in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance with obligations arising out of the order.

IN THE MATTER OF

STERLING DRUG INC.

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

Docket 8797. Complaint, Aug. 7, 1969—Decision, April 7, 1972.

Order modifying and adopting hearing examiner's decision dismissing complaint that a New York City drug firm selling a broad range of health and beauty aid products violated Section 7 of the Clayton Act in acquiring another New York City company manufacturing and selling health and beauty aids, household deodorizer and other non-food consumer products.

COMPLAINT

The Federal Trade Commission has reason to believe that Sterling Drug Inc., a corporation and the respondent herein, has merged with Lehn & Fink Products Corporation, a corporation, in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18); therefore, pursuant to Section 11 of the Clayton Act, as amended (15 U.S.C. 21), it issues this Complaint, stating its charges in that respect as follows:

I Definitions

1. For purposes of this complaint, the following definitions are applicable:

(a) Proprietary Drugs—pharmaceutical preparations advertised to the public;

(b) Personal Care Products—perfumes, cosmetics, and other toilet preparations advertised to the public;

(c) Health and Beauty Aids—All products which are either proprietary drugs or personal care products, as defined above;

(d) Household Aerosol Deodorizers—products in aerosol form which are designed to purify air in the household by removing odors or destroying germs; and

(e) Nonfood Household Consumer Products—chemically-based products which are advertised to the public and used in the house-

hold, including health and beauty aids, household aerosol deodorizers, soaps and detergents, and a variety of cleaning and maintenance products.

II Respondent

2. Respondent, Sterling Drug Inc., is now, and was at the time of the subject merger, a corporation organized and existing under the laws of the State of Delaware, with its principal offices located at 90 Park Avenue, New York, New York.

3. In calendar 1965, the last full calendar year prior to the subject merger, respondent had net sales of $303,300,000 and was the 228th largest industrial corporation in the United States. On December 31, 1965, respondent's assets amounted to $221,175,000. During the ten-year period 1956 through 1965, respondent increased its sales by over 70 percent and its assets by more than 56 percent.

4. Respondent is now, and was at the time of the subject merger, engaged in the manufacture and sale of a broad range of health and beauty aid products. In calendar 1965, respondent's health and beauty aid sales amounted to approximately $90 million and accounted for approximately 45 percent of respondent's total domestic sales in that year.

5. At the time of the subject merger, respondent's health and beauty aids business included many nationally known brands which are leaders in their respective fields. The following is a partial lise of respondent's well-known brands: "Bayer" aspirin, "Phillips'" milk of magnesia, "Campho-Phenique" external antiseptic, "Cope" and "Vanquish" pain relievers, "Dr. Lyon's" tooth powder, "Z.B.T." baby powder, "pHisoHex" skin cleanser, and "Phisoac" acne aid.

6. Respondent is highly successful in achieving and maintaining brand allegiance toward its health and beauty aid products through the use of extensive advertising. Respondent's advertising expenditures are very substantial, both in absolute amount and in proportion to respondent's health and beauty aid sales. In calendar 1965 respondent spent approximately $31 million for all media advertising and was the 36th largest advertiser in the United States. For respondent's four largest selling products in that year, all of which were health and beauty aid products, advertising expenditures averaged approximately 25 percent of net sales.

7. The majority of respondent's advertising budget is directed toward network television. In calendar 1965 respondent spent approximately $18 million for network television advertising and was the 16th largest network television advertiser for that year.

8. Respondent markets its health and beauty aid products through its own national sales organization, which is divided into regions and districts and sells on a direct basis to wholesale and retail food, drug, department, variety and mass-merchandise outlets.

9. Respondent engages in a continuous research and development program in building for its near-term and long-term future in the health and beauty aid field. Like its product lines, respondent's research is highly diversified and is directed not only toward the development of new products but toward maintaining the brand allegiance of existing products.

10. In addition to its health and beauty aids business, respondent is engaged in the manufacture and sale of a number of other nonfood household consumer product lines, most of which it entered through acquisition. The brands acquired include the following: "Glis" spray starch, "Jato" spray cleaner, "Glisade" fabric finish, "Down-the Drain" drain cleaner, and "d-Con" insecticides and rodenticides.

11. At all times relevant herein, respondent has sold and shipped products in interstate commerce throughout the United States and engaged in "commerce" within the meaning of the Clayton Act, as amended.

III Lehn & Fink Products Corporation

12. Prior to the subject merger, Lehn & Fink Products Corporation ("Lehn & Fink") was a corporation organized and existing under the laws of the State of Delaware with its principal offices located at 445 Park Avenue, New York, New York.

13. Lehn & Fink was engaged principally in the manufacture and sale of a broad range of health and beauty aids, household deodorizers, and other nonfood household consumer products.

14. For the fiscal year ending June 30, 1965, the twelve-month period immediately preceding the subject merger, Lehn & Fink had net sales of $66,702,978. As of June 30, 1965, Lehn & Fink's assets amounted to $28,291,522. During the ten-year period 1956 through 1965, Lehn & Fink increased its sales by over 125 percent and its assets by approximately 117 percent.

15. At the time of the subject merger, Lehn & Fink's health and beauty aids business included many nationally-known brands, some of which were leaders in their respective fields. The following is a partial list of Lehn & Fink's well-known brands: "Medi-Quick" antiseptic products, "Stri-Dex" medicated products, "Dorothy Gray" and "Tussy" cosmetics, and "Noreen" and "Ogilvie" hair preparations.

