of their brand of soap pads for a number of years. The S.O.S. Company, prior to the acquisition, operated two plants, both located in Chicago, for manufacturing steel wool. Brillo, likewise, operated two plants, located in Brooklyn, New York, and London, Ohio. (RX 27, p. 6)

27. The prices at which S.O.S. and Brillo sold their soap pads were nearly identical. The following table gives the prices at which S.O.S. and Brillo sold their soap pads:

	S.O.S.		*Brillo*
24/4's	$2.40	24/5's[6]	$2.45
24/10's	4.80	24/12's	4.75
12/18's	3.60	12/20's	3.50

(CX 15, 130, 139, 151A, 166A)

28. There have been no significant changes in the manufacturers of household steel wool. The Alloy Metal Wool Products Corporation entered the steel wool business in 1956 (Tr. 891), and sold its business in 1963, and the name of the business was changed to Demcorp. (Tr. 890–901) Consequently, Demcorp cannot be considered a new entrant but rather a successor to the business of Alloy.

29. Subsequent to the acquisition of The S.O.S. Company by General Foods, significant changes took place which resulted in

[6] S.O.S. sold its soap impregnated steel wool pads in three different package sizes: 4-pad, 10-pad, and 18-pad packages. Until January, 1961, Brillo sold its soap pads in packages containing 5, 12, and 20 pads, which were priced with and designed to sell against the S.O.S. 4-pad, 10-pad, and 18-pad packages, respectively. After January, Brillo packages contained the same number of pads as S.O.S. (CX 7, p. 24; 166A)

S.O.S. substantially improving its market position. As can be seen from Appendix A, S.O.S., when compared to Brillo, had lost some of its market share in the year 1957, and that this loss continued in the years 1958 and 1959 but was reversed in 1960 and subsequent years. The changes which occurred consisted of changing the color of the soap used in the S.O.S. soap pads from red to blue; the introduction of a new and improved box in which to display and sell the S.O.S. soap pads, and a change in the type and emphasis of advertising and promotion of the S.O.S. soap pads.

30. The General Foods management of S.O.S., working in conjunction with the new advertising agency, devised a new marketing campaign for the S.O.S. product. Mr. Arthur Schultz, of Foote, Cone & Belding, stated that the agency recommended to the General Foods management that a number of steps be taken to improve the S.O.S. situation, "It seemed to us the whole marketing and advertising unit had to be rejuvenated. That involved new advertising, new media selection, hopefully a visible product improvement, new packaging, and in each of those areas we strongly urged that action be taken." (Tr. 1077) The new agency recommended that General Foods concentrate its advertising on the distinctive differences and advantages of S.O.S. rather than on the uses for soap pads which the old S.O.S. company had done. (Tr. 1078)

31. The most important change made by General Foods subsequent to the acquisition was the change in media for advertising S.O.S. soap pads. Prior to the acquisition, The S.O.S. Company had spent substantial amounts of money in magazine advertising and this was continued for two years after the acquisition. Thereafter, the emphasis was all on television advertising of S.O.S. products. General Foods is one of the nation's largest television advertisers, and as such has purchased time on some of the most attractive television programs. (CX 8, 49, 177B–C) During the last several years General Foods has contracted with the television networks, among others, for the following television shows: "The Danny Thomas Show," "The Andy Griffith Show," "The Gertrude Berg Show," "Gunsmoke," "The Zane Grey Theater," "The Lucy-Desi Hour," "I've Got a Secret," "Twilight Zone," and "The Ann Southern Show," and S.O.S. has been advertised along with other General Foods products on these nighttime network television programs. (CX 11, 46, 64, 123B; Tr. 631–633) Prior to 1958, S.O.S. network television advertising was limited to partial sponsorship of daytime shows such as "The Price is Right,"

"Queen for A Day," "Tic Tac Dough," and "Comedy Time." (CX 12; 19, p. 30; 81–88) The following table gives the amount spent by S.O.S. and General Foods for newspaper, magazine and television advertising for the years indicated:

ADVERTISING EXPENDITURES OF THE S.O.S. COMPANY (1954–1957) AND OF GENERAL FOODS—S.O.S.
(1958–1963)
(in thousands of dollars)

Year	*Newspapers* (000)	*Magazines* (000)	*TV* (000)
1954	$5	$470	$1,300
1955	4	570	1,310
1956	1	650	1,150
1957		710	1,390
Acquisition on 12/31/57			
1958	580	600	550
1959	790	410	690
1960	2		1,950
1961	11		2,360
1962	9	13	2,520
1963	55		2,220

(CX 9, 10, 58)

32. The evening hours are considered to be prime time for television advertising (TR. 1129), and advertisers are required to pay a higher price to advertise during this time on the high cost programs. (Tr. 439–440) General Foods had an advantage over the old S.O.S. Company since General Foods could spread the cost of this more expensive television time over several products, rather than just one. (Tr. 439) Immediately after the acquisition, the general manager of the division of General Foods of which S.O.S. was a part, failed to get on the corporate television shows because they were late getting their times in, and the available time was already allotted to other divisions. This lack of television advertising is reflected in a drop in S.O.S. sales. However, these sales promptly increased as soon as S.O.S. was advertised substantially on the General Foods evening shows. (See Appendix A)

33. An additional advantage which General Foods enjoyed over the old S.O.S. Company was its ability to take advantage of cheaper rates for longer periods of advertising time spread over several products, *e.g.*, two half-hour shows costs more than one, one-hour show. Consequently, General Foods with its many prod-

ucts was able to purchase longer shows and spread the cost over several products.

34. Respondent argues that there has been a definite increase in competition since the time of the merger and that, therefore, it cannot be said that the merger has resulted in any probability of substantially lessening competition. It is true that the competitive tempo has increased, but respondent's argument is really one *ab inconvenienti* since respondent has been the principal protagonist in this activity. This is amply illustrated by the discussion above of respondent's increased advertising activity subsequent to the acquisition. Respondent also was most successful in the New York City area with an intensive advertising campaign. In August and September of 1959, S.O.S. had 15.1 per cent of the combined S.O.S.-Brillo sales in New York. (CX 124) Immediately thereafter, Molly Goldberg, a well-known actress, was hired by respondent's advertising agency and began to appear on television commercials for S.O.S. This advertising campaign was an immediate success, particularly in view of her appeal to the important Jewish population in New York City. (Tr. 1083–84, 1163–64) S.O.S. sales in New York City improved immediately, and as of August-September, 1963, S.O.S. (and S.O.ettes) had 31.8 per cent of the combined New York sales of S.O.S. and Brillo. (CX 124)

35. As part of its effort to make New York competitive, General Foods also introduced vigorous promotional activity. In addition to promotions which were in effect in New York as well as elsewhere, special New York promotions included a 6¢-off-label promotion in fiscal 1959, a combination trade and consumer cents-off promotion in March, 1959, another such promotion in May and June, 1960, a trade buying allowance in September, 1961, a retail promotional payment offer in September-October, 1962, and a coupon good for 7 cents off on a box of S.O.S. mailed to consumers in September, 1962. (CX 13, 51, 89, 90; Tr. 803–804) General Foods has continued these trade and consumer promotions, principally in New York City, and in 1963, spent nearly $145,000 for such promotions. (CX 59, 60)

36. The cumulative effect of all of these product and package improvements, heavy expenditures on television advertising and trade or consumer promotions has been to enhance the market share of S.O.S. until, in 1963, it accounted for 61 per cent of total household steel wool soap pad sales with Brillo accounting for 37 per cent. (See Appendix A)

37. Brillo, when faced with the increased advertising and pro-

motional activity of General Foods, also increased its activities. Brillo had its package redesigned and increased its advertising and promotional budgets (Tr. 1446–47; CX 159, 160, 164), but nevertheless fell further and further behind (See Appendix A), until in December, 1963, Brillo merged with the Purex Corporation Limited, a manufacturer of household cleaning products with total sales of $126,923,000 for its fiscal year ended June 30, 1963. (RX 27) The household steel wool industry, therefore, now consists of one giant, General Foods, one substantial competitor, Purex, and three insignificant competing manufacturers. In the light of the Commission decision In the Matter of *Proctor & Gamble Co.*, FTC Docket 6901, Decided Nov. 26, 1963 [63 F.T.C. 1465], which, of course, is binding upon the examiner, it must be concluded that this merger falls within the proscription of Section 7.

CONCLUSION

The acquisition of The S.O.S. Company by General Foods Corporation has resulted in a substanial lessening of competition and a tendency toward monopoly in the household steel wool industry in violation of Section 7 of the amended Clayton Act.

ORDER

I

It is ordered, That the respondent, General Foods Corporation, a corporation, through its officers, directors, agents, representatives and employees, within one year from the date of service of this Order shall divest itself absolutely, in good faith, as a unit by sale to a purchaser approved by the Federal Trade Commission, of all right, title and interest in all assets, properties, rights, and privileges, tangible and intangible, including but not limited to, all manufacturing plants, equipment and operating facilities, lands, leases, warehousing facilities, machinery, inventories, trade names, trademarks and good will, acquired by respondent as a result of its acquisition of the stock or assets of The S.O.S. Company, together with the additions of whatever description that are presently utilized by respondent in its operation of the acquired facilities and with such additional assets as may represent any expansion of the steel wool manufacturing and distribution facilities of the acquired company, during the time of their operation by respondent.

II

It is further ordered, That the aforesaid property required to be divested shall not be sold or transferred, directly or indirectly, to anyone who at the time of the divestiture is a stockholder, officer, director, employee or agent of, or otherwise directly or indirectly connected with, or under the control or influence of, respondent or any of respondent's subsidiaries or affiliated companies, or who owns or controls, directly or indirectly, more than one (1) per cent of the outstanding stock of General Foods Corporation.

III

It is further ordered, That if respondent divests the assets, properties, rights and privileges, described in Paragraph I of this Order, to a new corporation the stock of which is wholly owned by respondent, and if respondent then distributes all of the stock in said corporation to the stockholders of respondent in proportion to their holdings of respondent's stock, then Paragraph II of this Order shall be inapplicable and the following Paragraph IV shall take force and effect in its stead.

IV

It is further ordered, That no person who is an officer, director, or executive employee of respondent, or who owns or controls, directly or indirectly, more than one (1) per cent of the stock of respondent, shall be an officer, director or executive employee of any new corporation described in Paragraph III, or shall own or control, directly or indirectly, more than one (1) per cent of the stock of any new corporation described in Paragraph III.

V

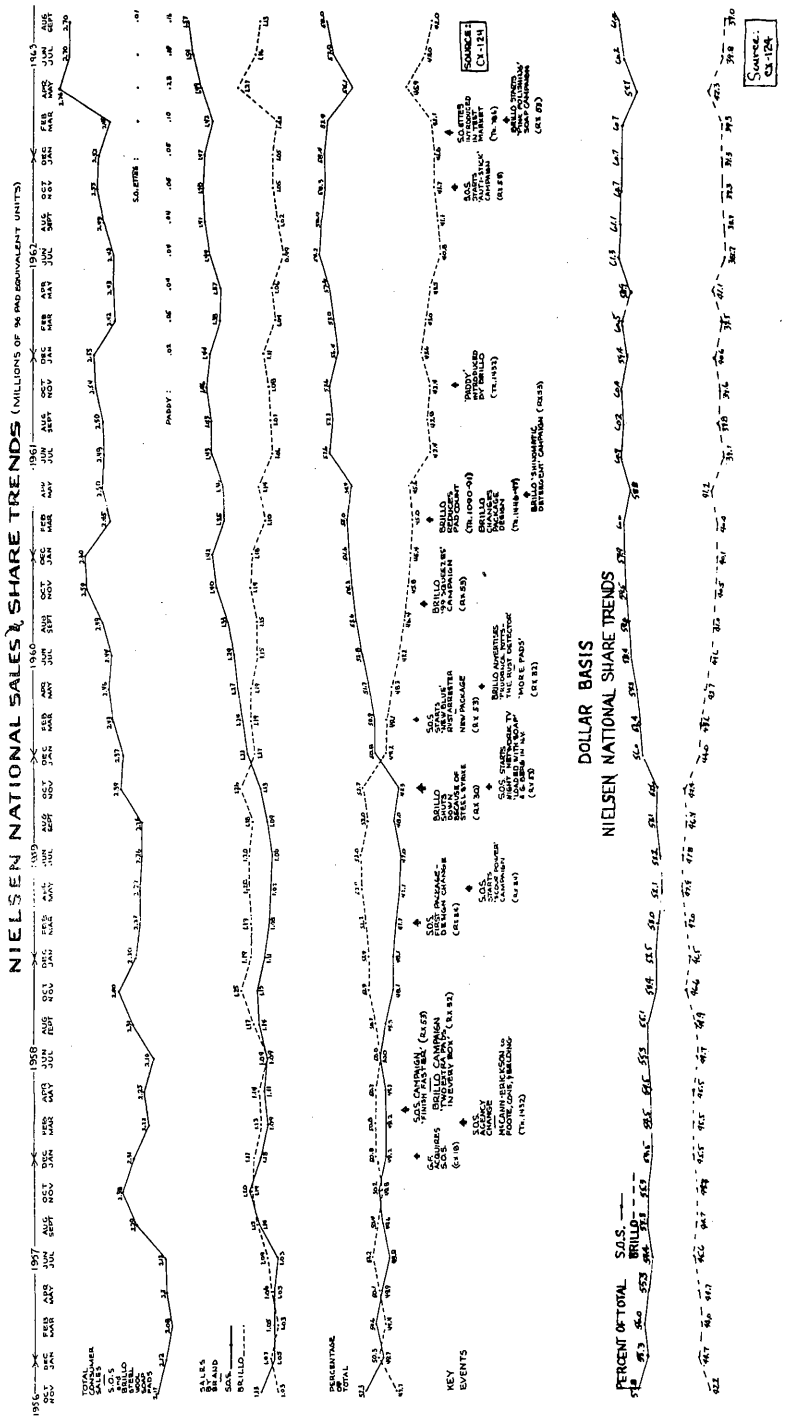
It is further ordered, That any person who must sell or dispose of a stock interest in respondent or the new corporation described in Paragraph III in order to comply with Paragraph IV of this Order may do so within six (6) months after the date on which distribution of the stock of the said corporation is made to stockholders of respondent.

VI

As used in this Order, the word "person" shall include all members of the immediate family of the individual specified and shall include corporations, partnerships, associations and other legal entities as well as natural persons.

VII

It is further ordered, That respondent shall periodically, within sixty (60) days from the date this Order becomes final and every ninety (90) days thereafter until divestiture is fully effected, submit to the Commission a detailed written report of its actions, plans, and progress in complying with the provisions of this Order and fulfilling its objectives.


APPENDIX A.
NIELSEN NATIONAL SALES & SHARE TRENDS (MILLIONS OF 96 PAD EQUIVALENT UNITS)
DOLLAR BASIS
NIELSEN NATIONAL SHARE TRENDS
PERCENT OF TOTAL
S.O.S.
BRILLO
KEY EVENTS
SOURCE: CX-124

APPENDIX B

NIELSEN NATIONAL RETAIL MARKET SHARE STATISTICS (STEEL WOOL SOAP PADS)

Consumer Dollar Basis*
(in thousands of dollars)

Year	Total Sales	S.O.S.	S.O.S. % Total Sales	Brillo	Brillo % Total Sales
	(000)	(000)		(000)	
F1958	$30,800	$16,900	54.9	$13,900	45.1
F1959	32,300	17,400	54.1	14,800	45.9
F1960	33,400	18,000	53.8	15,400	46.2
F1961	36,400	21,500	59.0	14,900	41.0
F1962	37,400	22,400	59.9	15,000	40.1
F1963	37,300	22,600	60.6	14,700	39.4

*The above sales figures represent sales of steel wool soap pads through grocery stores and supermarkets taken from CX 48.

APPENDIX C

NIELSEN NATIONAL RETAIL MARKET SHARE STATISTICS (STEEL WOOL SOAP PADS)

Pad Basis (Thousands of 96—Pad Equivalent Units)*

Year	Total Pads	S.O.S.	S.O.S. % Total Pads	Brillo	Brillo % Total Pads
	(000)	(000)		(000)	
F1958	13,423	6,644	49.5	6,779	50.5
F1959	13,715	6,684	48.7	7,031	51.3
F1960	13,987	6,790	48.5	7,197	51.5
F1961	15,017	8,060	53.7	6,957	46.3
F1962	15,011	8,509	56.7	6,502	43.3
F1963	14,812	8,642	58.3	6,170	41.7

*The above sales figures represent sales of steel wool soap pads through grocery stores and supermarkets taken from CX 48.

OPINION OF THE COMMISSION

MARCH 11, 1966

BY JONES, *Commissioner*:

On September 30, 1963, complaint issued against respondent General Foods Corporation (General Foods) charging it with violation of Section 7 of the Clayton Act by reason of its acquisition on December 31, 1957, of the assets of The S.O.S. Company, Inc. (S.O.S.). The complaint alleged that the effect of the acquisition "has been, or may be, substantially to lessen competition or tend to create a monopoly in the manufacture, distribution and sale of household steel wool * * * throughout the United States * * *."

On December 18, 1964, the hearing examiner filed his initial decision. The hearing examiner concluded that General Foods' acquisition of S.O.S. had the tendency substantially to lessen competition and consequently violated Section 7 of the Clayton Act. Respondent has appealed and urges, first, that the examiner erred in defining the relevant product market as consisting solely of household steel wool products and excluding from this definition some 40 other cleaning devices; second, respondent contends that this product extension merger was totally dissimilar in type and effect on competition to Proctor & Gamble's acquisition of The Clorox Company, held illegal by this Commission in 1963 (*The Proctor & Gamble Co.*, Docket 6901) [63 F.T.C. 1465], and indeed that respondent's acquisition of S.O.S., rather than diminishing competition, has brought much-needed competition in an industry which had been characterized by peaceful competitive co-existence. Accordingly, respondent contends that the complaint against it should be dismissed. We will consider these arguments seriatim.

I

The Relevant Product Market [1]

The examiner found that the appropriate line of commerce or product market for measuring the effect of the acquisition is household steel wool. This product market consists primarily of soap-impregnated steel wool pads, but also includes plain household steel wool pads with or without separate pieces of soap. Respondent, condemning this market as "artificial," contends that, in addition to steel wool pads, approximately 40 other kitchen clean-

[1] The hearing examiner found, and both parties agree, that the relevant geographic market is the entire United States.

ing devices, composed of such materials as plastic, cellulose and metals other than steel, should be included in the market. Two of these devices are impregnated with soap and the remainder are not.[2]

A. *The Criteria for Determining the Appropriate Product Market*

The standards to be applied in delineating a line of commerce do not depend upon the form of the merger but on the realities of the market in which the merged companies operate.[3]

The relevant market is the "area of effective competition" within which the respondent operates, *Standard Oil Company of California* v. *United States,* 337 U.S. 293, 300, n. 5 (1949). "[T]he problem of defining a market turns on discovering patterns of trade which are followed in practice." *United States* v. *United Shoe Machinery Co.,* 110 F. Supp. 295, 303 (D. Mass., 1953); *aff'd per curiam,* 347 U.S. 521 (1954). The boundaries of the market "must be drawn with sufficient breadth to * * * recognize competition where, in fact, competition exists." *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 326 (1962). The product line must be "sufficiently inclusive to be meaningful in terms of trade realities". *Crown Zellerbach* v. *F.T.C.,* 296 F. 2d 800, 811 (9th Cir. 1961). *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 357 (1963).

The fact that different products may in some sense be competi-

[2] The examiner classified the devices which are claimed by the respondent to be part of the relevant market as follows: "(a) 14 are steel wool pads which counsel in support of the complaint agree are properly includable in the 'line of commerce,' whether soap-impregnated or not. (b) 13 items are plastic mesh balls or pads, some of which have a sponge inside the ball or mesh, but none of which are soap-impregnated. Respondent's product 'Tuffy' is in this group. (c) 14 items are basically plastic or cellulose sponges with an abrasive surface joined to one side of the sponge. Minnesota Mining and Manufacturing Company's 'Rescue' is in this group and is soap-impregnated. (d) 7 items are pads of metal mesh made of metal other than steel wool, but none of which are soap-impregnated. (e) 2 items are fiber dish cloths coated with an abrasive substance, neither of which is soap impregnated" (I.D., par. 15).