16. Lehn & Fink was achieving and maintaining brand allegiance toward its health and beauty aids and other nonfood household consumer products through the use of extensive advertising. For the fiscal year ending June 30, 1965, Lehn & Fink spent approximately $12 million for all media advertising and was approximately the 102nd largest advertiser in the United States. For Lehn & Fink's five largest selling products in that year, three of which were health and beauty aid products, advertising expenditures averaged approximately 22 percent of net sales.

17. Lehn & Fink marketed its health and beauty aid products through its own national sales organization, supplemented in some instances by the use of brokers. Lehn & Fink's sales organization sold on a direct basis to wholesale and retail food, drug, department, variety, and mass-merchandise outlets.

18. Lehn & Fink's rapid growth in the ten-year period preceding the subject merger is attributable, in large part, to its diversified program of product research and development, which resulted in the successful introduction of a number of important new health and beauty aid products. These products include "Medi-Quick" antiseptic products, "Stri-Dex" medicated products, and various cosmetics and hair preparations.

19. Lehn & Fink was the leading firm in the national household aerosol deodorizer market. The company introduced its "Lysol" brand spray disinfectant-deodorizer in 1962 and, at the time of the subject merger, had captured 36 percent of the market. By August of 1968, approximately two years after Lehn & Fink was merked into Sterling, "Lysol's" market share had increased to 42 percent.

20. At all times relevant herein, Lehn & Fink has sold and shipped products in interstate commerce throughout the United States and engaged in "commerce" within the meaning of the Clayton Act, as amended.

IV The Merger

21. On or about June 28, 1966, Lehn & Fink was merged into respondent via an exchange of stock, pursuant to which Lehn & Fink stockholders received one share of a new preferred stock of respondent, convertible into 1 and ¼ shares of common and callable at $55 a share after five years, in exchange for each share of Lehn & Fink stock.

V The Nature of Trade and Commerce

A. *The General Market—Health and Beauty Aid Products*

22. In terms of Standard Industrial Classification categories, the health and beauty aid market is found wholly within Major Group 28—"Chemicals and Allied Products." Every product contained within the market falls into either Industry No. 2834 "Pharmaceutical Preparations" or 2844—"Perfumes, Cosmetics, and Other Toilet Preparations." The market consists of all products in those two industries which are promoted directly to the consumer.

23. Health and beauty aid products are generally pre-sold to the consumer through extensive advertising and promotion and are then purchased by the consumer primarily in retail, food, drug, department and mass-merchandise outlets. In comparison with the total range of products purchased by the typical household, these products are relatively low in price and relatively high in rate of turnover.

24. The health and beauty aid market is rapidly expanding. During the period 1947 through 1966 the dollar value of total shipments increased from approximately $710 million to approximately $3.5 billion. Together, respondent and Lehn & Fink accounted for approximately 3.5 percent of this total market.

25. The health and beauty aid market is characterized by an extraordinarily high degree of product differentiation, and the necessity of creating and maintaining consumer brand preference through advertising is a substantial barrier to entry into the market. A second major barrier to entry is the necessity of obtaining and maintaining widespread distribution through large numbers of retail outlets.

26. In order to successfully manufacture and sell a broad range of health and beauty aid products, a firm must possess the following competitive resources, among others:

(a) A chemically-oriented research and product development department capable of continually introducing new brands and maintaining consumer preference for existing brands;

(b) A financial base large enough to support continuous, substantial advertising expenditures; and

(c) An experienced national sales force capable of obtaining and servicing thousands of food, drug, department and mass-merchandise outlets.

B. The Primary Submarkets

27. The health and beauty aid market encompasses two primary submarkets: (1) proprietary drugs (pharmaceutical preparations advertised to the public); and (2) personal care products (including perfumes, cosmetics, and other toilet preparations advertised to the public).

28. Each of the submarkets is rapidly expanding. During the period 1947 through 1966 the dollar value of total shipments of proprietary drugs increased from approximately $328 million to approximately $1.1 billion; during the same period, the value of personal care product shipments increased from approximately $381 million to approximately $2.4 billion.

29. All of the statements contained in Paragraphs 23, 25 and 26, *supra*, describing competitive conditions in the health and beauty aid market, are applicable to each of the two submarkets.

30. Virtually all of the leading firms in the health and beauty aid market manufacture and sell products in both of the primary submarkets. Since the same technological resources, advertising abilities, and distribution channels can be applied to, and are necessary for success in both supermarkets, it is logical to expect manufacturers of proprietary drugs to continue to expand into personal care products and, conversely, to expect manufacturers of personal care products to continue to expand into proprietary drugs.

C. Specific Proprietary Drug Product Lines

31. Acne aids and external antiseptics are representative of the products which comprise the proprietary drug submarket. Each of these product lines was highly concentrated prior to the subject merger, as is illustrated by the following tabulation:

Product	Year	Dollar value of total sales	Percent of total sales accounted for by— 4 largest companies	8 largest companies
Acne aids	1963	$43 million	61	78
External antiseptics	1964	$41 million	41	55

32. All of the statements contained in Paragraphs 23, 25, and 26 *supra*, describing competitive conditions in the health and beauty aid market, are applicable to each of these specific product lines.

D. Household Aerosol Deodorizers

33. The household aerosol deodorizer market includes those products in aerosol form which are designed to purify air in the household by removing odors or destroying germs.

34. The manufacture and sale of household aerosol deodorizers is highly concentrated and has been dominated since 1965 by one nationally-known brand, Lehn & Fink's "Lysol" spray disinfectant deodorizer, as is illustrated by the following tabulation:

Year	Dollar value of total sales	Percent of total sales accounted for by:	
		"Lysol"	7 largest companies
1965	$62 million	28	86
1966	$73 million	34	8
1967	$77 million	34	88
1968 (8 mos.)	$54 million	41	84

35. Household aerosol deodorizers are pre-sold to the consumer through extensive advertising and are then purchased by the consumer primarily in retail food and drug stores.

VI The Violations Charged

36. The effect of the merger of Lehn & Fink into respondent has been, or may be, substantially to lessen competition or to tend to create a monopoly in the national health and beauty aid market, in each of the two primary submarkets contained therein, and in certain specific product lines in each of the following ways, among others:

(a) Lehn & Fink has been eliminated as an independent competitive factor in the manufacture and sale of health and beauty aids;

(b) Potential competition between respondent and Lehn & Fink has been eliminated in the manufacture and sale of proprietary drugs and personal care products;

(c) Actual competition between respondent and Lehn & Fink has been eliminated in the manufacture and sale of acne aids and external antiseptics; and

(d) Lehn & Fink's position as the dominant firm in the household deodorizer market has been, or may be, further entrenched to the detriment of actual and potential competition.

37. The merger of Lehn & Fink into respondent, as alleged above, constitutes a violation of Section 7 of the Clayton Act, as amended. (15 U.S.C. 18).

Mr. James Y. Wood, *Mr. Robert J. Fulgency*, and *Mr. David Zoll* supporting the complaint.

Mr. Herbert A. Bergson, *Mr. Lionel Kestenbaum*, and *Mr. Bruce P. Saypol*, *Bergson, Borkland, Margolis, and Adler*, Washington, D.C., *Mr. Sidney P. Howell, Jr.*, *Rogers, Hoge, and Hills*, New

York, New York, and *Mr. James H. Luther*, general counsel, and *Mr. Gregor F. Gregorich*, Sterling Drug Inc., for respondent.

INITIAL DECISION BY WILLIAM K. JACKSON, HEARING EXAMINER

MAY 12, 1971

PRELIMINARY STATEMENT

The Federal Trade Commission on August 7, 1969, issued its complaint in this proceeding charging Sterling Drug Inc. (Sterling), a corporation, by its acquisition of Lehn & Fink Products Corporation (Lehn & Fink), a corporation, violated Section 7 of the Clayton Act, as amended (15 U.S.C. § 18).

The complaint alleges that the acquisition may have serious anticompetitive effects with a resulting substantial lessening of competition in the national health and beauty aid market and the submarkets thereof (a) proprietary drugs and (b) personal care products, and in two specific product lines (a) acne aids and (b) external antiseptics. Additionally, it is alleged that the acquisition may have caused a lessening of competition in the household aerosol deodorizer market.

Among the specific anticompetitive effects alleged in the complaint to flow from this acquisition are the following: (1) Lehn & Fink has been eliminated as an independent competitive factor in the manufacture and sale of health and beauty aids; (2) potential competition between Sterling and Lehn & Fink has been eliminated in the manufacture and sale of proprietary drugs and personal care products; (3) actual competition between Sterling and Lehn & Fink has been eliminated in the manufacture and sale of acne aids and external antiseptics; (4) Lehn & Fink's position as the dominant firm in the household aerosol deodorizer market has been, or may be, further entrenched to the detriment of actual and potential competition.

After being served with the complaint, respondent appeared by counsel and filed on November 3, 1969, its answer to the complaint denying, in substance, that the merger was illegal. Thereafter, between November 14, 1969, and November 5, 1970, four prehearing conferences were held for the purposes of simplification of the issues, obtaining admissions of fact and authentication of documents, discovery of relevant material, exchanging lists of exhibits and names of witnesses to be used at the trial, and the preparation of a concise statement of the contested issues of law and fact. In accord-

ance with the examiner's pretrial order, both parties prepared and submitted a pretrial memorandum.

Hearings for the presentation of testimony and other evidence by complaint counsel began in Washington, D.C. on December 7, 1970, and concluded on December 18, 1970. Respondent's defense commenced at Washington, D.C. on January 11, 1971, and concluded on January 14, 1971. No rebuttal was requested and the record was closed on January 14, 1971. The Commission extended the time of the hearing examiner to render an initial decision until May 14, 1971, in view of the joint request of the parties for additional time to submit proposed findings of fact, briefs, and reply briefs.

Proposed findings of fact and brief in support thereof were filed by complaint counsel on February 18, 1971, respondent filed its proposed findings of fact and brief on March 10, 1971, and complaint counsel filed a reply brief on March 22, 1971.

Any motions not heretofore or herein specifically ruled upon, either directly or by the necessary effect of the conclusions in this Initial Decision, are hereby denied.

This proceeding is before the hearing examiner upon the complaint, answer, testimony and other evidence, proposed findings of fact and conclusions and briefs filed by counsel supporting the complaint, and by counsel for respondent. The proposed findings of fact, conclusions and briefs in support thereof submitted by the parties have been carefully considered by the examiner, and those findings not adopted either in the form proposed or in substance are rejected as not supported by the evidence or as involving immaterial matter.