[3] Cases to date involving "conglomerate" mergers have used the same tests for defining the relevant market and measuring the effects of such mergers as those applied to test the effects of horizontal and vertical mergers; see *Consolidated Foods Corp.* (Dkt. 7000, 1962); *rev.* 329 F. 2d 623 (7th Cir. 1964); *rev.* 380 U.S. 592 (1965); *Reynolds Metals Co.* v. *F.T.C.* 309 F. 2d 223 (D.C. Cir. 1962); *Union Carbide Corp.,* 59 F.T.C. 614, 642–3, 658 (Dkt. 6826, 1961); and the *Procter & Gamble Co. (Clorox)* (Dkt. 6901, 1963), [63 F.T.C. 1465]. Legal commentators and economists who have discussed "conglomerate" mergers have similarly not suggested the application of any different tests to define the relevant product market in such mergers. See for example, Turner, "Conglomerate Mergers and Section 7 of the Clayton Act," 78 Harvard Law Review 1313 (1965); Clark, "Conglomerate Mergers and Section 7 of the Clayton Act," 36 Notre Dame Lawyer 255 (1961); Edwards, "Conglomerate Bigness as a Source of Power", Business Concentration and Price Policy 331 (1955); Stocking, "Conglomerate Bigness—Comment," Business Concentration and Price Policy 352 (1955); Blair, "The Conglomerate Merger in Economics and Law," 46 Georgetown Law Journal 672 (1958); Adelman, "Antitrust Problems: The Anti-Merger Act 1950–60," American Economic Association at 236; Day, "Conglomerate Mergers and 'The Curse of Bigness,'" 42 N. Carolina Law Review 511 (1964); Comment, "Conglomerate Mergers Under Section 7 of the Clayton Act," 72 Yale Law Journal 1265, 1270 (1963).

tive with each other is not sufficient to place them in the same market if by themselves they constitute distinct product lines. In *United States* v. *Aluminum Co. of America. (Alcoa-Rome Cable)*, 377 U.S. 271, 275 (1964), insulated aluminum conductor was considered a separate market although the Court conceded that there was sufficient competition between this product and its copper counterpart to justify grouping these two products in a single product market. In *Union Carbide Corp.*, 59 F.T.C. 614, 655 (Dkt. 6826, 1961), the Commission noted that "there is and will continue to be competition between polyethylene film and other flexible packaging materials" but nonetheless place them in separate lines of commerce. Competing products have also been placed in separate product markets in a number of other cases, including *United States* v. *Lever Bros. Co.*, 216 F. Supp. 887, 891 (S.D.N.Y. 1963) (where low sudsing detergents and high sudsing detergents were placed in separate markets despite the "direct competition" between them), and *United States* v. *Aluminum Co. of America, et al.*, 233 F. Supp. 718 (E.D. Mo. 1964) (where a market was found for aluminum curtain wall despite the competition between it and other types of building materials). See also *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 356 (1963); *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 593 (1958); *Crown Zellerbach Corp.* v. *F.T.C.*, 296 F. 2d 800, 814, 815 (1961); *Reynolds Metals Co.* v. *F.T.C.*, 309 F. 2d 223, 229 (D.C. Cir. 1962) and *United States* v. *Pennzoil Co.*, 1966 Trade Cases Par. 71, 659 (W.D. Pa. 1966).

Similarly, the fact that "substitute" products are available does not compel the conclusion that they be placed in the relevant market. In *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957) the market was restricted to "automotive fabrics and finishes" even though the same or similar products were utilized in other industries. In *Union Carbide Corporation, supra,* the Commission acknowledged that there were "adequate substitutes" for polyethylene film as a flexible packaging material but nevertheless excluded such substitutes from the relevant market. See also *Consolidated Foods Corp., supra* (where dehydrated onion and garlic were held to comprise a separate market, even though a broader market could presumably have been considered including fresh onion and garlic, as respondent therein contended); *Reynolds Metals Co.* v. *F.T.C.*, 309 F. 2d 223 (D.C. Cir. 1962) (where the market was narrowly defined to be decorative aluminum foil sold to the florist trade, as distinct from aluminum deco-

rative foil, aluminum household foil and perhaps even wrapping paper); and *Clorox, supra,* (where household dried bleach was shown to be available as a substitute product for certain purposes but was nevertheless excluded from the market, which was confined to household liquid bleach).

The applicable legal test for defining a product market for the purposes of determining the effect upon competition of a merger or acquisition was most recently reaffirmed in the *Brown Shoe* opinion, *supra* at page 325:

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist, which, in themselves, constitute product markets for antitrust purposes. *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 593–595. The boundaries of such a submarket may be determined by examining such practical indicia 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. Because § 7 of the Clayton Act prohibits any merger which may substantially lessen competition "in *any* line of commerce" (emphasis supplied), it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition. If such a probability is found to exist, the merger is proscribed.[4]

While conceding the validity of the tests enumerated in the *Brown Shoe* case, respondent nevertheless argues that the relevant market must be defined to include all products which could in any sense be regarded as competitive. In support of this view respondent relies heavily on the Supreme Court decision in *United States* v. *Continental Can.* 378 U.S. 441 (1964), decided three weeks after *Alcoa-Rome Cable, supra.* In *Alcoa,* the merger challenged was between two aluminum conductor producers and defendant argued that its acquisition did not have the prohibited impact on competition because of the existence of substitute prod-

[4] The criteria enumerated in *Brown Shoe* did not spring full-blown from the Supreme Court but had been developed in the preceeding cases decided under Section 7 subsequent to its amendment in 1950. For example, (1) industry and public recognition of the market was regarded as a significant factor in defining the market in *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y. 1958) and *A. G. Spalding & Bros.*, Inc., 56 F.T.C. 1125, 1160 (Dkt. 6478, 1960), aff'd. 301 F. 2d 585 (3rd Cir. 1962); (2) the "peculiar characteristics and uses" of automotive fabrics and finishes was the sole basis for the finding of the market in *United States* v. *E. I. du Pont de Nemours & Co. (General Motors)*, 353 U.S. 586, 593–95 (1957); (3) the distinct prices of two product lines was one of the factors cited by the Commission in the *Spalding* and *Union Carbide* cases in placing such products in separate markets; (4) price sensitivity was one of the tests applied in *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 259 F. 2d 524, 530 (2nd Cir. 1958) and; *Union Carbide*, 59 F.T.C. 614 (Dkt. 6826, 1961).

ucts (*i.e.*, insulated copper conductors) which therefore required a broader market definition comprising all competitive products. The Court rejected this argument, finding that whatever the broader market might be, a meaningful product also existed consisting of aluminum conductors alone.

In *Continental Can,* the Court was confronted with just the reverse of the situation in *Alcoa.* In *Continental Can,* the acquiring company, Continental, produced metal containers and the acquired company produced glass containers. Thus, the issue before the Court was whether a broader market encompassing both products was meaningful; the Court was not concerned with the question as to whether a more limited product market also existed. The Court held that metal and glass containers were in the same product market for the purposes of considering the effects of the acquisition, even though the Court considered the products of the two companies to be in "separate industries" and to comprise distinct "product markets." The market defined by the Court in *Continental Can* was that delimited by the "outer boundaries" referred to in the *Brown Shoe* opinion; but the Court took pains to point out that its finding with respect to this broader market did not preclude the finding of narrower submarkets within the more comprehensive market:

> * * * That there may be a broader product market made up of metal, glass and other competing containers does not necessarily negative the existence of submarkets of cans, glass, plastic or cans and glass together, for "within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes." *Brown Shoe Co.* v. *United States,* 370 U.S., at 325 (378 U.S. 457–58).

In short, the test of the relevant market is whether a given line of products constitutes an economically significant market and whether that market is "sufficiently inclusive to be meaningful in terms of trade realities." *Crown Zellerbach Co.* v. *F.T.C.,* 296 F. 2d *supra* at 811. In defining the market it is immaterial that there may be other broader or narrower markets in which the companies are also operating.[5]

[5] Respondent argues that "whatever the technical definition of the product market no rational evaluation of present or future competitive conditions can be made without taking non-steel scouring devices into account" (Respondent's Brief on Appeal, page 26). It is clear, however, under Section 7 of the Clayton Act, that once the appropriate product market for determining the effect of the merger has been defined, the only consideration which is relevant is whether or not there is a reasonable probability that competition in that market may be substantially lessened. "If such a probability is found to exist the merger is proscribed." *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 325 (1962). Consequently, we reject respondent's contention that whatever the definition of the market may be we must nevertheless still consider the broader cleaning device market in our assessment of the competitive impact of respondent's merger.

B. *Application of the Brown Shoe Criteria To Define the Relevant Product Market*

Although seven separate criteria are suggested in *Brown Shoe* for use in defining the market, the opinion did not indicate that all of them must necessarily be considered in each case. We find the following factors are particularly significant in this case:

1. *Industry or public recognition of the submarket as a separate economic entity* [6]

The producers of household steel wool recognized that the product, which they frequently referred to as a "soap pad," constituted a distinct market and looked only to the steel wool products manufactured by each other in setting prices and making marketing decisions. Thus respondent, in its pre-acquisition report, considered only the steel wool products of S.O.S. and Brillo in making its determination that S.O.S. had "60 per cent of the national dollar volume" (CX 5(b)).

Furthermore, in separate studies prepared for respondent by Market Facts, Inc., in 1959 (RX 12), by National Family Opinion, Inc. in 1962 (RX 14) and by Foote, Cone and Belding in 1963 (RX 15), the market was again referred to as the "soap pad market," which included steel wool products and excluded other cleaning devices. Other non-steel wool cleaning devices were considered in the 1963 Foote, Cone & Belding report, but they were consistently referred to as constituting a different market separate and distinct from steel wool pads. Even for the purpose of this litigation counsel for respondent was unable to produce any study of a market including both steel wool and non-steel wool devices.

It is clear that the only competition which respondent seriously considered in the advertising, packaging and production of its product was that offered by Brillo household soap-impregnated steel wool pads. Thus, in its pre-acquisition study of S.O.S., respondent made a distinction between the "direct competition" between S.O.S. and Brillo and the "indirect competition" between S.O.S. and such articles as "abrasive sponges and bronze or stainless steel scouring pads" (CX 7, p. 10). After its acquisition of S.O.S., respondent continued its preoccupation with the sales of S.O.S. as compared with those of Brillo and did not concern itself with the market roles of the cleaning devices which it now claims

[6] Respondent misstates this test as " 'industry and public recognition' of the presence or absence of competition between the products under consideration" (Respondent's Brief on Appeal, page 17).

are part of the market. Thus after the acquisition respondent revamped the advertising and packaging of S.O.S. pads in an attempt to demonstrate or convey the impression that the S.O.S. pad rusted less and "actually carried more soap than the average Brillo pad" (Tr. 1079). A change in the color of the soap pad from red to blue was prompted by studies which "had indicated that the reddish soap used by both Brillo and S.O.S. reminded the housewife of rust" (Respondent's Brief on Appeal, page 11). Moreover, when respondent launched an onslaught on the New York market in 1959, the only other product which it took into consideration was the Brillo soap pad (RX's 12, 17, 42; Tr. 1089).

One of the products now claimed by respondent's counsel to be directly "competitive" and to have been artificially excluded from the relevant product market is respondent's own plastic device, "Tuffy." This must come as a surprise to respondent's own officials, who, as shown by the record, had apparently never considered "Tuffy" to be directly competitive with the S.O.S. soap pads. In a report prepared for the board of directors prior to the acquisition it was stated that "Tuffy and S.O.S. are complementary rather than competitive." (CX 5(b)). In General Foods' acquisition study of S.O.S., Tuffy was stated to be part of the "indirect competition" with S.O.S. At the hearing, a former general manager and the present general manager of the Kool-Aid Division of General Foods which now includes S.O.S. pads, testified that Tuffy did not compete with "S.O.S." (Tr. 626, 761–762).

Respondent's own general manager up to the time of this litigation had been totally unaware of even the existence of many of the cleaning devices now alleged by respondent to be part of the relevant product market and directly competitive with steel wool pads (Tr. 791–795, 816–817).

Finally, it should be noted that the other steel wool pad manufacturers regard themselves as constituting a separate and distinct industry. Thus, the president of Durawool Company testifying at the hearing drew a careful distinction between what he characterized as "the new products" (meaning non-steel wool products) and those "in the industry" (consisting of steel wool producers) (Tr. 875). The president of Demcorp testified that the non-steel wool devices did not offer his product any "direct competition" and that he did not "take the prices of the other products into consideration when he set his price" (Tr. 974). The president of Alloy Metal Wool Products declared that his only competitors were Brillo, S.O.S., Durawool and American Steel

Wool Company, and that he had not considered the non-steel wool devices to be "competitive items" (Tr. 897–898).

It is obvious that if respondent and the other steel wool soap pad manufacturers regard themselves as a separate market, then it is this market in which the impact of respondent's acquisition must be judged. It cannot be said that the existence and conduct of other manufacturers outside this market must be considered where the soap pad manufacturers themselves do not take these substitute product manufacturers into account in their own pricing and marketing decisions.

2. *The product's peculiar characteristics and uses*

The steel wool pad is composed of triangular-shaped steel strands with three cutting edges. When used, a number of the edges are pressed down, and the pad cleans the surface in a manner similar to a knife or a razor blade. The soap with which a soap pad is impregnated lubricates, inhibits scratching, facilitates polishing, and removes grease and grime (Tr. 432, 629, 893, 939, 978–979). The steel wool pad is a soft and pliable product which is able to reach crevices and corners (Tr. 844).

The primary use of steel wool pads is the scouring of pots and pans; the general manager of respondent's Kool-Aid Division estimated on the pad usage basis that this use constitutes "at least 80 percent of the total volume" (Tr. 759). Other uses, described as peripheral, are cleaning white-wall tires, floors, walls, stoves, aluminum doors and windows and barbecue grills.

Physically, the non-steel wool cleaning devices which respondent's counsel argues should be included in the relevant market are unquestionably distinct. They are composed of a variety of substances such as plastic, copper and abrasive surface sponges, none of which closely resembles steel wool. Furthermore, only two of the non-steel wool devices, unlike the overwhelming number of steel wool pads produced, contain soap.

The examiner found that steel wool pads "made a particularly effective abrasive" (I.D. par. 18) and that none of the other devices "are able to perform the wide range of household cleaning jobs as well as household steel wool" (I.D. par. 20). Respondent's counsel accuse the examiner of "substituting his own *personal* judgment for that of the market place with respect to the *quality* of the different scouring devices involved" and further disparages the examiner's finding by declaring that his "personal quality judgment is without evidentiary support" (Respondent's Brief on Appeal, page 19).

We find, however, that the examiner's finding, which coincides with the conclusions of S.O.S.' and repondent's own officials who testified at the hearing, is amply supported by the record, and we note that the only evidence which respondent offered to contradict this evidence consisted of advertising claims made for some of the purportedly competitive products. A former general manager of the respondent's Kool-Aid Division testified flatly that "For the uses that S.O.S. was advertised for and pictured on the box, it was better than other products" (Tr. 624). He further testified that respondent had tested a number of other cleaning devices and found that none of them could "perform as well as the S.O.S. steel wool soap pad * * * for the purposes that we advertise on the box" (Tr. 626). The president of S.O.S. prior to the acquisition testified that his company had "found there was nothing in [its] opinion that was as good as steel wool abrasive" (Tr. 429–30) and that in his opinion "soap pads are the best cleanser I know of" (Tr. 431). Moreover, respondent's own plastic device, "Tuffy," which, according to a study prepared for respondent in 1962 (RX 14(m)), is by far the largest of all of the non-steel wool cleaning devices which respondent seeks to include in the relevant market, was not devised or used for scouring pots and pans, according to respondent's own officials who testified at the hearing (Tr. 626, 761) as well as respondent's preacquisition report, in which it had stated:

S.O.S. in the kitchen is used primarily for scouring pots, pans, stoves, etc, while Tuffy is used much as a dish rag is used (CX 5(b)).

Also, at least four other plastic devices, "Dobie," "Handy Mandy," "Polly Puff," and "Reddy," which respondent's counsel claim should be included in the market, do not even claim in their advertisements that their products can be used for scouring pots and pans. (See respondent's proposed findings, pp. 148, 152, 155 and 156).

Accordingly, we find that household steel wool has unique physical characteristics; that many of the allegedly competitive devices are not even claimed to perform all of the household chores performed by steel wool, including its principal task, scouring pots and pans; and that those as to which such claims are made are substantially inferior in the performance of such tasks.

3. *Distinct prices*

The unit sales prices of steel wool soap pads and the other cleaning devices claimed by respondents to be part of the same

market differ markedly from each other. (See Appendix B, Table IV.) Steel wool soap pads sell at a range of 1.4 cents to 2.8 cents (the latter representing the price at which S.O.S. and Brillo pads normally sell,[7] while the prices per item of the non-steel wool devices range from 6 cents to 29 cents. Respondent emphasizes the fact that the prices per package of certain of the non-steel wool devices (13 of which sell for 29 cents and one of which sells for 27 cents) are comparable to those of Brillo and S.O.S. pads (28 cents per package). However, the number of units per package varies so widely as to render the package price meaningless in any comparison of prices between steel wool and non-steel wool devices. For example, one "Scotch Brite" pad separately packaged sells for 29 cents, while the allegedly comparable "package" of Brillo or S.O.S. soap pads which sells for 28 cents per package contains ten pads. Similar examples could be multiplied. Moreover, in considering respondent's argument it should be noted that in the case of many of the scouring devices which respondent claims should be included in the relevant market (8 of which sell for less than 20 cents) even the package prices bear no relationship of any kind to the prices of the dominant steel wool brands.

It is clear that while the prices of steel wool pads are substantially identical, they bear little or no relationship to the prices of non-steel wool cleaning devices. The only way in which prices could be compared would be to make estimates of the useful life of the 29-cent single pad, for example, as compared with the 10 S.O.S. pads selling for 28 cents. Surely, the need to make such a computation in order to compare prices almost by itself demonstrates the distinctiveness of the steel wool products as compared with the other cleaning devices which respondent urges be included in the relevant market.

4. *Sensitivity to price changes*

Although there is no direct evidence as to consumer sensitivity to price changes, the record does make it clear that respondent and the other steel wool manufacturers paid little or no attention to the prices of the non-steel wool devices. The former manager of respondent's Kool-Aid Division testified that respondent "didn't pay much attention to the pricing structure of these small products" in setting its prices (Tr. 626). The present general manager of this division was almost totally ignorant of the prices of the non-steel wool devices (Tr. 790–795), thus clearly indicating that the prices of such goods were of slight concern to respon-

[7] Brillo also has a special purpose Brillo Whitewall Tire pad which sells for 7.3 cents.

dent. The smaller steel wool manufacturers who appeared at the hearing also testified unanimously that the only prices which they took into consideration were the prices of other steel wool products and that they did not consider the prices of the non-steel wool devices in setting their prices (Tr. 841, 973–938 and 897–898).

5. *Unique production facilities*

The facilities required for the production of steel wool are distinct from those required for the other cleaning devices cited by respondent. The production of steel wool requires large, complicated cutting machines and other accessory equipment is required such as "take-offs" and "balling machines" (Tr. 828), for the automatic shaping, soap-impregnation and drying of the product. The machines are not generally available on the open market, but are custom-made to the manufacturer's specification (I.D. 17). The machines used in the production of steel wool can be used for no other function than the production of steel wool (I.D. 17).