For the convenience of the Commission and the parties, the findings of fact include references to the principal supporting items in the record. Such references are intended to serve as convenient guides to the testimony and exhibits supporting the recommended findings of fact, but do not necessarily represent complete summaries of the evidence considered in arriving at such findings.

Reference to the record are made in parentheses, and certain abbreviations, as hereinafter set forth, are used:

CX—Commission's Exhibit
RX—Respondent's Exhibit
CPF—Complaint Counsel's Proposed Findings and Conclusions
RPF—Respondent's Proposed Findings and Conclusions
RB--Respondent's Brief
CRB—Complaint Counsel's Reply Brief

The transcript of the testimony is referred to with either the last name of the witness and the page number or numbers upon

which the testimony appears or with the abbreviation Tr. and the page.

Having heard and observed the witnesses and after having carefully reviewed the entire record in this proceeding, together with the proposed findings, conclusions and briefs submitted by the parties, as well as replies, the examiner makes the following:

FINDINGS OF FACT

I Identity and Business of Respondent and Acquired Company

A. The Respondent

1. Respondent, Sterling Drug Inc., is now, and was at the time of the subject merger, a corporation organized and existing under the laws of the State of Delaware, with its principal offices located at 90 Park Avenue, New York, New York. (Complaint, Par. 2; Answer, Par. 3).

2. In calendar 1965, the last full calendar year prior to the subject merger, Sterling had net sales of $303,300,000 and was the 228th largest industrial corporation in the United States. Sterling's assets were $221,175,000 on December 31, 1965. During the 10-year period 1956–1965 Sterling increased its sales by over 70 percent and its assets by more than 56 percent (Complaint, Par. 3; Answer, Par. 4).

As of December 31, 1965, Sterling's assets in the United States, including trademarks, goodwill and deferred charges amounted to $149,251,000; in addition, Sterling had foreign assets amounting to $71,924,000 (CX 24; RX 26; Pfister 1261).

In calendar 1965, the year prior to the acquisition involved in this case, Sterling's total sales in the United States of all products and services were $196,337,000; in addition, Sterling had consolidated foreign sales of $106,963,000 (CX 4(j), CX 19(k), CX 24; Pfister 1261).

3. Sterling's principal business is the manufacture and sale of proprietary drugs and other medicinal preparations, primarily prescription drugs. This comprised 90 percent of its total U.S. sales in 1965 (CX 4, CX 19, CX 24). Its U.S. sales of proprietary drugs in 1965 were $81 million (CX 24; Pfister 1261) and its U.S. sales of other medicinal specialties amounted to $71,735,000 (CX 34).

4. At the time of the subject merger, Sterling's business included many nationally known brands which are leaders in their respective fields. The following is a partial list of Sterling's well-known brands: "Bayer" aspirin, "Phillips'" milk of magnesia, "Campho-

Phenique" external antiseptic, "Cope" and "Vanquish" pain relievers, 'Dr. Lyon's" tooth powder, 'Z–B–T" baby powder, and "pHisoHex" skin cleanser (CXs 20–28; Elson 176–77, Johnson 204–05, Campbell 331, Elliott 522–23, Friedman 552–60).

5. Sterling's proprietary drug products are manufactured and marketed by its Glenbrook Laboratories Division (Berry 1455). Glenbrook's operations are concentrated predominantly in two product categories, analgesics and antacids/laxatives (Berry 1457).

(a) In 1965, analgesics comprised approximately 65 percent and antacids/laxatives comprised approximately 30 percent of the sales of Glenbrook Laboratories. Antacids and analgesics/laxatives have continued to account for 95 percent of Glenbrook's sales to the present (Berry 1457).

(b) Glenbrook's principal analgesic product is Bayer Aspirin, of which it sold $41,672,000 in 1965 (CX 35, CX 44(e)). Its other proprietary analgesic products include Bayer Children's Aspirin, Cope, Vanquish and Fizrin (Berry 1458).

(c) Glenbrook's principal antacid/laxative product is Phillips' Milk of Magnesia in liquid and tablet forms, of which it sold $18,456,000 in 1965 (CX 35, CX 44(e), (f)). Phillips' Milk of Magnesia is an antacid when taken in small dosages and a laxative in large dosages (Berry 1462). Other proprietary antacid and/or laxative products produced by Glenbrook include Haley's M–O, Dr. Caldwell's and Fletcher's Castoria (Berry 1461).

6. Sterling's ethical pharmaceuticals, including prescription drugs and over-the-counter ethical specialties, are produced by its Winthrop Laboratories Division. The Sterling-Winthrop Research Institute in Rensselaer, New York is engaged in basic research, looking toward the development of new prescription drugs in approximately 50 categories of medicines in such diverse fields as arteriosclerosis, anesthesia, kidney diseases and infectious diseases (Tainter 1747–52, 1759–60).

7. Sterling has been highly successful in achieving and maintaining brand allegiance towards its products through the use of extensive advertising. Its advertising expenditures are very substantial, both in absolute amounts and in proportion to its sales. In calendar 1965, respondent spent approximately $35 million for all media advertising, and was the 36th largest advertiser in the United States. For Sterling's four largest selling products in that year: Bayer Aspirin, pHisoHex, Phillips Milk of Magnesia liquid and Phillips Milk of Magnesia tablets, advertising expenditures averaged ap-

proximately 25 percent of net sales (CX 59(a), CX 44(e)-(f); Elson 176–77, Johnson 204–05, Campbell 331, Elliott 522–23, Friedman 558–60).

The majority of Sterling's advertising budget is directed toward network television. In calendar 1965, Sterling spent approximately $18 million for network television advertising and was the 16th largest television advertiser for that year (Complaint, Par. 7; Answer, Par. 8; CX 59(c)).

8. Sterling's Glenbrook Division which markets its proprietary drug and household products operates autonomously with its own national sales organization divided into regions and districts. Each Glenbrook salesman calls upon customers within his district and sells only products of Glenbrook Laboratories. Sales are made on a direct basis to wholesalers (drug and miscellaneous) and retailers (drug and nondrug, both chain and independent) (CX 48(e)-(f)).

9. At all times relevant to the case herein, respondent has sold and shipped products in interstate commerce throughout the United States and engaged in "commerce" within the meaning of the Clayton Act, as amended (Answer, Par. 12).

B. Lehn & Fink Products Corporation

10. Prior to the subject merger, Lehn & Fink Products Corporation was a corporation organized and existing under the laws of the State of Delaware with its principal offices located at 445 Park Avenue, New York, New York, (Complaint, Par. 12; Answer, Par. 12).

11. For the fiscal year ending June 30, 1965, the 12-month period immediately preceding the merger, Lehn & Fink had net sales of $66,702,978. As of June 30, 1965, Lehn & Fink's assets amounted to $28,291,522. During the 10-year period 1956 through 1965, Lehn & Fink increased its sales by over 125 percent and its assets by approximately 117 percent (CX 8, p. 14; Answer, Par. 14).

(a) As of June 30, 1965, Lehn & Fink's total domestic assets amounted to $22,568,072; in addition, it had foreign assets of $5,723,450 (CX 8).

(b) For the fiscal year ending June 30, 1965, Lehn & Fink's total sales in the United States of all products and services were $57,906,200; in addition, Lehn & Fink had foreign sales of $8,796,778 (CX 8, CX 31).

12. The operations of Lehn & Fink and its subsidiaries were divided into three major groups accounting for approximate sales percentages as follows: the Consumer Products Group, 62 percent; the Industrial Products Group, 19 percent; and the International Group, 19 percent (CX 4(m)).

13. Within the Consumer Products Group, the Cosmetics Division produced and sold Dorothy Gray and Tussy cosmetics and Ogilvie Hair Preparations (CX 4(m)). Domestic sales of the Lehn & Fink Cosmetics Division for the fiscal year ending June 30, 1965, amounted to $20,094,400 (CX 31).

14. Domestic sales of the Consumer Products Group's L&F Products Division for the fiscal year ending June 30, 1965, amounted to $24,160,100 (CX 31). Included in this figure were sales of Lysol Brand Spray Disinfectant amounting to $12,230,000 and sales of Lysol Liquid Disinfectant amounting to $5,822,000 (CX 44(b)). Also included were sales of L&F's two proprietary drug items—Medi-Quik aerosol antiseptic, a first-aid product, which had domestic sales in fiscal 1965 of $2,036,000, and Stri-Dex medicated pads, sold for the treatment of acne, which had domestic sales in fiscal 1965 of $2,125,000 (CX 44).

15. Lehn & Fink at the time of the merger was achieving and maintaining brand allegience toward many of its consumer products through the use of extensive advertising. For the fiscal year ending June 30, 1965, Lehn & Fink spent approximately $12 million for all media advertising and was approximately the 102nd largest advertiser in the United States. For Lehn & Fink's five largest selling products in that year, advertising expenditures averaged approximately 22 percent of net sales (CX 6, pp. 3–4; CX 7, p. 3; CX 8, p. 4; CX 44 (b)–(c); CX 59 (a)).

16. Lehn & Fink marketed its consumer products through its own national sales organization, supplemented in some instances by the use of brokers. Lehn & Fink's sales organization sold on a direct basis to wholesale and retail food, drug, department, variety and mass-merchandise outlets (CX 4(n); CX 7, p. 3; CX 8, p. 4; CX 14(a)(b)).

17. Lehn & Fink's rapid growth in the 10-year period preceding the subject merger is attributable, in large part, to its diversified program of product development, which resulted in the successful introduction of a number of important new products. These products include "Medi-Quik" antiseptic products, "Stri-Dex" medicated products, and various cosmetics and hair preparations (CX 2; CX 5, pp. 6–7; CX 7, pp. 1–3; CX 9; CX 10; CX 29).

18. Lehn & Fink was the leading firm in the national household aerosol deodorizer market. The company introduced its "Lysol" brand spray deodorizer in 1962 and, at the time of the subject merger, had captured 36 percent of the market. By August 1968, approximately two years after Lehn & Fink was merged into Sterling, Lysol Spray's market share had increased to 42 percent (CX 38(e)).

19. At all times relevant herein, Lehn & Fink sold and shipped products in interstate commerce throughout the United States and engaged in "commerce" within the meaning of the Clayton Act, as amended (Answer, Par. 20).