C. *Conclusion*

In conclusion we find of particular significance the facts that: (1) household steel wool is recognized by the industry as a separate and distinct market and that in making marketing decisions and in setting their prices the manufacturers of this product do not take into account the plastic and other types of cleaning devices referred to by respondent; (2) the substitute products advanced by respondent are significantly inferior in performance of the household cleaning chores performed by household steel wool and therefore they can at best offer only indirect competition to the household steel wool manufacturers; (3) there is a substantial difference between the price of steel wool and that of the plastic and other type cleaning devices; (4) and the machines used for the production of steel wool are distinct from those used for the production of the allegedly competitive cleaning devices. Accordingly, we are of the opinion that it would be economically unrealistic to include said other products in the relevant market. Since the household steel wool industry is economically significant and sufficiently inclusive to be meaningful in terms of trade realities it seems clear that the hearing examiner was correct in determining that this is the appropriate market for adjudging the effects of the merger.

We note that the same conclusion was reached by the Commission in *Brillo Mfg. Co., Inc.* (Dkt. 6557, 1963) [64 F.T.C. 245;

253, 254] in which we considered the precise issue now before us. As we stated in that case:

* * * Steel wool is generally recognized as an essentially unique product, *i.e.*, possessing peculiar characteristics and uses. It can be used either wet or dry on either a wet or dry surface. It will both clean and polish soiled and oxidized surfaces. It is fine and flexible so that it can be used on rough and irregular surfaces. * * *

* * * [N]o competing product is capable of the variety of applications possible with steel wool. Any householder who has ever utilized steel wool to clean cooking utensils, white-wall tires, golf clubs, rusty tools, linoleum or tile floors, and to remove peeling paint or rust recognizes that this is a uniquely versatile product. * * *

* * * Moreover, both the industry members and the public recognize steel wool as an essentially unique product sold and distributed in its own separate markets. There is little or no cross-elasticity of demand between steel wool and other products. The machinery upon which it is produced cannot be utilized to produce products other than metal wool. * * *

* * * The single most peculiar "characteristic and use" of steel wool and steel wool products is that no other product will perform all of the multiple function of steel wool in either the household or in the industrial market. The housewife can buy steel wool for dozens of household uses rather than buying separate products for each use. The same fact applies equally in the industrial field. Although other products may compete with steel wool for some uses, such demand exists at the outer boundaries of the steel wool market and need not be considered in evaluating the competitive impact of this merger between two steel wool producers.

II

The Competitive Effects of the Merger

The acquisition of S.O.S. by General Foods demonstrates the same anticompetitive effects as the acquisition by Procter & Gamble of The Clorox Chemical Company, which the Commission recently held to be violative of Section 7 of the Clayton Act. *The Proctor & Gamble Company* (Dkt. 6901, 1963) [63 F.T.C. 1465] (herein called the *Clorox* case). There is a substantial identity both in the structure of the household steel wool market involved in this case and the structure of the liquid bleach market involved in the *Clorox* case and in the significant operative facts respecting the impact of those mergers in their respective markets. A detailed comparative analysis of the relevant facts in the two cases is attached hereto as Appendix A.[8] While we will not detail in our opinion all of the factual similarities which are set forth in

[8] The facts recited in Appendix A, together with those referred to in this opinion and those found by the hearing examiner to the extent the latter are not inconsistent constitute our Findings of Fact in this case.

Appendix A, a few of the major conclusions respecting the competitive significance of these facts will serve to illustrate the basic identity of the two acquisitions and the reasons why our factual and legal analysis and conclusions in the *Clorox* case are applicable with even greater force to demonstrate the anticompetitive and illegal nature of General Foods' acquisition of S.O.S.

A brief summary of the operative facts respecting respondent's acquisition of S.O.S. is necessary before analyzing the competitive impact of this acquisition in the relevant household steel wool market.

A. *The Household Steel Wool Market*

S.O.S. at the time of its acquisition by General Foods in December 1957 was basically a single-product company engaged principally in the production of household steel wool pads (App. A, pars. 1, 3). Its sales of this product amounted to $14.6 million in 1957, representing 51% of the household steel wool market (App. A, par. 6). It also manufactured industrial steel wool which both parties agree is not included in this market definition as well as one plastic scouring device (App. A, par. 3). Its principal competitor, Brillo Manufacturing Company, Inc., also primarily a single-product company, accounted for 47.6% of the household steel wool market and the remaining 1.4% of the market was accounted for by three small companies with net assets valued at less than $500,000 each (App. A, pars. 5–7). Household steel wool products on the market are virtually indistinguishable from each other (App. A, par. 16). They are low-price, high-turnover household consumer commodities sold to consumers through grocery and supermarket outlets (App. A, par. 17).

Advertising is an essential factor in the marketing of steel wool pads, both as a means of building brand loyalty and of securing adequate shelf space (App. A, pars. 18–20). S.O.S. and Brillo had advertising budgets in 1957 of $2.2 and $1.8 million respectively, expended primarily for daytime TV and magazines (App. A, par. 19). Their three small competitors lacked the financial resources for advertising to any appreciable extent and accordingly were forced to market their products principally under private labels and through discount houses (App. A, pars. 20, 24).

Respondent General Foods Corporation is the largest producer of packaged food in the United States, with net sales of $1 billion (App. A, pars. 25, 27). General Foods also produces some nonfood items such as bluing (App. A, par. 26). All of its products are

low-price, high-turnover household consumer commodities sold to consumers through the same grocery and supermarket outlets as are S.O.S. steel wool soap pads (App. A, par. 25). Mass advertising and promotions are essential factors in the marketing of General Foods', product lines (App. A, par. 28). General Foods had an advertising budget of $105 million and expended a substantial portion of this on nighttime TV. Its budget for consumer and trade promotions, which neither S.O.S. nor Brillo engaged in, amounted in 1957 to $19 million, exceeding S.O.S.' total sales in that year (App. A, par. 28).

After its acquisition by General Foods, S.O.S. was organized first as a separate division of General Foods and later, in 1960, was merged with General Foods Kool-Aid Division, the products of which were, like S.O.S. pads, also sold through food brokers (App. A, par. 33(g)). In 1962 General Foods incorporated the distribution of its Kool-Aid Division products into its overall distribution-sales service warehousing and distributive system, thus effecting estimated economies in transportation, warehousing and sales costs of $647,000, of which $388,000 was attributed to savings effected respecting the products of the Kool-Aid Division (App. A, par. 33(f)). This incorporation of S.O.S. directly into General Foods' overall distributional organization provided an incentive for General Foods' customers to include S.O.S. products in their orders of other General Foods products. Furthermore, S.O.S. could and did induce purchases by offering discounts based on combined purchases of the products of various divisions of General Foods. Presumably, General Foods warehousing and distributive system also improved S.O.S.' national availability (App. A, par. 33(f)). General Foods improved the appearance of the S.O.S. pad as well as its advertising. The costs of advertising S.O.S. products were substantially reduced by reason of the discounts which were available as a result of the overall General Foods advertising budget, estimated to amount to a net saving of 23% or a net increase in TV time of 28% in the case of network TV advertising, a 15% decrease in the cost of spot-TV advertising, a 5.5% decrease in radio advertising and a range of 5–15% discount in magazine advertising. General Foods also engaged in substantial consumer and trade promotions respecting S.O.S. pads which S.O.S. had not itself engaged in prior to the acquisition (App. A, pars. 33(a)–(d), (i)).

After the acquisition, S.O.S.' share of the market increased from 51% in 1957 to 56% in 1962. The market share of Brillo,

its nearest competitor, declined during this same period from 47.6% to 41.8%. The combined share of the three remaining companies increased slightly by 0.8%. On an absolute basis, S.O.S.' sales of soap pads grew from $14.6 million in 1957 to $19.1 million in 1962, an increase of 31% while Brillo's sales rose from $13.6 million to $14.3 million for the same period, or an increase of only 5% (App. A, par. 34). In December 1963 Brillo merged with Purex Corporation Limited, a manufacturer of household cleansing products, with total sales for its fiscal year ended June 30, 1963 of $127 million (App. A, par. 37).[9]

B. *Competitive Impact of Respondent's Acquisition*

General Foods' acquisition of S.O.S. and consequent entry into the household steel wool market is a product extension merger identical in all respects to the extension of Procter & Gamble's product line to liquid bleach, a product which it had not theretofore produced or sold. As we noted in our *Clorox* decision, product extension mergers involve functionally closely related products by which we stated we "meant to * * * suggest the kind of merger that may enable significant integration in the production, distribution or marketing activities of the merging firms" (*Clorox*, p. 15) [63 F.T.C., at 1543]. Integration at the marketing level we defined as encompassing integration of advertising and sales promotion activities and as resulting where the products of the merging firms were "sold to the same customers or are actually complementary" (*Clorox*, p. 15) [63 F.T.C., at 1543]. In *Clorox* we pointed out that Procter was engaged in the sale of a broad range of low-cost, high-turnover household consumer goods sold to the consumer in grocery and department store outlets primarily through mass advertising and sales promotions. The liquid bleach market was held by us to be "virtually indistinguishable" from the markets previously utilized by Procter for its product lines insofar as "the problems and techniques of marketing the product to the ultimate consumer are concerned" (*Clorox*, p. 17) [63 F.T.C., at 1545]. We pointed out that liquid bleach was functionally identical to Procter's product line "even if we look beyond household cleansing agents to the food, paper and toilet

[9] The record contains no market data after 1963. Accordingly, the discussion in this opinion of the competitive impact of General Foods' acquisition of S.O.S. concerns the steel wool soap pad market as it existed prior to this merger between Brillo and Purex. While the record does not permit a definitive appraisal as to the impact of this merger on the household steel wool market, it should be observed that one of the anticompetitive factors considered by the Courts in determining the validity of mergers is their likelihood of triggering other mergers in the same market thus pyramiding their own impact on the market. See *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 343–44 (1962).

products which round out the Procter line" (*Clorox*, p. 17) [63 F.T.C., at 1544].

The functional relationship between S.O.S.' steel wool soap pads and General Foods' product line is identical as respects the problems and techniques of marketing involved in both groups of products. Household steel wool, like liquid bleach, is marketed by the same techniques (principally advertising and promotions) and through the same distributional outlets (principally supermarkets) as General Foods' other products and is purchased by the housewife at the same time and along with the other products sold by General Foods. Thus we hold that General Foods' acquisition of S.O.S. involves functionally related products and constitutes a product extension merger cognizable under Section 7 of the Clayton Act (See App. A, pars. 17, 18, 25, 28, 33.)

The next question to be determined is whether this merger had the requisite anticompetitive effects to render it illegal under Section 7.

We find that General Foods' acquisition of S.O.S. had the same anticompetitive effects as those which we found to exist in Procter's acquisition of Clorox and on which we based our conclusion that that acquisition had the effect of substantially lessening competition in the household liquid bleach industry. Here, as there, the market of the acquired company was highly concentrated and oligopolistic (App. A, par. 6). Indeed, the steel wool soap pad industry appears even more concentrated, since it does not have the large number of small fringe companies which characterized the liquid bleach industry.

In *Clorox*, the acquired company was the dominant factor in the industry, the only national seller in an industry consisting primarily of regional sellers and able to command a premium price for its product. Its nearest competitor of significance was Purex with 15% of the market, which confronted Clorox directly in only 50% of the national market. In the steel wool soap pad industry, the acquired company, S.O.S., prior to its acquisition was also a dominant industry factor able to command a premium price, but, unlike Clorox, S.O.S. shared its dominant market position with Brillo (App. A, par. 6). Thus, the impact of General Foods' acquisition of S.O.S. was of greater anticompetitive significance than Procter's acquisition of Clorox, since whatever competition existed between Brillo and S.O.S. was far more distorted by the entry of General Foods into that market than was the competitive structure of the liquid bleach market by Procter's entry

into that market. General Foods' entry into the household steel wool market eliminated the competitive balance between S.O.S. and Brillo and weighted it irrevocably in favor of S.O.S.

Thus, whereas in *Clorox* the acquisition of Clorox operated primarily quantitatively to render even more dominant the single dominant industry member, in the instant case the acquisition of S.O.S. by General Foods operated qualitatively as well to eliminate the market balance which had prevailed between the two dominant members of the industry and created a situation in which S.O.S. as a result of its acquisition by General Foods acquired decisive competitive advantages over Brillo. As we noted in our *Clorox* decision, it is the disproportionate strength of the companies in a market which is of major significance in judging its competitive viability or lack thereof (*Clorox*, pp. 23–27) [63 F.T.C., at 1548–1551].

Not only did General Foods' acquisition of S.O.S. contribute to and increase concentration in the steel wool industry, but it also operated to render almost insurmountable the barriers to entry surrounding this market. In this case, as in *Clorox*, the barriers to entry were high prior to the acquisition.[10] In each case, the product of the acquired company was functionally identical to that produced by smaller companies but was differentiated through extensive advertising and a long history of dominance in the field to such an extent that the smaller companies in the industry producing less well-known brands and potential producers of new brands could not penetrate the market to any significant degree, absent huge investments in advertising and promotions (App. A, pars. 16–23). The entry of General Foods into the household steel wool market substantially heightened the factual and psychological barriers to entry to that market, just as the entry of Procter in the liquid bleach market raised the barriers surrounding that market (App. A, par. 33). As we held in *Clorox*, such substantial heightening of the barriers to entry constitutes an important element in the finding that a merger is in violation of Section 7 (*Clorox*, p. 50) [63 F.T.C., at 1568].

General Foods, like Procter, is a powerful company, strongly entrenched in the marketing of low-cost consumer products to grocery stores with huge financial resources and advertising

[10] The high barriers to entry into the household steel wool market prior to the acquisition were attested to by General Foods in its pre-acquisition study, in which it concluded that "the fact that S.O.S. and Brillo have well-established product franchises is undoubtedly a restraining factor which does not invite widespread competition even though profit margins are very attractive" (CX 7, p. 23).

budget (App. A, pars. 25–28). Its presence in the soap pad market where the existing competitors were relatively small, like Procter's presence in the liquid bleach market, operated as a formidable barrier to new market entrants who, in order to gain a significant foothold in the market, would have to withstand the powerful competitive weapons available to General Foods which would immediately confront them upon their first entry (App. A, par. 33). Furthermore, General Foods' merger had exactly the same consequence which we noted in our *Clorox* decision is an important anticompetitive result of mergers of this type, namely, that of motivating the remaining firms in the market to seek protection by affiliating by merger with companies larger than themselves (*Clorox*, p. 55) [63 F.T.C., at 1573]. This was what we predicted would happen in *Clorox* and what actually did occur after General Foods' acquisition when Brillo merged with Purex (App. A, par. 38).

General Foods' entry into the household steel wool market conferred on S.O.S. a series of advantages which its competitors could not match (App. A, par. 33). As we noted in our Clorox decision, "the merger of a relatively small, single-product firm with a very large multi-product firm enables substantial cost savings and other advantages in advertising and sales promotion, especially in television advertising." All of the discount rate and other cost-saving advantages in television,[11] radio and magazine advertising and in promotions as well as in marketing and distribution which accrued to Clorox as a result of its acquisition by Procter were demonstrated in this case to have accrued in large part to S.O.S. after its acquisition by General Foods (App. A, pars. 33(a)-(d)).

Due to the functional identity of the various household steel

[11] Respondent seeks to belittle the impact of the television discounts available to S.O.S. after the acquisition by contending that as a matter of fact Brillo was more efficient in its television advertising and that its television advertising costs were lower than those of S.O.S. (Respondent's Brief on Appeal, pp. 49–51). We reject this argument on its facts and on its logic. Respondent's calculations of relative costs and efficiency are based on Neilsen's estimates of actual viewers after the program has been contracted, paid for and shown. Thus, if the program attracted more viewers than originally estimated respondent would equate the resulting lower per viewer cost with greater efficiency. What respondent is in fact equating with efficiency is the popularity of a program not originally anticipated and therefore not paid for. We do not believe that this is a proper basis for determining costs and efficiency of advertising. If the figures relied upon by respondent show anything, they demonstrate that for the program selected by respondent for its cost/efficiency calculation, S.O.S. spent far more on advertising after the merger than Brillo and its commercials reached many more viewers than Brillo's. S.O.S. was able to reach 700,120 viewers by spending $1,999,300 on the programs enumerated, whereas Brillo was able to reach only 336,459 persons as the result of its expenditure of $934,385 on the programs listed on which its commercials appeared (CX 170).

wool products (like the identity of the various liquid bleaches in their market), and the high degree of product differentiation, or preference by the consumers for the established, well-known brands, extensive advertising is crucial (App. A, pars. 16–22). Without widespread advertising a potential competitor cannot enter the market and an existing competitor will disappear (App. A, par. 18). Thus, just as Procter's ability to advertise and promote less expensively gave it a substantial competitive advantage over Clorox's competitors and inhibited the entry of new competitors so the ability of General Foods to secure lower advertising and promotion costs gave it a substantial advantage over S.O.S.' competitors and raised the barriers to entry into the market (App. A, par. 33).

After its acquisition by General Foods, S.O.S. could and did induce potential customers to purchase its steel wool pads by offering them discounts based on pooled purchases from various divisions of General Foods and by enabling customers to coordinate their steel wool soap pad orders with their orders of other General Foods' products. These were marketing advantages which accrued to S.O.S. solely as a result of the merger and which were not enjoyed by its single-product competitors (App. A, par. 33(f)).[12] Again, as was also true with Procter, General Foods' position as a well-established producer of "must" items made it likely that it would be able to obtain from retailers various advantages in the display or marketing of its products which were not available to S.O.S. prior to the merger or to any of its competitors, all of whom were small single-product firms (App. A, par. 33(h)).

To the extent that unlawful exercise of its marketing power by Procter was taken into account in assessing the competitive impact of its acquisition of Clorox, so must this same factor also be considered in appraising the competitive significance of General Foods' acquisition of S.O.S. (*Clorox,* pp. 48–49) [63 F.T.C., at 1566–1568]. In this connection we find the same potential anticompetitive possibilities to be present in the General Foods' acquisition. The significance of this factor did not depend in the *Clorox*

[12] Respondent in its brief denied that its incorporation of S.O.S. into its Kool-Aid Division, with the resulting consolidation of the warehousing and distribution facilities of the two companies, achieved any cost savings or increased efficiency (Respondent's Reply Brief, pp. 8–10). Complaint counsel, on the other hand, argued the reverse (Complaint Counsel's Brief, pp. 44–45). To the extent the point is relevant we find that cost savings did result (App. A, pars. 33 (f) and (g)). We note, however, in this connection that whatever cost savings were achieved were not reflected in any reduction in the list price of S.O.S. pads and in fact after the merger one price increase was announced (App. A, par. 36).

case on the few instances in the record where Procter had in fact exercised its power unfairly in the past, but rather on the fact that it possessed such market power to compete unfairly (*Clorox*, pp. 48–49) [63 F.T.C., at 1566–1568]. There is no doubt that the degree of market power enjoyed by General Foods is substantially identical to Procter's and that its possession of this power must be regarded as engendering the same potentially anticompetitive effects in the steel wool pad market as we found Procter's power potentially engendered in the liquid bleach market.

The so-called acceleration of competition which respondent alleges followed upon General Foods' acquisition of S.O.S. appears to us to have been somewhat ephemeral and in any event is not of such a quality as in our opinion changes or mitigates the deep underlying structural changes which General Foods' acquisition accomplished in this market and which, in our judgment, constitute the same type of competitive destruction which we foresaw in the liquid bleach market after Procter's entry and which led us to conclude that that merger was illegal. In our appraisal of respondent's claims respecting the competitive "awakening" which allegedly followed its acquisition of S.O.S., we find particularly significant the facts that during the six-year period which followed the acquisition the only price change made by S.O.S. and Brillo was a price *increase*, that by 1962 General Foods (S.O.S.) had increased its market differential over that of Brillo to 14.2%, in contrast with the modest lead of only 3% which it had had in 1957, and that there were no new entries into the market during the period in question (App. A, par. 34).