II The Acquisition

A. Description of Transaction

20. On or about June 28, 1966, Lehn & Fink was merged into respondent by means of an exchange of stock, pursuant to which Lehn & Fink stockholders received one share of a new preferred stock of respondent, convertible into 1 and ¼ shares of common and callable at $55 a share after five years, in exchange for each share of Lehn & Fink stock (Complaint, Par. 21; Answer, Par. 20).

B. Background and Motives for the Acquisition

21. Because of the then current value of Lehn & Fink stock, the transaction was attractive from an investment standpoint (Pfister 1254). In addition, Sterling was interested in the Lehn & Fink acquisition because of its desire to obtain a wider line of consumer products to distribute through its foreign business operations. Sterling had extensive manufacturing and distribution operations abroad and it was interested in Lehn & Fink's consumer lines, particularly Lehn & Fink's cosmetic formulations, for its overseas selling organizations. Unlike the United States, marketing conditions in many overseas countries are such as to facilitate common distribution of diverse consumer products (Pfister 1255, 1257, 1273–74). Sterling also considered that the acquisition would diversify its domestic operations by buying a going business in cosmetics and household products lines, different from any of Sterling's own operations (Pfister 1257). Sterling did not contemplate combining the U.S. operations of Lehn & Fink with its own, and there was no analysis made of, or consideration given to, any relationship between the companies' domestic manufacturing, research and development, distribution, marketing, advertising or other operations (Pfister 1258–59; Berry 1478; Tainter 1766). In fact, after the merger, Lehn & Fink's domestic business was not changed and it has continued to operate independently as had been intended and as commercial considerations required (Kirk 1379). Prior to the Lehn & Fink transaction, Sterling had not made any substantial acquisition of a public company with significant sales volume, *i.e.*, annual sales volume equal to $5 million (Pfister 1270, 1289).

22. Prior to the acquisition of Lehn & Fink, Sterling had not considered entering the cosmetics business by internal growth, it had

considered entering the cosmetics business by acquisition. At the same time respondent was considering Lehn & Fink, it was also observing Shulton, Jergens and Max Factor (Pfister 1259). Prior to the acquisition of Lehn & Fink, Sterling had not given any consideration to entering the household aerosol deodorizer market either by internal expansion or acquisition (Pfister 1259–60; Berry 1477).

23. Lehn & Fink's interest in the Sterling acquisition was due to the view of a majority of its board of directors that it would be to the best financial interests of the stockholders if Lehn & Fink merged with another company (Kirk 1376–79). Prior to the acquisition, consideration had been given by Lehn & Fink to the possibility of merger with companies other than respondent. These included Alberto-Culver, Pfizer, American Tobacco, Borden Foods, Norwich Pharmacal and Chesebrough-Pond's (Kirk 1297).

24. Lehn & Fink's management was opposed to these mergers, as it was opposed to the Sterling acquisition. The views of Lehn & Fink's management were testified to by one of the opponents of the merger with Sterling, Roger Kirk, then head of Lehn & Fink's Consumer Product Group, now president of Lehn & Fink Products Corp. (Kirk 1292, 1298). The reasons were as follows:

(a) Lehn & Fink management was concerned about the vast differences between its business and that of Sterling. They were fearful that Sterling would not allow Lehn & Fink management to manage its own business and proceed along the lines it desired in the household, cosmetics and industrial areas with which Sterling had no familiarity or expertise (Kirk 1298).

(b) At the time of the acquisition, management could not visualize or foresee any advantages which the merger would bring to Lehn & Fink and it felt that its growth would be delayed (Kirk 1299). Lehn & Fink did not need assistance in financing, research, production, distribution, marketing, or advertising and its management was confident it could continue its growth pattern (Kirk 1298–1303). Lehn & Fink had no difficulty in obtaining additional capital to finance its growth (Kirk 1297, 1299–1300).

(c) Lehn & Fink management saw great differences in the companies capabilities and requirements in research and development, distribution, marketing and advertising—Lehn & Fink's research was oriented toward product development whereas Sterling was involved in basic pharmaceutical research; Sterling's drug production facilities differed greatly from the cosmetics and household product-oriented facilities of Lehn & Fink; sales and distribution arrangements were entirely different; and Lehn & Fink's advertising was

oriented toward a younger audience and purchased on a different basis (Kirk 1299–1303; see Findings 119–24, 130).

III Nature of the Trade and Commerce—the Line of Commerce

A. Health and Beauty Aids as a Line of Commerce

(1) Allegation of the Complaint

25. The complaint alleges a "health and beauty aids" line of commerce consisting of those products falling within the Bureau of Census Standard Industrial Classification ("SIC") 2834—"Pharmaceutical preparations" and SIC 2844—"Perfumes, cosmetics, and other toilet preparations," which are promoted by the manufacturer directly to the consumer (Complaint, Par. 22; Tr. 1229–31).

(2) Trade Usage of the Term "Health and Beauty Aids" Fails to Support the Alleged Line of Commerce

26. The term "health and beauty aids" was developed after World War II principally in the grocery trade by rack jobbers, and it relates to a section of a supermarket or discount store, where nonprescription drugs and a variety of other products, previously sold principally in drugstores, are featured (Elson 158; Johnson 208–09; Bryant 234–37, 292–93; Campbell 316; Heller 381–82; Mahoney 460, 482; Elliott 514–16; Friedman 552, 564–65; Kirk 1295–96; Berry 1455–56). While one drugstore witness stated that his company used the term, having picked it up from food stores (Campbell 316), the Walgreens drug chain witness testified that the term was "concocted" by rack jobbers for their short line of items, and it would not be used by his firm to describe its comprehensive lines of drugs, cosmetics and other products (Elson 158–60, 188). Korvette's official stated that it uses the term in advertising but, since it has pharmacies, it designates store sections by "legitimate" names—drug categories, vitamins, etc. (Friedman 565).