The record indicates that another major multiproduct company —Colgate-Palmolive Company—was engaged in the sale of household steel wool in Canada (Tr. 947–948), and thus could be regarded as a potential competitor of S.O.S. Presumably there were other companies engaged in the sale of low-cost, high-turnover commodities in supermarkets, which could also be considered to have been potential entrants. Therefore, the entry of General Foods into the market did not eliminate all potential competition. Nevertheless, its entry did have the effect of substantially lessening potential competition, since it raised to virtually insurmountable heights the barriers to entry which had already existed to some extent; thus, the acquisition severely limited the role which potential competition could otherwise have played as a critical check on the ability of S.O.S. to stifle competition in the steel

wool industry. (See *Clorox,* pp. 61–62 [63 F.T.C., at 1577–1578].)

In sum, we conclude that the same discrepancies in size between the acquired and acquiring company, the same threat posed by the acquisition to transform a basically single-product small firm industry into an industry in which the incentive will be to merge and ape the dominant company, the same probability that the acquisition would dampen or even eliminate whatever modest competition actually or potentially may have existed in the pre-acquisition market—all of these factors relied on in our *Clorox* decision apply with even greater force, and on the same legal and factual reasoning, to the steel wool soap pad industry.

As we emphasized in *Clorox*, advantages of scale can be an important factor heightening the barriers to entry and impairing competitive conditions in an industry. (See *Clorox* opinion at pp. 28–29, 31, 33, 46–47, 54, and 64–65 [63 F.T.C., at 1552, 1554, 1555, 1565–1566, 1571–1572, 1580–1581].) Whether a merger has or has not conferred benefits on either the customers of the acquired company or on the acquired company itself is not the primary inquiry which Congress and the Courts have commanded us to make in determining whether a merger violates the law or not. That a merger may "on some ultimate reckoning of social or economic debits and credits * * * be deemed beneficial" is a "value choice" from which we have been foreclosed from considering. *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 371 (1963). The central inquiry is whether the merger will probably substantially lessen competition.[13] As we pointed out in our *Clorox* opinion:

> In stressing as we have the importance of advantages of scale as a factor heightening the barriers to new entry into the liquid bleach industry, and so impairing competitive conditions in that industry, we reject, as specious in law and unfounded in fact, the argument that the Commission ought not, for the sake of protecting the "inefficient" small firms in the industry, proscribe a merger so productive of "efficiencies." The short answer to this argument is that, in a proceeding under Section 7, economic efficiency or any other social

[13] *E.g.,* 95 Cong. Rec. 11486. For discussion of the Congressional objectives in enacting the Clayton Act and of the case law see Comment, " 'Substantially to Lessen Competition . . . ,: Current Problems of Horizontal Mergers," 68 *Yale L. J.* 1627, 1660 (1959); Blake and Jones, "In Defense of Antitrust," 65 *Col. L. R.* 377, 382 (1965) and Bok, "Section 7 of the Clayton Act and the Merging of Law and Economics," 74 *Harv. L. R.* 226, 235–37, 318–21 (1911); some of the leading cases in which mergers were invalidated despite claimed efficiencies, *e.g., United States* v. *First National Bank and Trust Co.,* 376 U.S. 665 (1964); *United States* v. *El Paso Natural Gas Co.,* 376 U.S. 651 (1964); *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 370–71 (1963); *United States* v. *Bethlehem Steel Corp.,* 168 F. Supp. 576, 615–18 (S.D.N.Y. 1958).

benefit resulting from a merger is pertinent in only so far as it may tend to promote or retard the vigor of competition. * * * Congress did not mean the adjudicators of Section 7 cases to attempt to weigh the ultimate social and economic merits and demerits of a merger, but only to determine its effect on competition and monopoly (Op., p. 64) [63 F.T.C., at 1580].

In the instant case we have concluded that General Foods' acquisition of S.O.S. will in fact substantially lessen competition in the steel wool pad market. We have based this conclusion on our finding that respondent's acquisition of S.O.S. has raised to virtually insurmountable heights entry barriers which were already high, that the presence of General Foods in the market has changed the steel wool pad market which prior to the merger consisted of two substantially equal-sized companies and several smaller firms to one in which S.O.S. is now dominant, and finally that the substitution of General Foods for S.O.S. will depress rather than enhance the competitive vitality of the market and will paralyze any incentive to compete which might otherwise have existed. The fact that these high entry barriers to potential entrants and the impairment of the competitive vitality of the market arises in part because of the impact which General Foods' advertising, promotional and distributional resources had on potential and actual competitors in this market did not make its acquisition any less anticompetitive. Evaluation of competitive impact must take account of business reality and of the reaction of businessmen to a state of facts. The state of facts in the instant case is the effect on competition which General Foods' presence in this market will have. We have concluded that its presence in the market will be to lessen competition substantially. Because it chose to achieve this market position by merger it runs afoul of Section 7.

III

Relief

The order entered by the hearing examiner requires respondent to divest itself of the S.O.S. assets which were found to have been acquired in violation of Section 7. As we held in *Clorox,* this is the appropriate relief in a case involving a product extension merger of the type herein considered. We pointed out in *Clorox* that:

It is settled * * * that divestiture is normally the appropriate remedy in a Section 7 proceeding. *United States* v. *E. I. du Pont de Nemours,* 366 U.S. 316. This case would be a particularly inappropriate one in which to make an exception. The anti-competitive effects of this acquisition are non enjoinable.

They inhere in the very presence of Procter, standing in the place of Clorox in the liquid bleach industry [here the very presence of General Foods standing in the place of S.O.S. in the household steel wool industry], and can be corrected only by restoration of the market structure, so far as possible, as it existed at the time of acquisition (*Clorox* Opinion, p. 70) [63 F.T.C., at 1584].

In conclusion, therefore, the initial decision, as supplemented and modified to conform to this opinion and to Appendix A attached hereto, and the order entered by the examiner, are adopted as the decision and order of the Commission.

The Commission's decision of this case is without the concurrence of Commissioner MacIntyre.

Commissioner Elman dissented and has filed a dissenting opinion.

APPENDIX A

Comparison of Operative Facts in the General Foods and Procter & Gamble Cases

Facts in the *General Foods Corporation* Case, Docket No. 8600 A. The S.O.S. Company, Inc. and the Household Steel Wool Industry Prior to the Acquisition	Facts in the *Procter & Gamble Company* (Clorox) case, Docket No. 6901 (November 26, 1963) [63 F.T.C. 1465] A. The Clorox Chemical Company and the Household Liquid Bleach Industry Prior to the Acquisition
1. On December 31, 1957 General Foods Corporation (herein called GF) acquired The S.O.S. Company, Inc. (herein called S.O.S.) which was the nation's leading manufacturer of household steel wool (App. B., Table I). As of July 31, 1957 S.O.S. had net assets of almost $6 million and a net worth of $4,400,000, which was almost three times its total liabilities (CX 5(h)). Its net sales in 1956 amounted to $14,468,000, and its profits before taxes in that year ($3,214,000) amounted to a 22.2% return on net sales and over 72% of net worth as of July 31, 1957 (CX 5(h); CX 5(i)).	1. On September 30, 1957 Procter & Gamble Company (herein called P&G) acquired the Clorox Chemical Company (herein called Clorox) which was the nation's leading manufacturer of household liquid bleach. Clorox had annual sales of slightly under $40,000,000 (Clorox Opinion, pp. 1, 5) [63 F.T.C., at 1534, 1536].[1]
2. In GF's pre-acquisition report of S.O.S. it was stated that its sales of household steel wool would grow as	2. P&G prepared a report prior to its acquisition of Clorox in which it predicted the ascendency of liquid bleach

[1] The citations are to the pages of the Commission Opinion on which the operative facts relied on were recited.

the number of uses multiplied, the items within each were category expanded and the population increased, with an improving standard of living (CX 7, pp. 21, 22). The real growth of S.O.S. had been accomplished within the 10 years preceding the acquisition (CX 7, p. 21). Sales of S.O.S. soap pads increased from $3.9 million in 1948 to $14.6 million in 1957 (CX 5(g), CX 118(b)). According to the pre-acquisition study prepared by General Foods, this growth was due to the fact that the soap-pad products were "very efficient as a cleaner of aluminum and, as the use of aluminum has multiplied, sales of pads have increased. This growth has been abetted by the increased distribution of modern kitchen ranges and the need to clean burner plates, ovens and broiling pans" (CX 7, p. 21).	over powdered bleach (Clorox Opinion, p. 13) [63 F.T.C., at 1541].
3. In addition to household steel wool, S.O.S. also produced small quantities of plastic scouring devices and industrial steel wool. In 1956 S.O.S.' sales of the former totaled $1.4 million (CX 5(g)), and its sales of industrial steel wool amounted to $229,000 (*Brillo Mfg. Co.*, D 6557, 1963).	3. Clorox was engaged almost exclusively in the manufacture of household liquid bleach (Clorox Opinion, p. 6) [63 F.T.C., at 1537].
4. Prior to the entry of GF into the household steel wool industry, the industry had been basically a small-firm industry. Its total sales were less than $29 million annually (App. B, Table I).	4. Prior to the advent of P&G, household liquid bleach was basically a small-firm industry (*Clorox* Opinion, p. 55) [63 F.T.C., at 1573].
5. S.O.S.' principal competitor in the household steel wool soap pad business was Brillo Manufacturing Company, Inc. (herein called Brillo) with total sales in 1958 of 21.7 million dollars (CX 161). Like S.O.S. Brillo engaged almost exclusively in the manufacture of steel wool products, but also produced a relatively small amount of industrial steel wool and a plastic scouring device (*Brillo Mfg. Co.*, D. 6557, 1963; RX 4(b)(2)).	5. Clorox's principal competitor in the liquid bleach field was the Purex Corporation, with total sales in 1957 of approximately $50 million. Unlike Clorox, Purex manufactures, in addition to liquid bleach, a number of other products, including detergents, an abrasive cleanser and a toilet soap (*Clorox* Opinion, p. 6) [63 F.T.C., at 1537].
6. During the year 1957, S.O.S., with sales of household steel wool in the	6. In 1957, Clorox (with sales slightly under $40 million and 48.8% of

amount of $14,600,000, was the leader in the industry, with 51% of the national sales of household steel wool products. Brillo was a close second with sales of $13,629,000, or 47.6% of the market. Thus, the two together accounted for 98.6% of the market. Three smaller producers, Durawool Incorporated, American Steel Wool Manufacturing Company, Inc. and Alloy Metal Products Corporation, shared the remaining portion of the market, amounting to 1.4% (App. B, Table I). So insignificant were the market positions of the smaller companies that S.O.S. and Brillo could, and did, ignore them in their competitive activities (CX 7, pp. 21–25; CX 124). Durawool began producing household steel wool in or about 1952 or 1953 (Tr. 825–826). American first entered the business in 1898 (Tr. 921). Alloy began producing steel wool soap pads in late 1956 (Tr. 889–891). Alloy was dissolved in 1963 and its plant and equipment sold to Demcorp which subsequently entered the steel wool industry (Tr. 890, 901). Two other small producers of household steel wool had been eliminated from the market through acquisition by S.O.S. and Brillo respectively in 1954 and 1955 (CX 7, p. 19; CX 53; CX 118(b); Tr. 936).

7. S.O.S. and Brillo had net assets of $6,000,000 and $8,000,000 respectively, while the net assets of each of the smaller manufacturers were valued at less than $500,000 (Answer Par. 2(d); CX 158 (a); CX 156(b); CX 144; Tr. 871, 966).

8. Both Brillo and S.O.S. had national distribution and sold their products in every state in the country (CX 7, p. 24; CX 124). S.O.S. had two plants in Chicago (CX 7, p. 26) and Brillo had two plants, one located in Ohio and the other in Brooklyn, New York (RX 27, p. 6). Each of the three smaller soap pad companies had only

the market) and Purex (with 15.7%) between them accounted for almost 65% of the nation's household bleach sales; four other manufacturers accounted for 15%; and the remaining 20% of the market was divided among approximately 223 small producers plus a "large number of extremely small" producers (*Clorox* Opinion, pp. 5, 6) [63 F.T.C., at 1536, 1537].

7. Only eight of the liquid bleach manufacturers had assets in excess of $1 million. Very few had assets of more than $75,000 (*Clorox* Opinion, p. 6) [63 F.T.C., at 1537].

8. Clorox, which had 13 plants distributed throughout the country, was the only producer selling on a national scale. Purex had as many plants as Clorox, but did not distribute its bleach in the northeast or middle-Atlantic states and sold in less than 50% of the national market. Most of the other liquid bleach manufacturers had

regional distribution. Durawool and American were limited to the northeastern area of the United States (Tr. 834–835, 923, 957), and Alloy, which indeed made no sales at all until 1958 (App. B, Table I) was limited primarily to Detroit, Michigan (Tr. 910).

only a single plant and were limited to a regional market (*Clorox* Opinion, p. 7) [63 F.T.C., at 1537, 1538].

9. While S.O.S. had 51% of the national market in terms of total dollar sales of household steel wool in 1957 (App. B, Table I), it had almost 55% of the combined S.O.S.-Brillo sales in the nation of soap-impregnated steel wool pads in terms of retail sales (App. B, Table II). Its share of combined S.O.S.-Brillo sales in terms of packages sold was proportionately higher in certain regions of the country, namely: 60% of New England, 75% in Chicago, 68% in the West Central Region, 66% in the Southwest Region and 77% in the Pacific Region (CX 7, p. 84).

9. While Clorox had 48.8% of the national market, it had 56% of the market in New England, 64% of the market in the metropolitan New York area, and 72% of the market in the middle-Atlantic states (*Clorox* Opinion, p. 7) [63 F.T.C., at 1538].

10. Except for metropolitan New York, S.O.S.' share of the combined sales of Brillo and S.O.S. soap-impregnated steel wool soap pads in terms of packages sold was at least 47.8% in each region. The only area in which Brillo had a greater dominance than S.O.S. was in metropolitan New York, where Brillo had 76.7% and S.O.S. had 23.3% of sales in terms of packages sold in April-May 1957 (CX 7, p. 84).

10. Even in areas where the principal competitors of Clorox were active, Clorox's total share of the liquid bleach market was high. Except in metropolitan Chicago and the west-Central states, Clorox accounted for at least 39% of the sales (*Clorox* Opinion, p. 7) [63 F.T.C., at 1538].

11. Between the founding of S.O.S. in 1919 and the mid-1930's its soap pads were protected by patent. After the expiration of this patent, no patent on the steel wool soap pad product or process has been in effect (CX 7, p. 21). While S.O.S. claims to have a "rust arrester" (CX 68) and Brillo advertises that its product contains a "rust resistor" (CX 167(k)), there is no indication in the record that either is the result of a secret process.

11. Neither the liquid bleach product nor its process is the subject of a patent or trade secret (*Clorox* Opinion, p. 6) [63 F.T.C., at 1537].

12. The American-made machines used for the manufacture of household steel wool are custom-made to the

12. The manufacturing process is relatively simple (*Clorox* Opinion, p. 8) [63 F.T.C., at 1538].

manufacturer's specifications (Tr. 847, 888–890, 908–909). A German-manufactured machine is available but cannot produce steel wool as efficiently as American-made machines (Tr. 847–848). Technical know-how is vital and constitutes a barrier to entry by potential competitors (CX 7, pp. 11, 23, 75).

13. S.O.S.' costs of producing its products and of the equipment required to manufacture these products were low, compared with its sales and profits. In 1956 gross sales (less allowances and cash discounts) amounted to $15,728,000 and profits before taxes were $3,214,000 (CX 5(i)). The cost of goods sold was $7,144,000, or 45% of gross sales (less allowances and discounts) (CX 5(i)). Although there are no precise figures as to the costs of the raw materials (primarily steel and soap), it does appear that labor costs are low (CX 7, pp. 31 ff.). The cost of the equipment on the corporate books was $2,293,000 (CX 5(h)), which was $900,000 less than the profits for the year 1956. No accurate figures are obtainable as to the minimum costs of the equipment required to enter the business, but the evidence indicates that the approximate cost is between $200,000 and $300,000 (CX 156(b); Tr. 871, 966).

14. Steel wool soap pads are sold on a delivered price basis, with the manufacturer paying the freight. Shipping costs amounted to 11% of S.O.S.' production and distribution costs in 1956 (CX 5(i)). The President of American Steel wool Manufacturing Company testified that freight "is a very large part of our costs" (Tr. 942). The President of Alloy testified that freight was "very definitely" a factor which prevented his company from selling in other parts of the country (Tr. 913). Demrack, of Demcorp, testified that "[f]reight rates are very high on steel wool. It carries a good

13. The equipment, raw materials and labor required in the manufacture of liquid bleach are relatively inexpensive (*Clorox* Opinion, p. 6) [63 F.T.C., at 1537].

14. Household liquid bleach is expensive to ship. Freight, which the manufacturer pays for, commonly averages more than 10% of unit cost. Liquid bleach was not profitably distributed outside of a 300-mile radius from the manufacturing plant (*Clorox* Opinion, p. 7) [63 F.T.C., at 1537].

class of freight. It carries a top class of freight. Percentage-wise it is very high" (Tr. 979). Transportation and warehousing together comprised 15% of S.O.S.' costs of production and distribution in 1956 (CX 5(i)).

15. The record contains no precise steel wool soap pad capacity data but indicates that the household steel wool soap pad industry has adequate capacity with an ability to expand, at least for short-range intervals (Tr. 428; RX 28(a)).

15. The liquid bleach industry is not plagued by inadequate productive capacity or shortages and industry members are not producing at full capacity (*Clorox* Opinion, p. 8) [63 F.T.C., at 1538].

16. Although the household steel wool soap pads produced by the various manufacturers can be distinguished from each other by such superficial characteristics as color and shape, there are no significant differences in their essential ingredients, and they are substantially equivalent in quality and performance (Tr. 481, 566, 954).

16. All household liquid bleaches are chemically identical, and none is superior to any other (*Clorox* Opinion, p. 8) [63 F.T.C., at 1538].

17. Household steel wool is a low-price, high turnover consumer product sold to housewives mainly through grocery stores and self-service supermarkets (Tr. 492). Approximately 97% of S.O.S.' soap pads were sold through grocery channels (CX 7, p. 22).

17. Household liquid bleach is a low-price, high turnover consumer product sold mainly to housewives in grocery stores (*Clorox* Opinion, p. 8) [63 F.T.C., at 1538].

18. The allocation of sufficient shelf space and the housewife's preconditioning to select a given brand are indispensable elements in the successful sale of the product. Advertising is vital in the sale of steel wool soap pads—so important, in fact, that, as respondent's Chairman testified, the cessation of advertising by S.O.S. would result in the loss of consumer brand loyalty, in the discontinuance of sales of the product by supermarkets and in the ultimate disappearance of the product from the market (Tr. 493, 494–5, 511, 524–25, 565–66, 557; CX 36, p. 7; CX 39, p. 9).

18. Successful sales of liquid bleach depend on the extent to which a manufacturer can presell it, and thus advertising and promotion are vital to create familiarity and brand loyalty for the product and insure that adequate shelf-space will be allocated to the product by the grocer (*Clorox* Opinion, pp. 8–10) [63 F.T.C., at 1538–1540].

19. S.O.S. expended a total of $2,265,000 or 15.7% of net sales, for advertising in 1956 (CX 5(i)). In 1957, S.O.S. spent $711,000 for magazine and newspaper advertising,

19. Prior to the acquisition, Clorox had advertised extensively. In 1957, it had spent $1,750,000 for newspaper advertising, $560,000 for magazine advertising, $258,000 for radio and

\$22,000 for radio advertising, and \$1,390,000 for TV advertising, or a total of \$2,124,000 (CX 10). Brillo's advertising expenses amounted to \$1,837,762 in 1957 (CX 159).

billboard advertising, and \$1,150,000 for TV advertising (a total of \$3,718,000). Advertising expenditures were thus equal to almost 10% of total sales (*Clorox* Opinion, pp. 8–9) [63 F.T.C., at 1538–1539].

20. The smaller competitors lacked the financial resources to engage in any substantial advertising (Tr. 836, 894, 972). Moreover, being regional distributors, they could not derive the same benefits from advertising which were available to the national distributors, S.O.S. and Brillo. Due to the almost complete lack of advertising the smaller producers were virtually unable to obtain shelf-space in grocery stores and supermarkets (Tr. 836, 894, 942–954, 972–992).

20. Most manufacturers of liquid bleach lacked the financial resources to advertise extensively (p. 9). Purex was a large advertiser but very possibly less effective than Clorox because of Purex's territorially limited distribution (Clorox Opinion, p. 9) [63 F.T.C., at 1539].

21. Neither S.O.S. nor Brillo engaged in trade or consumer promotions to any significant extent prior to the acquisition. S.O.S. had a policy of not engaging in consumer or trade promotion (CX 5(b); CX 7, p. 36) and in 1957 Brillo spent nothing on consumer promotions of its soap pads and only \$26,858 on trade promotions (CX 160).

21. Prior to its acquisition by P&G, Clorox had not been active in sales promotions (*Clorox* Opinion, p. 8) [63 F.T.C. at 1538].

22. Before a new brand of household steel wool may be successfully launched, extensive test marketing, accompanied by substantial outlays for advertising and/or promotions are necessary (Tr. 833, 967, 977).

22. There is evidence in this case that before a new brand of liquid bleach can be safely launched, it must be test-marketed locally (*Clorox* Opinion, p. 43) [63 F.T.C., at 1562].

23. Due to the nearly universal acceptance of their brands, S.O.S. and Brillo were able to command higher prices for their products than their lesser-known competitors. For example, as of December 1958, S.O.S. was able to charge \$4.80 for twenty-four boxes of soap pads, containing *ten* pads each, whereas its competitors charged the following prices for twenty-four boxes, containing *twelve* pads each:

Brillo	\$4.75
American	4.15
Durawool	4.50
Alloy	4.05

(CX 15, 130, 139, 151(a), 166(a)).

23. Clorox is a premium brand that commonly sells for several cents per quart higher than regional or private brands (*Clorox* Opinion, p. 8) [63 F.T.C., at 1538].

24. As another result of the inability of the smaller companies to compete with the two dominant brands, the smaller manufacturers were relegated to the marketing of much of their steel wool soap pads under private labels and through discount houses and other outlets specializing in low-price merchandise (Tr. 832–834, 891, 922–923, 970–972). By way of contrast the two majors did little or no private label soap pad business. S.O.S. prior to the acquisition did a very small amount of private-label business through its Cleanser Products Division (CX 7, p. 19), but the overwhelming bulk of the production of these two companies was marketed under their two brand names, "S.O.S." and "Brillo" respectively (Tr. 720–722; CX 124).

24. Most manufacturers of household liquid bleach sell at least part of their production to grocery stores and supermarkets for resale to the consumer under the stores' own brand names. These private or house brands, however, appear to account for only a small proportion of the total sales of liquid bleach. Clorox sells no private-brand liquid bleach—all of Clorox's bleach is sold under "Clorox" brand name—and Purex very little (*Clorox* Opinion, p. 6) [63 F.T.C., at 1537].

B. *Position of General Foods Corporation*

B. *Position of The Procter & Gamble Company*

25. Respondent General Foods Corporation is engaged in the sale of a wide variety of low-price, high-turnover household consumer items sold to the consumer through grocery stores and supermarkets (CX 149). GF has 50% of the food sales markets in certain food products and is the largest packaged food manufacturer in the United States with net sales in the fiscal year ended March 31, 1957 of almost one billion dollars (CX 36). A substantial number of General Foods' present products were acquired through the acquisition by General Foods of the assets or stock of existing producers of such products. As of March 31, 1962 respondent had made about 69 of such acquisitions, including that of S.O.S. (Answer, par. 6).

25. At the time of the acquisition Procter & Gamble was engaged in the sale of a wide range of low-price, high-turnover household consumer items which it markets through grocery, drug and department stores. P&G was one of the nation's 50 largest manufacturers, with total net sales in 1957 of $1.156 billion (Clorox Opinion, p. 10) [63 F.T.C., at 1540].

26. GF's product range consists principally of packaged food products and includes other non-food items such as bluing (CX 149).

26. P&G's main locus of activity was in the general area of soaps, detergents and cleansers, and it also manufactures a wide variety of various food items such as baking mixes and shortenings and other household products such as shampoos and dentifri-

27. In the fiscal year ended March 31, 1957 GF's net sales were approximately one billion dollars (CX 36) or more than 68 times the total sales of S.O.S. in 1956 (CX 5(i)) and more than 36 times the industry-wide sales of household steel wool in 1957 ($29,000,000) (App. B, Table I).

28. In 1961 General Foods ranked third among all manufacturing corporations and first among food processors in total advertising expenditures (CX 117(b)). Its advertising expenditures in that year amounted to $105,000,000 (CX 117(b), or 50 times S.O.S.' advertising expenditures in 1957, the year preceding the acquisition (App. B, Table III). Respondent's consumer and trade promotions alone in 1957 amounted to $19,000,000 (CX 63), which was in excess of S.O.S.' estimated total sales in that year (CX 5(g)).

C. *The Acquisition by General Foods of S.O.S. and the Advantages to S.O.S. Which Accrued*

29. According to General Foods' pre-acquisition report, the acquisition could give GF "a dominant position in a tight little specialty market, similar to Postum in the non-coffee beverage field" (CX 7, p. 75).

30. General Foods' pre-acquisition report predicted that the acquisition would give GF "an opportunity to effect economies in physical distribution" of S.O.S. products (CX 7, p. 75). The president of S.O.S. stated that "Large savings on advertising, warehousing and transportation [of soap pads] could be made with S.O.S. in the ces (*Clorox* Opinion, pp. 10–11) [63 F.T.C., at 1540].

27. In 1957 P&G's sales of packaged detergents alone were 10 times the total sales of Clorox and 8 times the total sales of all of Purex's products combined. P&G's total sales were more than 20 times the total sales of Purex and more than 25 times the total sales of Clorox. P&G's total sales were more than ten times the industry-wide sales of household liquid bleach (*Clorox* Opinion, pp. 53, 55) [63 F.T.C., at 1571, 1573].

28. P&G is one of the nation's leading advertisers (*Clorox* Opinion, p. 12) [63 F.T.C., at 1541]. In 1957, P&G spent upwards of $80 million on advertising and $47 million for domestic sales promotion. Domestic sales were approximately $900 million in that year (*Clorox* Opinion, p. 12) [63 F.T.C., at 1541].

C. *The Acquisition by P&G of Clorox and the Advantages to Clorox Which Accrued*

29. According to P&G's pre-acquisition report, "Taking over the Clorox business . . . could be a way of achieving a dominant position in the liquid bleach market quickly which would pay out reasonably well" (*Clorox* Opinion, p. 13) [63 F.T.C., at 1541, 1542].

30. P&G's pre-acquisition report predicted that P&G's sales, distributing and manufacturing setup could increase Clorox's share of the market in certain areas where it was low and effect a number of savings that would increase the profits of the business considerably (*Clorox* Opinion, p. 13) [63 F.T.C., at 1542].

hands of one of the great national organizations" (CX 7, p. 70).

31. There is no indication in the record that General Foods had ever considered entering the household steel wool business by developing its own capacity or by acquiring one of the smaller competitors.

32. The assets of S.O.S. which were acquired by General Foods had a value of approximately $6 million and the stock of General Foods for which the assets were exchanged had a market value of $17,500,000 (Answer, Par. 2(d)).

33. The following substantial cost savings and other competitive advantages accrued to S.O.S. as a result of its acquisition by GF:

a. *Discounts for Network TV Advertising*

S.O.S. was able to obtain gross-time discounts (by earning the hourly rate rather than the half-hourly rate) and an increase in its weekly discounts (CX 86F). The discount on gross-time amounted to 16-2/3% (CX 81C, 81D, 82B, 82C, 83C, 83D, 84B, 84C, 85C, 85D, 86B, 86C, 86D, 87C, 87D, 87E, 88B, 88C, 88D). The weekly discount was increased from 6% (CX 81B, 83B, 85-0, 87F) to 15% (CX 82G, 84G, 86F, 88L). The result of the two discounts was to give S.O.S. a net saving of approximately 23% on its pre-acquisition advertising costs. By reason of the discount, S.O.S. was thus able to obtain at least 28% more television time for the same expenditure. The existence of TV discounts for large advertisers was referred to by the Chairman of the Board of General Foods (Tr. 529, 531).

b. *Discounts for Spot TV Advertising*

In December of 1957, S.O.S. contracted for 13 20-second announcements to

31. P&G had actually pondered the possibility of entry into the liquid bleach market on its own. Prior to the merger Procter was not only a likely prospect for new entry into the bleach market, it was virtually the only such prospect (*Clorox* Opinion, p. 61) [63 F.T.C., at 1577].

32. The assets of Clorox, which were acquired by P&G had a value of approximately $12.6 million and the stock of P&G for which the assets were exchanged had a market value of approximately $30.3 million (*Clorox* Opinion, pp. 13, 14) [63 F.T.C., at 1542].

33. The following cost savings and other competitive advantages accrued to Clorox as a result of its acquisition by P&G:

a. *Discounts for Network TV Advertising*

The maximum annual volume discounts available to the largest advertisers amount to 25%-30% for network TV advertising. In 1957, Clorox spent $1,150,000 on TV advertising. While complete discount rates are not included in the record, it is virtually certain that an expenditure of this size would not entitle Clorox to discounts of any substance. With Clorox now part of the Procter line, for the same amount of money Clorox spent on TV network advertising prior to the merger, at least 33-1/3% more TV network advertising can now be obtained (*Clorox* Opinion, pp. 44-45) [63 F.T.C. at 1563, 1564].

b. *Discounts for Spot TV Advertising*

Discount rates available for local "spot" television advertising favor

be televised over WCIA–TV, Champaign, Illinois, between January 2nd and April 1st, 1958. The rate to be charged S.O.S. for these announcements was $180.50 each (CX 77A). After its acquisition by GF, the rate for each announcement was lowered to $152.00, a reduction of approximately 15% (CX 78B). Moreover, S.O.S.' advertising costs were subject to further reduction through the ability of General Foods to package a certain number of spots in one locality desired by one division with a certain number of spots in another locality desired by another division (Tr. 529).

c. *Discounts for Radio Advertising*

As a result of the acquisition, S.O.S. was able to have the rates for participation in a program on the Yankee Radio Network reduced by 5.5% (CX 79A, 80D).

d. *Discounts for Magazine Advertising*

The maximum discount appears to have been approximately 15% for *Better Homes and Gardens* (CX 75B, 76B, 76F). Other discounts were 5% for *Good Housekeeping* (CX 75B, 76B, 76D), 8% for *Ladies' Home Journal* (CX 75B, 76G) and 7.5% for *Everywoman's* (CX 76B and 76K).

e. *Ability to Purchase Television Programs*

Prior to the acquisition, S.O.S. could not afford nighttime network television advertising, which is the most desirable time to reach consumers (Tr. 439–440). Of five network shows produced by General Foods subsequent to the acquisition, the cost of each of three (the Danny Thomas Show, the Andy Griffith Show, and Gunsmoke) was greater than the entire S.O.S. budget for advertising, and the cost of two shows (Zane Grey Theater

the large advertiser (*Clorox* Opinion, pp. 44–46) [63 F.T.C., at 1563–1564]. Moreover, the large national advertiser can furnish its divisions with coverage in a particular local area which it desires while spotting another commercial in another section of the country (*Clorox* Opinion, pp. 45–46) [63 F.T.C., at 1565].

c. *Discounts for Radio Advertising*

Substantial discounts are available to the largest advertisers for radio advertising (*Clorox* Opinion, p. 44) [63 F.T.C., at 1563].

d. *Discounts for Magazine Advertising*

The record discloses that maximum volume discounts of between 12% and 17% are available to advertisers in the leading women's or family magazines. An annual expenditure of $1 million or more may be necessary to earn the maximum in a particular magazine. Prior to the acquisition, Clorox received no discounts for magazine advertising (*Clorox* Opinion, p. 45) [63 F.T.C., at 1564].

e. *Ability to Purchase Television Programs*

A commercial announcement during a television program is substantially more effective in promoting a product than one during the between-program station break. Unless Clorox had been willing to put a disproportionate share of its advertising budget into a single venture, it could not, prior to the acquisition, have afforded to buy an entire network television program. Procter, however, can and does buy the sponsorship of such programs in

and Lucy-Desi Hour) was approximately equal to the entire advertising budget of S.O.S. (CX 46). After the acquisition, S.O.S. was able to participate in these nighttime programs because the amount of the cost allocated to S.O.S. was a fraction of the total cost of the shows. GF increased the amount spent on television advertising from $1,390,000 in 1957 to $2,520,000 in 1962 (App. B, Table III).

f. *Advantages Achieved Through Changes in Warehousing and Distribution*

Prior to the acquisition S.O.S.' products were shipped to some 32 independent warehouses scattered throughout the country from which they were then shipped to customers pursuant to specific order (CX 7, p. 35). In 1962 General Foods incorporated the distribution of the products of its Kool-Aid Division into its over-all distribution-sales service warehousing and distributing system, utilized by it for products of the Post, Jell-O and Institutional Products Divisions, for the purpose of achieving savings to respondent in transportation, warehousing and sales costs, through economies resulting from the integration of the operations of their divisions (CX 120, 121). At the time the plan was adopted it was estimated that it would save the corporation $647,000, of which $388,000 was attributed to savings to the Kool-Aid Division. This latter figure included a saving of $317,000, resulting from the reduction in transportation costs from $2,044,000 to $1,727,000, and a saving of $102,000, resulting from reduction of warehousing costs from $632,000 to $530,000 (CX 121, Schedule A). As a result of the integration of S.O.S. into General Foods, S.O.S. was able to induce purchases of its products by (1) granting customers discounts based on pooled purchases of the products behalf of several of its products, enabling Clorox to purchase network program advertising at a fraction of the previous cost. Moreover, even if Clorox could have purchased one show, it has the advantage now of being able to spread its sponsorship over more shows (*Clorox* Opinion, p. 45) [63 F.T.C., at 1564, 1565].

f. (No comparable advantages referred to.)

of General Foods' various divisions; (2) giving customers the convenience of including orders of S.O.S.' products in their orders of other General Foods' products; and (3) improving national availability (Tr. 512–515; CX 16(c)).

g. *Savings in Dealing With Brokers*

Prior to the acquisition S.O.S.' products were sold nationally through a network of independent brokers located in the major marketing areas of the United States (CX 128(d), (e), and (f)). Supervision of these brokers was maintained by S.O.S. through four regional sales managers (CX 7, p. 35). At the time of the merger S.O.S. was set up as a separate division of General Foods. In 1960 this division was merged into the Kool-Aid (Perkins) Division for the reason that the latter also sold its products through national networks of brokers. Dual brokerage, which existed in many areas with respect to the products of the two divisions, was gradually eliminated and by 1964 all of the products of the divisions were sold in particular marketing areas or territories by the same brokers (Tr. 786–789). Subsequent to the acquisition the commission paid to brokers on S.O.S. soap pads declined from 7½% of gross sales to 5% (CX 7, pp. 35, 76; Tr. 1278, 1317). On 1962 sales of S.O.S. soap pads of $19,170,396.27, this would amount to a savings of $479,-259.91 to respondent. The record does not indicate the reason for this decline. Nevertheless, even without considering this specific saving it would appear that the efficiency gained through the avoidance of dual brokerage resulted in substantial savings to General Foods.

g. *Savings in Dealing With Brokers*

(No comparable savings referred to.)

h. *Bargaining Position With Retailers*

That General Foods is the leading producer of a number of products

h. *Bargaining Position With Retailers*

That P&G is the leading producer of a number of products marketed

marketed through grocery stores may enable it to induce retailers to give favored treatment to S.O.S. It seems likely that General Foods can obtain from retailers as a matter of convenience or expediency certain advantages in the display or marketing of its products which are not available to a single-product producer such as the preacquisition S.O.S.

i. *Ability to Engage In Sales Promotions*

Prior to the acquisition, neither S.O.S. nor Brillo engaged in promotions to any substantial extent. General Foods, a firm that in 1957 incurred sales-promotional expenses in an amount greater than S.O.S.' total sales was in an obvious position to utilize the sales-promotion technique on a wide scale on behalf of S.O.S. more efficiently and effectively than S.O.S. would have been able to do had it attempted to engage in promotions on the same scale. Respondent's chairman testified that it was able to save money in coupon promotions by having one center for the redemption of coupons (Tr. 534). Respondent may have also saved money through its ability to obtain lower prices by combining the various divisions' purchases of "bonus items" such as frying pans, kitchen tool sets, skillets, etc. General Foods has since the acquisition engaged in extensive promotions of the S.O.S. products. Trade promotions have included case allowances and free goods and have been utilized in selected areas as well as nationally (CX 7, p. 36; CX's 13, 51, 59, 66, 160). Consumer promotions, including price reducing coupons, free goods, contests, cents-off labels and reduced price premiums have also been used locally and nationally and cost $211,000 in 1963 (CX's 13, 51, 60, 66). Brillo also sharply increased its promotions after the acquisition (CX 163). Due to the lower prices through grocery stores may enable it to induce retailers to give favored treatment to Clorox. It seems likely that P&G can obtain from retailers as a matter of convenience or expediency certain advantages in the display or marketing of its products which are not available to a single-product producer such as the premerger Clorox (*Clorox* Opinion, p. 47) [63 F.T.C., at 1566].

i. *Ability to Engage In Sales Promotions*

There is testimony in the record that sales promotions are considered in the main too expensive for a single-product firm in the relatively small liquid bleach industry; thus, at the time of the merger, Clorox was engaged in virtually no sales promotion activities. P&G, a firm that in 1957 incurred sales-promotion expenses in an amount greater than Clorox's total sales, is in an obvious position to utilize the sales-promotion technique on a wide scale in behalf of Clorox (*Clorox* Opinion, p. 47) [63 F.T.C., at 1566].

which they could command and to the relatively higher costs of producing the product and of conducting a promotional campaign the smaller companies could not and did not engage in promotions (Tr. 836–837).

j. *Ability to Offer Merchants Special Prices*

Although respondent did not engage in local price-cutting as such, it did demonstrate its ability and willingness to concentrate its consumer and trade promotions in certain locations. In 1963, of the $137,736 spent on trade promotions, $35,409 were spent in Metropolitan New York, and of the $211,083 which it spent for consumer promotions in that year, $109,-352 were for the Metropolitan New York market. Smaller firms, which cannot afford promotions, are driven from the supermarket shelves in the face of such intensive localized promotions (Tr. 837; CX's 59, 60).

k. *Ability to Engage in Systematic Underpricing*

This danger is present in this case to the same extent as it was in the *Clorox* case. However, the indication here is that the under-pricing may take the form of disproportionately high expenditures on promotions.

l. *Psychological advantages*

Although there is no evidence that GF is a more feared competitor than was S.O.S., it seems reasonable to infer this from GF's history of success, its size, and its prowess. However unwilling a potential entrant would be to challenge the established position of two brands as well entrenched as are S.O.S. and Brillo when backed up by comparatively small companies, he would be undoubtedly far more reluctant to challenge these brands when one of them is backed up by a colussus of American industry, namely, GF. Thus the same psychological barriers which were found in *Clorox* to prevent en-

j. *Ability to Offer Merchants Special Prices*

To be able to offer lower prices to retailers requires the kind of pricing flexibility available only to a firm with ample reserves. Local price-cutting is prevalent but cannot long be maintained by a firm short on reserves. In a fight to the finish, P&G, whose scale of operations and fiscal resources dwarf the entire industry, can hardly be bested (Clorox Opinion, p. 48) [63 F.T.C., at 1566, 1567].

k. *Ability to Engage in Systematic Underpricing*

There is a danger that P&G may engage in systematic underpricing below cost *(Clorox* Opinion, pp. 48–49) [63 F.T.C., at 1567].

l. *Psychological advantages*

The record discloses that Procter is regarded by the firms in the industry as a well managed and aggressive competitor, more to be feared than Clorox. Market behavior is determined by the state of mind of the firms in the market. P&G's history of success, size and prowess must be considered significant competitive factors. Because a large multiproduct firm enjoys competitive advantages, the prospects become remote that small or medium-sized firms will be minded to enter the industry. Only very large firms can reasonably be expected to be able to compete on roughly equal terms. A small or medium-sized firm

try of new competitors and limit expansion of existing competitors are present in this case, and in approximately the same degree.