27. The term "health and beauty aids" was characterized by several trade witnesses as a "catch all" (Campbell 346; Kirk 1295–96; Berry 1455–56), a "conversational term" and "confusing terminology" (Friedman 552, 565). Since it covers anything in a section of some types of stores, it is too broad to be considered a category (Campbell 316). There is clearly no commonly accepted definition of the term (Berry 1455–56); it is used to cover different groupings of products by different retailers. As one retailer witness summed up: "There is no such thing as the health and beauty aid market" (Elson 180).

28. The record controverts the alleged definition of "health and beauty aids" advanced in the complaint, which purports to exclude drugs other than "proprietary" drugs (*i.e.*, drugs promoted by the manufacturer directly to the consumer) and to limit the phrase to products reported in SIC 2834 and 2844, all of which are chemically based for the following reasons:

(a) The trade witnesses were unanimous that "health and beauty aids" sections, although varying among retailers always include non-prescription drugs commonly referred to as "over-the-counter ('OTC') ethicals;" these are not classified as "proprietary" because they are promoted by the manufacturer to the health professions, and not to the consumer. Within product use categories, proprietaries are directly competitive and reasonably interchangeable with OTC ethicals. Some OTC ethicals identified as prominent among "health and beauty aids" departments are Maalox, Gelusil, Mylanta, among antacids; Metamucil, among laxatives; Coricidin, among cold remedies; Empirin and Tylenol, among analgesics; Kaopectate, among anti-diarrheals, and Dramamine, among motion sickness remedies. These products and other OTC ethicals are packaged, distributed, and except for the method of promotion, are sold in the same way as competitive proprietary products within the same categories; they are displayed on the shelves along with such competitive proprietaries; and the consumer has the option of choosing between the OTC ethical and the proprietary drug in practically all product lines. Some OTC ethicals are leaders in their respective fields; for example, Maalox is the leading antacid "vastly" outselling all proprietaries and other OTC ethicals in that field. Metamucil is the second largest selling laxative in all outlets, the largest in drugstores. Coricidin is a very widely accepted and large seller in the cold remedy field and Tylenol far outsells Sterling's Cope and Vanquish, which are proprietaries in the analgesics field (Elson 154–56, 181–82; Johnson 211–12; Bryant 245, 291–92, 310; Campbell 319, 338–39; Mahoney 455–57, 491–92; Elliott 531–32; Friedman 566–68; Berry 1455,1458, 1461–62, 1496; see RX 6, RX 7).[1]

(b) It was also the testimony of the trade witnesses that the "health and beauty aids" sections include private-label items, packaged for retailers such as Peoples, Drug Fair, Kroger and Korvette's, and sold under their labels, as well as "generic" items sold under a general product designation, which are displayed and sold along with proprietary items. These products compete with pro-

[1] It is clear from the above that sales of OTC ethicals are very large, particularly large in product lines in which Sterling competes. However, the record does not show the total amount of OTC ethical drugs sold in the United States.

prietary drugs designed to serve the same end purposes (Johnson 201, 215–16; Campbell 333, 349, 357; Elliott 532–33; Friedman 560–62, 574–75, 577; Kirk 1295–96, 1363; Berry 1492–94; RX 7). While overall private-label sales are a small proportion of sales in "health and beauty aids" sections, in some items they are quite significant. In Korvette's, private-label vitamins sell equally with name brand items (Friedman 561). Private-label aspirin makes up about 1/3 of all aspirin tablet sales in the United States (Berry 1495). Private-label merchandise might be reported to Census as an ethical or proprietary product; it would be up to the packager, and the Census Bureau has no way of knowing how these products are in fact reported (Morgan 1213–15). Furthermore, in some lines, generics are also quite important. Korvette's leading sellers in external antiseptics are iodine, mercurochrome, merthiolate, rubbing alcohol, hydrogen peroxide, tincture green soap—all generic antiseptics (Friedman 559; Kirk 1296, 1363). Other important generics mentioned were mineral oil and epsom salts (RX 7(2), (5); Campbell 339).

(c) It was further established that trade witnesses that the term "health and beauty aids" is not limited to products reported in SIC 2834 and 2844 in that it covers very many products which are not chemically based, and therefore are not even reported in SIC Major Group 28. Among the many non-chemical items included in "health and beauty aids" by the trade are razors, razor blades, bandaids, adhesive tape, gauze, cotton swabs and balls, sanitary napkins, tampons, toothbrushes, dental floss, thermometers, hair brushes, combs, manicure sets, emery boards, corn pads, hair curlers, humidifiers, mechanical contraceptives, hair dryers, compacts, hand mirrors, and baby feeding paraphernalia (RX 3, RX 4, RX 6, RX 7(t), (z)(9), (11); Elson 184, 187; Johnson 214–15; Bryant 246; Campbell 334–37; Heller 426, 433; Mahoney 457; Elliott 527–29; Friedman 568–69, 574; Berry 455–56). Several trade witnesses had never heard the condition or restriction of "chemically based" associated with the grouping of "health and beauty aids" (Campbell 336; Friedman 569). As the Drug Fair official succinctly put it, "the first time I ever heard the term [chemically based] is when I have heard it here" (Campbell 336).