D. *Market Subsequent to Acquisition*

34. S.O.S.' share of the market increased from 51% in 1957, the year preceding the acquisition, to 56% in 1962, while Brillo's market share declined from 47.6% in 1957 to 41.8% in 1962 (App. B, Table I). Hence the differences in the percentages of market shares between the two companies rose from only 3.4% in 1957 to 14.2% in 1962. The share of the independents had only increased to 2.2% by 1962. Moreover, S.O.S.' share of the combined S.O.S.-Brillo sales of steel wool soap pads in grocery stores and supermarkets on a consumer dollar basis advanced from 54.9% in 1958 to 60.9% in 1963 (App. B, Table II). During the years 1958–1959, the disparity between S.O.S. and Brillo narrowed to .7% (App. B, Table I), but this appears to have been due principally to the fact that in those years S.O.S. failed to get on the General Foods night television programs and expended a relatively small proportion of its advertising funds on television advertising (App. B, Table III). On an absolute basis S.O.S.' sales of soap pads grew from $14,600,000 in 1957 to $19,170,000 in 1962, an increase of 31%, while Brillo's sales only rose from $13,629,000 in 1957, to $14,305,000 in 1962, an increase of only 5% in five years (App. B, Table I).

35. There were no new entries in the industry in the 6½ years which

contemplating entry cannot ignore the fact that P&G is a billion dollar corporation whose marketing experience stems far beyond the limited horizons of the industry. Even a large firm would be loath to challenge a brand as well established as Clorox when that brand is backed up by powerful marketing capacities of a firm such as P&G (*Clorox* Opinion, pp. 49–51) [63 F.T.C., at 1567–1568, 1569].

D. *Market Subsequent to Acquisition*

34. Clorox's share of the market increased from 48.8% in 1957, the year of the acquisition, to 51.5% in 1961 (*Clorox* Opinion, p. 68) [63 F.T.C., at 1583].

35. (No discussion of new entries subsequent to the acquisition.

elapsed between the acquisition and the hearing except that Demcorp took over the defunct Alloy Metal Wool Products Corporation in 1963 (Tr. 890–901).	
36. The single price change which took place was an increase in the price of S.O.S. soap pads in July, 1958 (CX 2(c)), which was apparently followed by Brillo.	36. (No price changes indicated.)
37. In December, 1963, Brillo merged with Purex Corporation Limited, a manufacturer of household cleaning products, which in the fiscal year ended June 30, 1963 had total sales of $127,000,000 (RX 27).	37. The remaining firms in the industry may now be motivated to seek affiliation by merger with giant companies (*Clorox* Opinion, p. 55) [63 F.T.C., at 1573].

Appendix B

TABLE I

*TOTAL MANUFACTURER'S HOUSEHOLD STEEL WOOL SALES**

(in thousands of dollars)

Year	S.O.S.		Brillo		Durawool		American		Alloy		Total Sales
	Sales	%	Sales	%	Sales	%	Sales	%	Sales	%	
	(000)		(000)		(000)		(000)		(000)		(000)
1955	$12,749	52.8	$11,043	45.7	$ 52	.2	$311	1.3	$—	—	$24,155
1956	14,343	52.7	12,486	45.8	49	.2	358	1.3	—	—	27,237
1957	14,600	51.0	13,629	47.6	64	.2	344	1.2	—	—	28,637
1958	15,044	50.4	14,387	48.2	85	.3	327	1.1	4	—	29,848
1959	15,159	49.4	14,948	48.7	122	.4	253	.8	215	.7	30,687
1960	18,102	54.0	14,983	44.7	134	.4	211	.6	117	.3	33,547
1961	18,966	57.0	13,751	41.3	205	.6	208	.6	175	.5	33,304
1962	19,170	56.0	14,305	41.8	425	1.3	265	.8	43	.1	34,208

*The above sales figures represent total sales by the manufacturers to their customers. It does not represent the total amount realized at the retail store level when the products in question are resold to consumers. (Tr. 1018, CX 20A–2, 20B–2, 20C, 118B, 130, 136, 137A, 150, 157, 169).

TABLE II

NIELSEN NATIONAL RETAIL MARKET SHARE STATISTICS (STEEL WOOL SOAP PADS)

Consumer Dollar Basis*
(in thousands of dollars)

Year	Total Sales	S.O.S.	S.O.S. % Total Sales	Brillo	Brillo % Total Sales
	(000)	(000)		(000)	
F1958	$30,800	$16,900	54.9	$13,900	45.1
F1959	32,300	17,400	54.1	14,800	45.9
F1960	33,400	18,000	53.8	15,400	46.2
F1961	36,400	21,500	59.0	14,900	41.0
F1962	37,400	22,400	59.9	15,000	40.1
F1963	37,300	22,600	60.6	14,700	39.4

*The above sales figures represent sales of steel wool soap pads through grocery stores and supermarkets taken from CX 48.

TABLE III

ADVERTISING EXPENDITURES OF THE S.O.S. COMPANY (1954–1957) AND OF GENERAL FOODS—S.O.S. (1958–1963)

(in thousands of dollars)

Year	*Newspapers*	*Magazines*	*TV*
	(000)	(000)	(000)
1954	$ 5	$470	$1,300
1955	4	570	1,310
1956	1	650	1,150
1957		710	1,390
Acquisition on 12/31/57			
1958	580	600	550
1959	790	410	690
1960	2		1,950
1961	11		2,360
1962	9	13	2,520
1963	55		2,220

(CX 9, 10, 58)

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TABLE IV

Retail Price of Household Steel Wool Products vs. Non-Steel Wool Products As Shown on Respondent's Exhibits 1–6 [1]

Steel Wool Products

Product	*Retail Price Per Package*	*Items Per Package*	*Price Per Item*
Brillo Soap Pads	$ .28 [2]	10	2.8¢
S.O.S. Soap Pads	.28 [2]	10	2.8¢
American Soap Pads	.23	12	1.9¢
Dura Soap Pads	.45	30	1.5¢
Brillo Whitewall Tire Pads	.29	4	7.3¢
Grand Soap Pads	.35	18	2.0¢
Staff Soap Pads	.27	12	2.5¢
S.O. Ettes	.29	15	1.9¢
Paddy Soap Pads	.29	20	1.5¢
Spring Soap Pads	.69	50	1.4¢

Non-Steel Wool Products

Product	*Retail Price Per Package*	*Items Per Package*	*Price Per Item*
Golden Fleece (king size)	$ .29	2	14.5¢
Hand-eez Cleaning Pads	.19	2	9.5¢
Rubber Scrubber	.27	2	13.5¢
Glit Scour'n Wipe Pads	.24	4	6.0¢
Kurly Kate Pot Cleaners	.29	3	9.7¢
Tuffy	.23 [2]	1	23.0¢
Glit Whopper Scrubbers	.29	2	14.5¢
Scrubbee Scouring Sponge	.29	1	29.0¢
Scotch Brite Scouring Pad	.29 [3]	1	29.0¢
Handy Mandy Pot Cleaner	.10	1	10.0¢
Rescue Soap Pads	.29 [4]	3	9.7¢
Terry Tex Scouring Pads	.23	3	7.7¢
Sudsy Scrubber	.29	1	29.0¢
Glit Scouring Sponge	.19	2	9.5¢
Magla Plastic Wool	.29	2	14.5¢
Kitchen Pal	.145	1	14.5¢
Gottschalk Stainless Steel Sponge	.19	2	9.5¢
Nylonet Scouring Pad	.29	1	29.0¢

[1] Many of the items included by respondent on RXs 1–6 do not have retail prices printed or stamped thereon, and the record does not contain any other evidence of their price. These products have not been included here. They are: Brillo Cleanser, Fyne-Tex Soap Pads, Shop-Rite Soap Pads, Shop-Well Soap Pads, PolyPuff, Chore Girl Pot Cleaner, Merry Maid, Kitchen Queen Pot Cleaners, Scotch Brite Scrubbing Sponge, Ken-Mar, Scrubbee Pot Cleaner, Scrub-Stik Pot Cleaner.

[2] Price not shown on RXs 1, 3 but obtainable from Record at Tr. 780; CX 7, p. 24; RX 17, pp. 2–3.

[3] Price not shown on RX 1 but obtainable from Record at TR. 1518–1519.

[4] Price not shown on RX 1 but obtainable from Record at TR. 1479.

Non-Steel Wool Products—Continued

Product	Retail Price Per Package	Items Per Package	Price Per Item
Reddy	$ .10	1	10.0¢
Nif-Tee	.10	1	10.0¢
Gottschalk Cleaning Pads	.23	3	7.7¢
Combo	.29	1	29.0¢
Dobie	.25	1	25.0¢
Kopper Kate Pot Cleaners	.29	3	9.7¢
Scour Puss	.10	1	10.0¢
Squeeze Ease Scrubber	.29	1	29.0¢
Tally Scouring Pad	.25	1	25.0¢
Wund-R Spunge	.29	1	29.0¢

DISSENTING OPINION

MARCH 11, 1966

BY ELMAN, *Commissioner:*

Unlike the majority, I do not regard this case as a mere replica of *Procter & Gamble* (*Clorox*). I do not agree that all of the factors relied on in *Clorox* "apply with even greater force, and on the same legal and factual reasoning," to this case. A conclusion that the merger in this case is illegal requires one, in my view, to move beyond the existing boundaries of the merger law. This does not mean, of course, that the Commission's decision is wrong. But it does mean that the process of decision should consist of more than treating this case as if it were simply an echo of *Clorox,* and as if illegality here were an *a fortiori* conclusion.

Without a doubt, this case and *Clorox* bear striking similarities. In both cases the acquired firm was a manufacturer of a high-turnover, low-cost, heavily-advertised consumer product. In this case, as in that, the acquired firm had a position of great strength in a highly concentrated market where a very few sellers accounted for an overwhelming proportion of the business; and in both cases the acquiring firms were very much larger than the acquired firms. But—and this seems to me to be the basic flaw in the Commission's approach to this case—we cannot stop with the similarities and ignore the differences between the two cases.

At the outset, it is necessary to put *Clorox,* and the Commission's opinion in that case, in proper perspective. *Clorox* involved the kind of conglomerate acquisition that has come to be labeled a product-extension merger. The Commission approached the decision of that case with a candid recognition that it was largely

writing on a clean slate. Eschewing reliance on specific prior decisions, the Commission stated that the lawfulness of the kind of merger involved in *Clorox* "is a question largely of first impression" which "has received little attention under the antitrust laws," and that the "absence of authoritative, specific precedents in this area compels us to look to basic principles in the interpretation and application of Section 7." (*Clorox,* pp. 18–19 [63 F.T.C., at 1545–1546].) Reviewing "in the context of first principles" (*id.,* p. 23 [63 F.T.C., at 1549]) the legal and economic problems posed by a product-extension merger, the Commission concluded that the legality of such a merger could not be determined by applying relatively simple or quantitative tests, as in the case of a conventional horizontal merger, but required more extensive analysis. In dealing with a conglomerate merger of this sort, the Commission found, it was necessary to focus inquiry on the merger's impact on the structure of the market or markets affected, particularly to determine whether the merger resulted in excessive concentration, unduly raised barriers to entry into a relevant market, or substantially eliminated potential competition.

I shall not attempt here to restate, or even to summarize, the full scope of the Commission's 71-page economic and legal analysis of Procter's acquisition of Clorox. The elaborateness of the opinion in that case, as has been noted, reflected the Commission's awareness that it was entering relatively uncharted territory. Accordingly, the inquiry in *Clorox* extended over a broad range of factors, *e.g.,* the relative disparity in size and strength as between Procter and the largest firms of the household bleach industry; the excessive concentration in the industry at the time of the merger, and Clorox's dominant position in the industry; the fact that Clorox's dominance was attributable to its advertising and promotional activities, there being no physical difference between competing brands of liquid bleach; the absence of any effective rivals of Clorox; the dominant position of Procter in functionally close markets, and its position as a probable entrant into the liquid bleach business; and the elimination, brought about by the merger, of Procter as a potential direct competitor of Clorox (and, of course, the corresponding elimination of Clorox as a potential direct competitor of Procter, had the latter entered the bleach industry through internal expansion).

The *Clorox* opinion made emphatically clear that the Commission based its decision not on any single factor but on a totality of circumstances "which, taken together (we need not, and do not,

consider whether one or more of these factors, taken separately, would be dispositive of the case), persuade us that the instant merger violates Section 7." (*Clorox,* p. 53 [63 F.T.C., at 1571].) What makes this a difficult case, and not a carbon copy of *Clorox,* is that there are lacking here some important elements of the combination of factors upon which, in their entirety, the Commission relied in deciding *Clorox.*

The majority opinion characterizes General Foods' acquisition of S.O.S. as "a product extension merger identical in all respects to the extension of Procter & Gamble's product line to liquid bleach." (P. 421.) Labels are convenient and can be helpful in promoting analysis, but not when the same label is attached to things that are not the same. There are product-extension mergers and there are product-extension mergers; and they are not all exactly alike. I agree that, for purposes of general descriptive classification, the acquisitions in both this case and in *Clorox* could be called product-extension mergers. But the label cannot resolve the question of legality. It no more follows that every product-extension merger is illegal than that every such merger is legal. Perhaps the time may come in the evolution of Section 7, as it is now written or as it may be amended by Congress, when the legality of a merger will be determined simply by attaching the proper label. But that time has not yet arrived, and I doubt very much that it ever will.

Unlike the product-extension merger in this case, the one before us in *Clorox,* as the Commission's detailed analysis abundantly demonstrated, had many of the same effects on competition as a conventional horizontal merger. Procter was the leading firm in the household cleansing agents industry of the United States. By its acquisition of Clorox, the Commission found, "Procter has not diversified its interests in the sense of expanding into a substantially different, unfamiliar market or industry. Rather, it has entered a market which adjoins, as it were, those markets in which it is already established * * *." (*Clorox,* p. 17 [63 F.T.C., at 1545].) To borrow an expression from a not too dissimilar context, it was Procter's "manifest destiny" to enter the household liquid bleach market. The whole logic of its corporate development; its size and direct proximity to the liquid bleach market; and the clear line and direction of its business growth, all pointed unerringly toward Procter's expanding into the household liquid bleach business. "At the time of the merger," the Commission found, "Procter was a progressive and experienced manufacturer

of many products in the same product line as liquid bleach; it had in the past frequently extended its product line by introducing a new brand in an industry in which it had not theretofore been active; it was one of the very few manufacturers of household products in the same general line as liquid bleach that was powerful enough to challenge, with some hope of success, Clorox's entrenched position in the bleach market; and it had actually pondered the possibility of entry into the liquid bleach market on its own." (*Clorox,* p. 61 [63 F.T.C., at 1577].) Moreover, Procter "was not only a likely prospect for new entry into the bleach market, it was virtually the only such prospect." (*Ibid.*)

These findings in *Clorox* were supported by specific documentation in the record. The evidence in *Clorox* disclosed that, after careful study of the various choices open to it, Procter decided to enter the household liquid bleach business through acquisition of Clorox, the dominant firm in that industry. After two years' study of the liquid bleach industry, a report of Procter's promotion department concluded: "Taking over the Clorox business . . . could be a way of achieving a dominant position in the liquid bleach market quickly, which would pay out reasonably well." (*Clorox,* p. 13 [63 F.T.C., at 1541, 1542].)

The Commission thus had before it in *Clorox* extremely persuasive evidence that the merger lessened potential competition in a most significant way. Potential competition was lessened not only by the elimination of Procter as a potential competitor of Clorox, but also by the elimination of Clorox as a potential competitor of Procter. Had Procter chosen to enter the bleach market through internal expansion, it would have encountered the formidable rivalry of Clorox, the dominant firm in the industry. That potential rivalry disappeared with Procter's acquisition of Clorox. In a fundamnetal sense, the merger in *Clorox* eliminated direct (one might even call it horizontal) competition between Procter and Clorox—competition no less substantial and significant because it was potential rather than present.

In contrast, in this record there is no evidence that General Foods contemplated entry into the household steel wool market by internal expansion, or that such entry was its manifest destiny. Nor is there evidence that General Foods was regarded in that industry as a potential competitor. It cannot be found here that, by acquiring S.O.S., General Foods eliminated itself as a restraining force on the behavior of the dominant firms in the steel wool industry; or that it eliminated S.O.S. as a direct potential

competitor which it would encounter upon its inevitable (or, at least, highly probable) entry into the steel wool market. The absence of this factor alone, which loomed so large in *Clorox*, makes this a different case.

There is some evidence in this record, similar to that in *Clorox*, that General Foods—S.O.S. will have some advertising and marketing advantages over its competitors. But it strains credulity to find that these advantages will be "decisive" or will lead to increased concentration in the steel wool industry. In the context of the household liquid bleach industry, the advertising and marketing advantages resulting from the Procter-Clorox merger affected important elements of market structure. Clorox, the only national marketer in the industry, held almost 50% of the market, while its nearest competitor, Purex, had a comparatively tiny 15% share. Almost any enhancement of Clorox's already considerable marketing advantage could bring it close to a virtually unchallenged market position. Put another way, a reduction in Purex's market share of only a few percentage points could render it completely helpless as a competitor. In this case, whatever advantages may accrue from the merger, they will have little consequence, for General Foods—S.O.S. must meet the strong competition of Brillo, a national marketer enjoying almost 40% of the household steel wool market, as well as the giant marketers of "substitute" scouring products.

The Commission finds—and I agree—that the product market in which the competitive effects of the acquisition here should be measured is household steel wool. But the crucial question in this case is not one of defining the "relevant market." It is, rather, whether, as the Commission holds, the merger violates Section 7 because of "the deep underlying structural changes which General Foods' acquisition accomplished in this market." (P. 426.) Conceding that "the entry of General Foods into the [steel wool] market did not eliminate all potential competition," the majority opinion asserts that "its entry did have the effect of substantially lessening potential competition, since it raised to virtually insurmountable heights the barriers to entry which had already existed to some extent; thus, the acquisition severely limited the role which potential competition could otherwise have played as a critical check on the ability of S.O.S. to stifle competition in the steel wool industry." (Pp. 426–427.)

I cannot agree that the substitution of General Foods for S.O.S. in the household steel wool industry worked such "deep underly-

ing structural changes" and had "the effect of substantially lessening potential competition." Whatever potential competition was eliminated is of paltry significance compared to what remains; and there is every indication that potential competition will increase, rather than decrease, in the future. To the extent that the possibility of new entry acts as a restraining influence on sellers in an oligopolistic or concentrated market, inclining them to maintain prices at a level low enough to discourage entry (see *Clorox,* pp. 27–28, 61–62) [63 F.T.C., at 1551–1552, 1577–1578], the acquisition here cannot be regarded as affecting potential competition in any way that could reasonably be expected to influence the behavior of S.O.S., Brillo, and the other firms in the steel wool business. In determining the impact of this merger on competition in that market, I do not think that it is irrelevant, as the Commission does, that a wide variety of rival products—non-steel wool scouring devices made of plastic, nylon, silica, and metals other than steel—are being marketed with increasing vigor and success. It is evident from the advertising claims made for these products, which attempt to capitalize on the deficiencies of steel wool,[1] that they are aimed directly at the consumer who now purchases steel wool soap pads. These scouring devices are sold side by side with steel wool soap pads on supermarket shelves and arrive there through the same channels of distribution. And, as the hearing examiner found,[2] the manufacturers of the non-steel wool devices price these products to be competitive with steel wool soap pads, taking into account the claims of greater durability and efficiency made for the former products.

Non-steel wool scouring devices are new to the market, many of them only two or three years old, and their further development and improvement is inevitable. The inherent deficiencies of steel wool soap pads offer the tempting prospect of a large market waiting to be captured by any firm that can devise a better product. Since the end of World War II we have seen the development of many new products that at first appeared only at the fringes of a market and then later competed directly with older products, in some cases replacing them. An example is clear plastic wrap, such as Saran. When first introduced, this product could not be said to compete directly with household wax paper. Yet today there can be no doubt about the competition Saran presents to wax paper.

[1] The claims made for various non-steel wool scouring devices include, "never frays or shreds," "long lasting," "safe," "no splinters," "kind to hands," and "one does the work of four rust and splinter soap pads."

[2] Finding of Fact 21 (I.D., p. 395).

Another example is the so-called miracle fibers which did not, immediately after their development, compete directly with cotton, silk, and wool; today, the producers of traditional, natural fibers are locked in direct, substantial competition with the producers of man-made fibers.

In its decision today, the Commission ignores the non-steel wool products and the competition which they represent to firms in the steel wool market. The Commission justifies this on the ground that the "relevant market" does not include these other products. But, as I have pointed out, the critical question in this case is that of determining whether, and to what extent, this merger will bring about "deep underlying structural changes" substantially lessening competition in the steel wool market. If, as the Commission holds, the legality of this merger must be judged by measuring its effects on potential competition, how can we close our eyes to anything that, as a matter of marketing reality, constitutes potential competition to firms in that market? If this were a conventional horizontal merger, it might well be unnecessary to consider its effect on potential competition. But where, as in this case, a conglomerate merger is being held illegal on the ground that it adversely affects market structure by lessening potential competition, we should view potential competition realistically and not on the basis of an abstract definition of "relevant market". In this case, it seems to me, no evaluation of potential competition is realistic if it ignores the emerging competition of the non-steel wool scouring devices. The manufacturers of these products include giants like Du Pont, Colgate-Palmolive Co., General Mills, Minnesota Mining & Manufacturing Co., and General Cable Corp. These companies, with their vast resources and marketing power, are not likely to take a back seat to General Foods, or be afraid to compete with it. So far as these companies are concerned, any promotional or advertising advantages enjoyed by General Foods would impose no competitive handicap on them.

The difference between the Commission's approach and mine is illustrated by a simple example. Suppose Brillo, rather than General Foods, were to acquire S.O.S. In such a case there would be a palpable, immediate, substantial lessening of competition. Elimination of S.O.S., its leading competitor, would give Brillo a monopoly position in the household steel wool industry. That industry of course constitutes a "line of commerce" within Section 7, and I would agree that in the case of a Brillo-S.O.S. merger it would be unnecessary and unjustifiable to pursue inquiry into the

existence or extent of potential competition from rival products outside the steel wool industry. The reason would be that a Brillo-S.O.S. merger would effect so great and so manifest a lessening of competition within the steel wool market that we would be justified in stopping inquiry right there, dispensing with any further reckoning of possible debits and credits. In the case of a horizontal merger of competing companies, a significant change in market structure occurs when concentration in the market is substantially increased or when the merger substantially adds to the size of an already dominant firm; and such a merger cannot be saved by a showing that potential competition has not thereby been lessened. *Ekco Products Co.*, F.T.C. Docket No. 8122 (decided June 30, 1964), p. 7 [65 F.T.C. 1163, 1207], *aff'd*, 347 F.2d 745 (7th Cir.).

However, a conglomerate merger, as in this case, has no immediate effect on the level of concentration or on the shares of particular competitors in any market. General Foods' acquisition of S.O.S. does not pose the same kind of clear and present lessening of competition as would a Brillo-S.O.S. merger. Hence, as the Commission recognized in *Clorox*, and apparently here also, it is necessary to go further and determine whether the merger will affect market structure in a way important to the existence of competition. In appraising the competitive impact of this kind of merger, it is especially necessary that we "recognize competition where, in fact, competition exists." *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 326. Where the illegality of a conglomerate merger depends on an analysis of its effects on market structure, we should also recognize potential competition where, in fact, potential competition exists—and not disregard the rivalry of products which, though outside the defined "relevant market," nonetheless constitute potential competition to firms in that market.

In my view, the competition between household cleaning devices, steel wool and non-steel wool, is so visible and real that—in making any predictive judgment of the effect of this merger on potential competition in the steel wool market—it must be taken into account. By ignoring such competition, the Commission undermines the soundness of its prediction that this merger will significantly lessen potential competition and substantially raise barriers to entry into the steel wool market. On no realistic appraisal of the market would it appear that Du Pont, Colgate, and these other giants are likely to be discouraged from taking on S.O.S. as a competitor because it has been acquired by General Foods. In

relation to these firms, the substitution of General Foods for S.O.S. has surely raised no barriers to entry or eliminated the potential competition that now exists.

The existence of these emerging competitors is critically important for another reason. One cannot ignore this competition and make predictions about the possible impact of this merger on possible new entry by hypothetical steel wool manufacturers. For, on the one hand, to the extent that we are concerned about the restraining effects of potential competition on S.O.S.'s market behavior, is it not likely that the restraining influence of other scouring devices marketed by giant rivals, who already have made large investments in production and marketing facilities, will be great—indeed, greater even than any restraining influence exercised by the possibility that a hypothetical manufacturer, who has not yet made any commitment, might enter the market to do battle with Brillo and S.O.S.? On the other hand, to the extent that we consider the merger's effects upon the likelihood that such hypothetical steel wool manufacturers will enter the market and deconcentrate it, is it not more realistic to suppose that any such firms will more likely be deterred by the declining acceptability of steel wool soap pads,[3] as well as by the increasing efforts of giant marketers of rival products to capitalize on the deficiencies of steel wool soap pads?

Predicting that a merger will have a substantial impact upon potential new entrants is difficult enough in any case (*Clorox*, p. 52) [63 F.T.C., at 1570]. And, as I have already pointed out, it is still an open question whether we would strike down a conglomerate merger where only one factor—such as a probable impact upon potential new entrants—was present. My point here is, however, that because of the emerging competition of other porducts and the declining acceptability of steel wool, as well as the other factors previously discussed which differentiate this case from *Clorox*, the net "lessening " of potential competition resulting from this merger is too tenuous and too speculative to furnish adequate basis for striking it down.

The Commission also includes, as a ground for holding this merger unlawful, purported cost savings accruing to S.O.S. through efficiencies in warehousing and distribution (p. 420; App. A, par. 33(f)). In the first place, the cost savings referred to by

[3] In the last few years, the public has become increasingly attracted to pots and pans with non-stick coatings, such as "Teflon." These utensils, which have the advantage of allowing one to cook without fats, cannot be cleaned with steel wool soap pads. Such utensils will undoubtedly expand the use of non-steel wool scouring devices.

the Commission represent lower costs to the entire Kool-Aid Division of General Foods, of which S.O.S. is merely a part. There is no evidence in the record to indicate how much, if any, of the savings is properly allocable to S.O.S. In fact, then, there is no evidence that its acquistion by General Foods gave S.O.S. an advantage over competitors by lowering its costs. More serious, however, is the erroneous legal significance which the Commission seems to attach to these alleged savings.

Economic efficiencies should not be a ground for the invalidation of a merger. Indeed, the promotion of competition has for one of its goals the achievement of greater efficiency. See Turner, *Conglomerate Mergers and Section 7 of the Clayton Act,* 78 Harv. L. Rev. 1313, 1323–28. In *Clorox* the Commission found that "the large-scale advertising 'economies' involved in this case represent price concessions available only to giant firms, and bear little relationship to ordinary notions of economic 'efficiency'." (*Clorox*, p. 65 [63 F.T.C., at 1581].)

When a large diversified firm like General Foods acquires the leading producer in a concentrated industry, it is a cause for concern. It is possible that the substitution of General Foods for S.O.S. will have long-term anticompetitive effects. The merger may also be objectionable on broader social grounds, as contributing to an unhealthy concentration of the nation's productive resources in the hands of a few large firms. But the statute does not leave us free to strike down mergers on the basis of sheer speculation or a general fear of bigness. See Turner, *supra*, at 1390. The statute requires proof of a reasonable probability that competition will be lessened substantially. As we pointed out in *Clorox*, "the language of Section 7 refutes any notion that every merger whose probable effect on competition is adverse is, for that reason, unlawful . . . . The impact must be significant and real . . . ." (P. 52 [63 F.T.C., at 1570].)

Section 7 does not incorporate into law the view that any acquisition made by a large firm which results in economies of scale thereby automatically lessens competition. Indeed, the Commission itself expressly rejected such a bald proposition not too long ago. *Union Carbide Corp.*, 59 F.T.C. 614, 658–59. In the present state of our knowledge of and experience with conglomerate mergers, we should move cautiously and tentatively. In this case, for the second time in recent weeks (see *National Tea Co.*, F.T.C. Docket No. 7453, decided March 4, 1966) [p. 226 herein], the Commission, to my regret, takes a long step toward ruling that a

"big" firm may grow only by internal expansion, and that any acquisition which makes it bigger thereby increases "concentration" and is therefore illegal.

Every merger of two firms, by eliminating one of them, to that extent increases "concentration" (in the sense of aggregate or national concentration). If increase in "concentration" is the standard to be applied under Section 7, every merger would be unlawful. But Congress did not prohibit all mergers but only those which are found to be anticompetitive in their probable effects. Under the statute we must draw a clear line between (1) those mergers which increase "concentration" *and* are anticompetitive, and (2) those mergers which increase "concentration" but are *not* anticompetitive. The decisions in this case and in *National Tea* blur, and may tend to erase, that line.

FINAL ORDER

This matter having been heard by the Commission on an appeal by respondent from the initial decision of the hearing examiner, and upon briefs and argument in support thereof and in opposition thereto; and

The Commission having rendered its decision determining that the appeal should be denied, that the initial decision, as supplemented and modified to conform to the views expressed in the accompanying opinion, should be adopted as the decision of the Commission, and that the order issued by the hearing examiner should be adopted as the order of the Commission:

It is ordered, That the initial decision, as modified and supplemented by the accompanying opinion be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That the order issued by the hearing examiner be, and it hereby is, adopted as the order of the Commission.

It is further ordered, That the respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

By the Commission, without the concurrence of Commissioner MacIntyre. Commissioner Elman dissented and has filed a dissenting opinion.

IN THE MATTER OF

FAE SWARTHOUT TRADING AS FAE'S HOUSE OF BRIDES

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE TEXTILE FIBER PRODUCTS IDENTIFICATION ACTS

Docket C-1048. Complaint, March 11, 1966—Decision, March 11, 1966

Consent order requiring a Sacramento, Calif., owner of a women's ready-to-wear shop, to cease misbranding, removing required labels from, and failing to keep required records for textile fiber products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Textile Fiber Products Identification Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Fae Swarthout, an individual trading as Fae's House of Brides, hereinafter referred to as respondent, has violated the provisions of said Acts and the Rules and Regulations promulgated under the Textile Fiber Products Identification 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 Fae Swarthout is an individual trading as Fae's House of Brides, with her office and principal place of business located at 1012 10th Street, Sacramento, California.

The respondent operates a single retail establishment where she is engaged in the sale of ladies' formals, gowns, dresses, and robes.

PAR. 2. Subsequent to the effective date of the Textile Fiber Products Identification Act on March 3, 1960, respondent has been and is now engaged in the introduction, delivery for introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, and the importation into the United States, of textile fiber products; and has sold, offered for sale, advertised, delivered, transported, and caused to be transported textile fiber products, which have been advertised or offered for sale in commerce; and has sold, offered for sale, advertised, delivered, transported, and caused to be transported, after shipment in commerce, textile

fiber products, either in their original state or contained in other textile fiber products; as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 3. Certain of said textile fiber products were misbranded by respondent in that they were not stamped, tagged, labeled, or otherwise identified to show any of the information required under the provisions of Section 4(b) of the Textile Fiber Products Identification Act, and the Rules and Regulations promulgated under said Act.

Among such misbranded textile fiber products, but not limited thereto, were textile fiber products to which no labels whatever were affixed, and textile fiber products with labels which failed to show in words and figures plainly legible:

(1) The true generic names of the constituent fibers present in textile fiber products; and

(2) The percentage of each of such fibers; and

(3) The name, or other identification issued and registered by the Commission, of the manufacturer of the product, or one or more persons subject to Section 3 with respect to such product.

PAR. 4. Respondent, in violation of Section 5(a) of the Textile Fiber Products Identification Act, has caused and participated in the removal of, prior to the time textile fiber products subject to the provisions of the Textile Fiber Products Identification Act were sold and delivered to the ultimate consumer, labels required by the Textile Fiber Products Identification Act to be affixed to such products, without substituting therefor labels conforming to Section 4 of said Act and in the manner prescribed by Section 5(b) of said Act.

PAR. 5. Respondent in substituting a stamp, tag, label or other identification pursuant to Section 5(b) has not kept such records as would show the information set forth on the stamp, tag, label or other identification that was removed and the name or names of the person or persons from whom such textile fiber product was received, in violation of Section 6(b) of the Textile Fiber Products Identification Act.

PAR. 6. The acts and practices of the respondent as set forth above were, and are, in violation of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts or practices, in commerce, under the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act and the Textile Fiber Products Identification Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Fae Swarthout is an individual trading as Fae's House of Brides, with her office and principal place of business located at 1012 10th Street, Sacramento, California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Fae Swarthout, an individual trading as Fae's House of Brides, or any other name, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, delivery for introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing to be transported in commerce, or the importation into the United States, of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, of any textile fiber product, which has been advertised or offered for sale in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, after shipment in commerce, of any

textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from misbranding textile fiber products by failing to affix labels to such textile fiber products showing in a clear, legible and conspicuous manner each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act.

It is further ordered, That respondent Fae Swarthout, an individual trading as Fae's House of Brides, or any other name, and respondent's representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from removing or mutilating, or causing or participating in the removal or mutilation of, the stamp, tag, label or other identification required by the Textile Fiber Products Identification Act to be affixed to any textile fiber product, after such textile fiber product has been shipped in commerce and prior to the time such textile fiber product is sold and delivered to the ultimate consumer, without substituting therefor labels conforming to Section 4 of said Act and the Rules and Regulations promulgated thereunder and in the manner prescribed by Section 5(b) of said Act.

It is further ordered, That respondent Fae Swarthout, an individual trading as Fae's House of Brides, or any other name, and respondent's representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from failing to keep such records when substituting a stamp, tag, label, or other identification pursuant to Section 5(b) as would show the information set forth on the stamp, tag, label, or other identification that was removed, and the name or names of the person or persons from whom such textile fiber product was received.

It is further ordered, That the respondent herein shall, within sixty (60) days after service upon her of this order, file with the Commission a report in writing setting forth in detail the manner and form in which she has complied with this order.

IN THE MATTER OF

JAMES W. LINT DOING BUSINESS AS EDUCATIONAL HOME SERVICES, ETC.

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

Docket C-1049. Complaint, March 17, 1966—Decision, March 17, 1966

Consent order requiring an Alexandria, Va., book distributor to cease using various false and deceptive representations to sell his books and to recruit salesmen.

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 James W. Lint, an individual, trading and doing business as Educational Home Services, Standard Associates and Metropolitan Industries, 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 James W. Lint is an individual, trading and doing business as Educational Home Services, Standard Associates, and Metropolitan Industries, with his principal office and place of business located at 4105 Duke Street, Alexandria, Virginia.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of various books, including an encyclopedia named "New Standard Encyclopedia," to the public.

PAR. 3. In the course and conduct of his business, respondent now causes, and for some time last past has caused, the said books, including the New Standard Encyclopedia, when sold, to be shipped from the State of Illinois to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of his business, respondent

has been, and now is, in substantial competition in commerce with corporations, individuals and firms in the sale of books of the same general nature as those sold by respondent.

PAR. 5. In the course and conduct of his business as aforesaid, respondent sells said books, including the New Standard Encyclopedia, at retail to the general public. Sales are made by respondent's agents, representatives or employees who contact prospective purchasers in their homes or at their places of business.

Respondent has formulated, developed and carried out a plan for selling the said books, including the New Standard Encyclopedia, which is commonly known and referred to as a "sales pitch," or "Presentation" program. Respondent supplies his agents, representatives or employees with said printed "sales pitch" and material for use in connection therewith and instructs them to use and follow same. Said agents, representatives or employees employ said printed sales presentation and material in orally soliciting the purchase of respondent's books, including the New Standard Encyclopedia.

Respondent, in said printed sales presentation and in advertising and promotional literature and other printed materials, and respondent's agents, representatives or employees, in the course of their sales talks, make many statements and representations concerning their status and employment, and the offer, price, characteristics and quality of respondent's said books, including the New Standard Encyclopedia. Some of these statements and representations are made orally by said agents, representatives or employees to prospective purchasers, and some are contained in advertising and promotional literature displayed by said representatives to said prospective purchasers.

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

A. That said agent or representative is connected with respondent's advertising or publicity department, and is not selling anything; that respondent's enterprise is a marketing research organization; and that said representative is conducting a survey.

B. That respondent is offering to give a set of the New Standard Encyclopedia free or at a reduced price to specially selected persons in return for:

1. A letter of endorsement regarding the said set of encyclopedia.

2. Display of the product in prospect's home.

3. An agreement that the encyclopedia will be kept up to date by prospective customer.

C. That the offer of respondent's encyclopedia is a "special introductory offer"; that said offer is not being made to the public generally; and that it is only being offered to a specially selected group of people in the particular community.

D. That certain books included in respondent's "combination offer" are given free of cost with the purchase of a subscription to respondent's "Information Service" for ten years, at $24.95 per year and that purchasers of respondent's "combination offer" pay only for a part of such books.

E. That respondent's quarterly supplement regularly sells for $10 and is being specially offered "free" or at a reduced price to prospective customers for only $2.95 a year which covers handling and postage charges.

F. That the favorable price, terms and conditions of the "special introductory" are limited to the time of the call on the prospective customer.

PAR. 6. In truth and in fact:

A. Said agents, representatives or employees, are not connected with respondent's advertising or publicity department. They are simply salesmen selling respondent's books and other articles of merchandise. Respondent's business enterprise is not that of a marketing research organization and respondent's representatives are not conducting a marketing survey.

B. Respondent's agents, or representatives do not give a set of the New Standard Encyclopedias free or at a reduced price to specially selected persons in return for the considerations heretofore listed in Paragraph 5(b) or for any other reasons or considerations. Said encyclopedias are offered and sold only at respondent's usual and customary prices.

C. Respondent's offer of said encyclopedia is not a "special introductory" offer. It is being offered to the general public at the time of the presentation and is not being offered only to a specially selected group of people in the particular community.

D. Certain of the books included with the encyclopedia in respondent's "combination offer" are not free of cost with the purchase of respondent's "Information Service," as the cost of all such books and said "Information Service" is included in the contract price of the combination offer. Purchasers pay the full price for all of the books in the "combination offer."

E. Respondent's quarterly supplement does not regularly sell

for $10 and is not being offered "free" or at a reduced price to prospective customers for only $2.95 to pay for handling and postage charges. Said supplement regularly sells for $2.95 per annum.

F. The price, terms and conditions of the so-called "special introductory" offer are not limited to the time when the call is made on the prospective customer.

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

PAR. 7. In the further course and conduct of respondent's business, and for the purpose of attracting and acquiring sales employees, respondent has caused, and is causing, classified newspaper ads to be published in newspapers distributed through the United States mail and by other means.

Typical and illustrative, but not all inclusive, of such advertisements and representations are the following:

Help Wanted: Assistant Interviewers at guaranteed monthly salary of $400.00.

PAR. 8. Through the use of the aforesaid statements and representations, and others of similar import and meaning but not specifically set forth herein, the respondent represents, and has represented, directly or by implication, that the offer of employment is for assistant interviewers at a guaranteed monthly salary.

PAR. 9. In truth and in fact, respondent's offer of employment was and is not for assistant interviewers at a guaranteed monthly salary, but for door-to-door book salesmen working on a commission.

Therefore, the statements and representations set forth in Paragraphs Seven and Eight hereof were and are false, misleading and deceptive.

PAR. 10. The use by respondent of the aforesaid false, misleading and deceptive statements and representations has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that such statements and representations were and are true, and to enter into contracts for the purchase of respondent's products because of such erroneous and mistaken belief.

The use by respondent of the aforesaid statements and representations in connection with the recruitment of personnel to sell encyclopedias and related books, has had, and now has, the capacity and tendency to mislead prospective employees into the erroneous and mistaken belief that such representations were, and are

true and to induce them to respond to such advertisements and to enter into respondent's employ in reliance thereon.

PAR. 11. 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.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent James W. Lint, is an individual, trading and doing business under the names of Educational Home Services, Standard Associates, and Metropolitan Industries, with his office and principal place of business located at 4105 Duke Street, in the city of Alexandria, State of Virginia.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent James W. Lint, an individual, trading and doing business as Educational Home Services, Standard Associates, and Metropolitan Industries, or under any other name or names, and respondent's representatives, agents and em-

ployees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of encyclopedias or other books or publications, or any other articles of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

1. That respondent's agents, representatives or employees are connected with respondent's advertising or publicity department; or that they are not selling anything; or that they have any status other than that which they have in fact.

2. Representing that respondent's enterprise is a marketing research organization; or that respondent's representatives are engaged in making a survey; or that the purpose of the call or interview by the salesman relates to other than the sale of books.

3. That purchasers may obtain a set of the New Standard Encyclopedia free, or at a reduction in the price thereof merely by writing a letter of recommendation therefor, or an opinion thereon, displaying the product or keeping it up to date, or that any of the books sold by respondent may be obtained by any means other than by payment of respondent's then current selling price.

4. That any offer of respondent's books or publications is a "special introductory" offer.

5. That the opportunity to purchase respondent's products is not available to the public generally; or that purchasers of any of respondent's books are specially selected.

6. That certain books are given "free" with the purchase of respondent's "Information Service"; or that purchasers of respondent's "combination offer" only pay for a part of such books.

7. That purchasers of a combination of respondent's books pay only for a part thereof.

8. That respondent's quarterly supplement or any other similar publication regularly sells for $10 per year or any other amount which is not respondent's regular selling price therefor; or that said quarterly supplement or any other similar publication is offered free or at a reduced price upon the payment of $2.95 or any other amount for handling and postage charges.

9. That any price at which respondent's books or other publications are offered for sale is a special or reduced price

or that any offer of respondent's books is a special offer, unless such price or offer is based upon, and is less than the price at which such books or other publications or services are regularly and usually sold by respondent in the recent regular course of business.

10. That respondent's offer of books or other publications is limited as to time: *Provided, however,* That it shall be a defense in any enforcement proceeding instituted hereunder for respondent to establish that such limitation is actually imposed and in good faith adhered to by respondent.

11. That jobs are available and applicants are sought for assistant interviewers or any other kind of employment or that employment is available at a guaranteed or stipulated income or salary: *Provided, however,* That it shall be a defense in any enforcement proceeding instituted hereunder for respondent to establish that jobs of the kind designated are available, that applicants to fill such jobs are sought and that the amount of income or salary so designated is paid to the persons employed to fill the advertised jobs.

It is further ordered, That the respondent herein shall, within sixty (60 days after service upon him 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 this order.

IN THE MATTER OF

MORRIS LESSNER

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS

Docket C-1050. Complaint, March 18, 1966—Decision, March 18, 1966

Consent order requiring a New York City manufacturing furrier to cease violating The Fur Products Labeling Act by misbranding and falsely invoicing his fur products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the au-

thority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Morris Lessner, an individual trading as Morris Lessner, hereinafter referred to as respondent, has violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling 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 Morris Lessner is an individual trading as Morris Lessner.

Respondent is a manufacturer of fur products with his office and principal place of business located at 150 West 28th Street, New York, New York.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondent has been and is now engaged in the introduction into commerce, and in the manufacture for introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and has been and is now manufacturing for sale, selling, advertising, offering for sale, transporting and distributing fur products which had been made in whole or in part of furs which had been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such misbranded fur products, but not limited thereto, were fur products with labels which failed to show the true animal name of the fur used in the fur product.

PAR. 4. Certain of said fur products were misbranded in violation of the Fur Products Labeling Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder inasmuch as required item numbers were not set forth on labels, in violation of Rule 40 of said Rules and Regulations.

PAR. 5. Certain of said fur products were falsely and deceptively invoiced by the respondent in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated under such Act.

Among such falsely and deceptively invoiced fur products, but

not limited thereto, were fur products covered by invoices which failed:

1. To show the true animal name of the fur used in the fur product.

2. To disclose that the fur contained in the fur product was bleached, dyed or otherwise artificially colored, when such was the fact.

PAR. 6. Certain of said fur products were falsely and deceptively invoiced with respect to the name or designation of the animal or animals that produced the fur from which the said fur products had been manufactured, in violation of Section 5(b) (2) of the Fur Products Labeling Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products which were invoiced as "Sable" when, in fact, the fur contained in such products was "American Sable" or "American Marten."

PAR. 7. Certain of said fur products were falsely and deceptively invoiced with respect to the name of the country of origin of imported furs used in such fur products, in violation of Section 5(b) (2) of the Fur Products Labeling Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products invoiced to show the name of the country of origin of furs contained in such fur products as "Russia" when the country of origin was, in fact, the "United States" or "Canada."

PAR. 8. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) Information required under Section 5(b) (1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth on invoices in abbreviated form, in violation of Rule 4 of said Rules and Regulations.

(b) The term "blended" was used on invoices as part of the information required under Section 5(b) (1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe the pointing, bleached, dyeing, tip-dyeing or otherwise artificial coloring of furs, in violation of Rule 19(f) of said Rules and Regulations.

(c) Required item numbers were not set forth on invoices, in violation of Rule 40 of said Rules and Regulations.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Textiles and Furs proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act and the Fur Products Labeling Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by the respondent that the law has been violated as alleged in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having reason to believe that the respondent has violated the Federal Trade Commission Act and the Fur Products Labeling Act, and having determined that complaint should issue stating its charges in that respect, hereby issues its complaint, accepts said agreement, makes the following jurisdictional findings and enters the following order:

1. Respondent Morris Lessner is an individual trading as Morris Lessner with his office and principal place of business located at 150 West 28th Street, New York, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Morris Lessner, an individual, trading as Morris Lessner or under any other trade name, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, or manufacture for introduction into commerce, or the sale, advertising or offering for sale in commerce, or transportation and distribution in commerce, of any fur product; or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation, or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce; as the terms "commerce," "fur" and "fur

product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Failing to affix labels to fur products showing in words and in figures plainly legible all of the information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.

2. Failing to set forth on labels the item number or mark assigned to each such fur product.

B. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices, as the term "invoice" is defined in the Fur Products Labeling Act, showing in words and figures plainly legible all the information required to be disclosed in each of the subsections of Section 5(b) (1) of the Fur Products Labeling Act.

2. Setting forth on invoices pertaining to fur products any false or deceptive information with respect to the name or designation of the animal or animals that produced the fur contained in such fur product.

3. Misrepresenting in any manner, on invoices directly or by implication, the country or origin of the fur contained in fur products.

4. Setting forth information required under Section 5(b) (1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in abbreviated form.

5. Setting forth the term "blended" or any term of like import as part of the information required under Section 5(b) (1) of the Fur Products Labeling Act and Rules and Regulations promulgated thereunder to describe the pointing, bleaching, dyeing, tip-dyeing or otherwise artificial coloring of furs contained in fur products.

6. Failing to set forth on invoices the item number or mark assigned to fur products.

It is further ordered, That the respondent herein shall, within sixty (60) days after service upon him 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 this order.

Complaint

IN THE MATTER OF

M. LEVINSON & SONS, INC., ET AL.

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

Docket C-1051. Complaint, March 18, 1966—Decision, March 18, 1966

Consent order requiring a New York City manufacturer of women's hats to cease selling hats containing foreign-made fur or wool felt bodies without conspicuously disclosing the country of origin of the bodies.

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 M. Levinson & Sons, Inc., a corporation, Harold Levinson and Benjamin Rosenthal, individually and as officers 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 M. Levinson & Sons, 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 596 Broadway, New York, New York.

Respondents Harold Levinson and Benjamin Rosenthal are officers of the corporate respondent. They formulate, direct and control the acts, practices and policies of the corporate respondent, including the acts, practices and policies hereinafter set forth. Their address is the same as that of corporate respondent.

PAR. 2. Respondents are now, and for the past two years have been, engaged in the manufacturing, offering for sale, sale and distribution of women's hats, to wholesalers and retailers for resale to the public.

PAR. 3. In the course and conduct of their said business, respondents now cause, and for sometime last past have caused, their said hats to be transported from their place of business in the State of New York to purchasers thereof located in various other States of the United States and the District of Columbia. Respondents maintain, and at all times mentioned herein have main-

tained, a substantial course of trade in said hats in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, respondents purchase hat bodies from importers, convert said bodies into finished hats and sell them. When the aforesaid hat bodies are received by respondents, they bear words stamped into the brims thereof, near the edge, or on tags attached thereto, disclosing the foreign country of origin of the bodies. In the course of finishing the hats, respondents remove the words stamped into the brims of the hat bodies so marked by shearing off the edges of the brims and remove the tags from the hat bodies so marked. When the finished hats are sold by respondents, said hats bear no disclosure of the foreign country of origin of the imported bodies from which they are made.

PAR. 5. In the absence of an adequate disclosure of the foreign country of origin of imported products or substantial parts thereof, including women's hats and the bodies from which such hats are made, the public understands and believes that such products are entirely of domestic origin, a fact of which the Commission takes official notice.

A substantial portion of the purchasing public has a preference for products, including women's hats, which are entirely of domestic origin, a fact of which the Commission also takes official notice.

PAR. 6. Through the use of the aforesaid practices, respondents place in the hands of retailers the means and instrumentalities by and through which they may mislead and deceive the public as to the origin of respondents' hats.

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 hats of the same general kind and nature as those sold by respondents.

PAR. 8. The use by respondents of the aforesaid practices has had, and now has, the capacity and tendency to mislead and deceive members of the purchasing public into the purchase of substantial quantities of respondents' hats in the erroneous and mistaken belief that said hats are entirely of domestic origin.

PAR. 9. The aforesaid acts and practices of 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 in commerce and unfair

and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Deceptive Practices proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by the respondents that the law has been violated as alleged in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having reason to believe that the respondents have violated the Federal Trade Commission Act, and having determined that complaint should issue stating its charges in that respect, hereby issues its complaint, accepts said agreement, makes the following jurisdictional findings and enters the following order:

1. Respondent M. Levinson & Sons, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business at 596 Broadway, New York, New York.

Respondents Harold Levinson and Benjamin Rosenthal are officers of said corporation and their address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents M. Levinson & Sons, Inc., a corporation, and its officers, and Harold Levinson and Benjamin Rosenthal, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or

through any corporate or other device, in connection with the offering for sale, sale and distribution of hats or any other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering for sale or selling hats containing fur or wool felt bodies which have been made in a foreign country unless the country of origin of such bodies is revealed by a marking or stamping on an exposed surface of the hats which is of such conspicuousness as to be clearly visible to prospective purchasers of the hats and so placed as not to be readily hidden or obliterated, and of such a degree of permanency as to remain on the hats until sold to the consumer;

2. Furnishing the means and instrumentalities to others by and through which they may mislead the public as to the country of origin of such hats.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

COTT CORPORATION ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 (d) OF THE CLAYTON ACT

Docket C-1052. Complaint, March 23, 1966—Decision, March 23, 1966

Consent order requiring a Manchester, N. H., distributor of soft drinks and producer of soft drink concentrates to cease violating Sec. 2(d) of the Clayton Act by paying discriminatory promotional allowances to favored retail customers selling its carbonated soft drink beverages.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof and more particularly designated and described hereinafter, have violated the provisions of Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Cott Corporation is a corporation organized, ex-

isting and doing business under and by virtue of the laws of the State of New Hampshire with its principal office and place of business located at 177 Granite Street, Manchester, New Hampshire. Cott Beverage Corporation was a corporation organized and existing under and by virtue of the laws of the State of Delaware. Its principal office and place of business was located at 197 Chatham Street, New Haven, Connecticut. On November 18, 1963 Cott Beverage Corporation was merged with Cott Corporation, which corporation, prior to the merger, was named Cott Bottling Co. of New England, Inc.

PAR. 2. Until the date of the merger, Cott Corporation was a franchised bottler of Cott Beverage Corporation, distributing and selling soft drink beverages in Maine, Vermont, New Hampshire, Massachusetts, New York and New Jersey. Until the date of its merger with Cott Corporation, Cott Beverage Corporation was engaged in the production of soft drink concentrate for distribution and sale to its franchised bottlers and in bottling soft drink beverages for distribution and sale to customers in New York, Massachusetts and Connecticut. Cott Corporation is the legal successor through merger to Cott Beverage Corporation and thereby has added to its previously described activity that business activity above ascribed to Cott Beverage Corporation. In 1963, their combined dollar sales volume was approximately $22,000,000.

PAR. 3. In the course and conduct of their business, respondents have engaged, and Cott Corporation is now engaged, in commerce, as "commerce" is defined in the Clayton Act, as amended, by shipping their products or causing them to be shipped from their places of business to customers located in the same and in other States of the United States.

PAR. 4. In the course and conduct of their business in commerce, respondents have been in the past, and Cott Corporation is now, in competition with other corporations, partnerships, individuals and firms engaged in the production, bottling, distribution and sale of carbonated soft drink beverages. Their customers did compete, and Cott Corporation's customers do now compete, with each other within the various trading areas in which they are engaged in business.

PAR. 5. Respondents have paid or contracted to pay something of value to or for the benefit of certain of their customers in consideration for advertising or other services and facilities furnished by or through such customers in connection with the offering for sale and sale of respondents' carbonated soft

drink beverages without making such payments available on proportionally equal terms to all customers competing in the offering for sale and sale of such products.

Specifically, respondents have made payments or granted free goods to or for the benefit of favored customers in consideration for certain promotional services and facilities performed by said customers in connection with their resale of respondents' carbonated soft drink beverages. These payments and free goods were not made available on proportionally equal terms to all other customers competing in the distribution of such products with said favored customers. The services and facilities performed by the favored customers included, but were not necessarily limited to, in-store displays and demonstrations of respondents' carbonated soft drink beverages as well as the advertising of respondents' carbonated soft drink beverages through radio, television and newspapers.

PAR. 6. The acts and practices of respondents, as alleged above, are in violation of Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. 13).

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of Cott Bottling Co. of New England, Inc., a corporation whose name was changed in November, 1963, to Cott Corporation, and of Cott Beverage Corporation, a corporation; and Cott Corporation and Cott Beverage Corporation, respondents named in the caption hereof, having been furnished thereafter with a copy of a draft of complaint which the Bureau of Restraint of Trade proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of Section 2(d) of the Clayton Act, as amended; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a recital that Cott Corporation is responsible for and subject to the duties and liabilities of Cott Beverage Corporation, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by the respondents that the law has been violated as alleged in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having reason to believe that the respondents have violated said Act, and having determined that complaint should issue stating its charges in that respect, hereby issues its complaint, accepts said agreement, makes the following jurisdictional findings and enters the following order:

1. Respondent Cott Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Hampshire, with its office and principal place of business located at 177 Granite Street, Manchester, New Hampshire.

Respondent Cott Beverage Corporation, 197 Chatham Street, New Haven, Connecticut, was a corporation organized and existing under and by virtue of the laws of the State of Delaware.

On November 18, 1963, Cott Beverage Corporation was merged into Cott Bottling Co. of New England, Inc., which firm thereupon changed its name to Cott Corporation. Cott Corporation is the legal successor through merger to Cott Beverage Corporation.

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

ORDER

It is ordered, That respondents Cott Corporation, a corporation, and Cott Beverage Corporation, a corporation, their officers, employees, agents and representatives, directly or through any corporate or other device in connection with the distribution and sale of carbonated soft drink beverages in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

> Paying or contracting for the payment of anything of value to or for the benefit of any customer of respondents as compensation or in consideration for advertising or any other services or facilities furnished by or through such customer in connection with the processing, handling, sale or offering for sale of respondents' carbonated soft drink beverages unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

PILLSBURY MILLS, INC.*

ORDER OF DISMISSAL, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT

Docket 6000. Complaint, June 16, 1952—Decision, March 28, 1966

Order dismissing pursuant to a Court remand, 354 F. 2d 952 (1966), 8 S. & D. 5, the Commission has determined that it would not be in the public interest to proceed further in its antimerger case against respondent; however, the Commission pointed out that it will maintain continuing surveillance of future developments in this industry and will give careful attention to any future acquisitions by respondent.

OPINION OF THE COMMISSION

On January 7, 1966, the Court of Appeals for the Fifth Circuit vacated the Commission's order and decision in this matter (57 F.T.C. 1274, 1389–1415), and remanded the case in order that the Commission, as now constituted, could "determine what steps should [now] appropriately be taken in view of both the lapse of time and the present state of the case law applying Section 7." (*Pillsbury Co.* v. *Federal Trade Commission,* 354 F.2d 952 (5th Cir. 1966) [8 S.&D. 5].

This proceeding has had a long, complex history, which is detailed in the opinion of the Court of Appeals and need not be repeated here. The case is fourteen years old. The record exceeds 40,000 pages in length. The evidence contained in the record pertains to market conditions which existed more than a decade ago. Whether the Commission could properly adjudicate the merits on the basis of the present record, without taking further evidence, is at least highly doubtful. Passage of time has also created serious uncertainty as to the availability of effective relief, even if the challenged acquisitions should be found unlawful. There are also in the case a number of procedural problems; thus, it is not unlikely that, upon a further court review, the substantive questions on the merits may not be reached.

Accordingly, in the light of all these considerations, the Commission, mindful of its responsibility to "develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate [the Commission's] available funds

*Now known as The Pillsbury Company.

and personnel in such a way as to execute [that] policy efficiently and economically" (*Moog Industries, Inc.* v. *Federal Trade Commission,* 355 U.S. 411, 413 (1958)), has determined that it would not be in the public interest to proceed further in this matter. The complaint will be dismissed. Continuing surveillance will be maintained, however, of future developments in this industry. Any future acquisitions by respondent will receive careful attention, and the Commission will take such action thereon as may be required in the public interest.

Commissioner MacIntyre did not participate.

ORDER DISMISSING COMPLAINT

For the reasons set forth in the accompanying opinion, *It is ordered,* That the complaint herein be, and it hereby is, dismissed.

Commissioner MacIntyre not participating.

IN THE MATTER OF

TAYLOR-FRIEDSAM CO., INC., ET AL.

ORDER, OPINIONS, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE TEXTILE FIBER PRODUCTS IDENTIFICATION ACTS

Docket 8658. Complaint, March 8, 1965—Decision, March 28, 1966

Order requiring a New York City wholesale distributor of domestic and imported ribbons, to cease misbranding any textile fiber ribbon and furnishing false guaranties that such textile fiber products were not misbranded or misrepresented.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Textile Fiber Products Identification Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Taylor-Friedsam Co., Inc., a corporation, and Dorothy Nitsch, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Textile Fiber Products Identification Act, and it appearing to the Commission that a proceed-