(d) The record further shows that the health and beauty aids grouping includes chemically based products found within SIC Major Group 28 but outside 2834 and 2844. For example, Drug Fair includes Dial soap among health and beauty aids, and Kroger includes various bath items, such as bubble bath and gift bath soaps, which are classified in SIC 2841, outside the two 4-digit categories alleged in the complaint (RX 6; Elliott 529–30).

(e) Kroger also includes in its health and beauty aids department dietetic products and food supplements, which are reported in SIC Major Group 20 (Elliott 529).

29. The trade witnesses also testified that the "health and beauty aids" sections do not include so-called "franchised cosmetics." Although these products are reported in Census category SIC 2844, and comprise a very substantial part of SIC 2844, they are not found in the health and beauty aids sections of supermarkets.

(a) The trade clearly distinguishes between mass-merchandised toiletry items and lines of franchised cosmetics. Mass-merchandised toiletry items are sold at self-service counters, such as health and beauty aids racks. They are sold for specialized purposes—*e.g.*, Head & Shoulders Shampoo is sold for the specific purpose of removing dandruff. On the other hand, franchised cosmetics like Elizabeth Arden, Prince Matchabelli and Lehn & Fink's Dorothy Gray and Ogilvie, are marketed to the consumer through trained sales personnel or demonstrators in selected department and drugstores. Franchised cosmetics are not displayed on health and beauty aid racks in mass-merchandise outlets. They appear in long lines of related formulations—for example, there are as many as 1,500 specific cosmetic items sold by Lehn & Fink (Kirk 1352). Franchised cosmetics are shipped in small quantities of many items, to maintain necessary inventories, whereas toiletries are usually shipped in large quantities of single items because of high turnover rates. Furthermore, cosmetics and mass-merchandise toiletries and cosmetics are advertised differently. Franchised cosmetics, for example, are advertised heavily in women's magazines; they are not significantly promoted by the use of television advertising (Heller 394; Kirk 1357; Elson 156, 161, 164–66; Johnson 197; Bryant 226–27, 294–95; Campbell 320; Heller 377–78; Mahoney 453–54, 457, 460–61, 495–97; Elliott 514; Friedman 553, 570–71, 576–77; Kirk 1352–54, 1357; Berry 1475–76).

(b) Korvette's "does not include cosmetics in health and beauty aids" but maintains a separate department for such franchised cosmetics distinct from its health and beauty aids department (Friedman 553, 571). Norwich Pharmacal, which manufactures both toiletries and franchised cosmetics, does not sell the latter through the health and beauty aids section of food stores; this is characteristic both of Norwich Pharmacal's own cosmetics line as well as Lehn & Fink's Dorothy Gray and Ogilvie lines of cosmetics (Mahoney 460–61, 495–96).

30. The record further shows that "health and beauty aids" is not a meaningful grouping from the standpoint of competitive relationships, since the term covers a range of products which are not in any

sense substitutes for one another. Products compete within categories of product use—such as analgesics, antacids, first-aid, feminine hygiene, etc. Retailers testified that they classified products according to such categories and regarded specific items as competitive with other items in the same use category (including in each drug category the competitive proprietaries and OTC ethicals) (RX 3, RX 4, RX 6, RX 7; Elson 187–88; Johnson 196–98, 209–11; Campbell 342–43; Elliott 514, 527–35; Friedman 552–55, 557, 566–68). Shelf space is allocated on the basis of use categories, and competition for shelf space exists principally within use categories. The Korvette's and Kroger witnesses described how they ran regular comparisons of products within separate classes or subgroups such as antacids, toothpaste, or cough and cold; an analgesic may displace another analgesic but not likely a foot powder (Elliott 534–36; Friedman 557; see Mahoney 482; Kirk 1398). The Kroger catalogue shows how items are so grouped on the shelves (RX 7).

31. Because of the small size of the items in "health and beauty aids," introduction of new products can often be accommodated without removing other items, as by simply reducing the number of facings. This reduces the impact of shelf space competition. As testified by the Norwich witness, displacement of products does not happen often as a matter of actual practice; the retailer manages to squeeze both on the shelf (Mahoney 480). Shelf space competition is, moreover, very much less a factor in drugstores than in supermarkets since drugstores have more space (Johnson 204; Mahoney 480–83; Elliott 534–35; Friedman 572; Berry 1463). The Walgreens witness testified that if it were to carry every Sterling proprietary product, such products would occupy less than 1 percent of the shelf space (Elson 185). In the Kroger catalogue (RX 7) for its stores' health and beauty aids section (32 linear feet, with seven shelves), Sterling products occupied only 16 facings; assuming an average facing of about 3 inches each (Berry 1463), this is about 1 and ½ percent of the health and beauty aids shelf space.

32. Manufacturers of products carried in the "health and beauty aids" sections classify their products according to use categories, and do not consider themselves in competition with products in other use categories. Officials of these companies designated their competitors in such categories as analgesics, antacids, cough syrup, hand lotion, etc. (Bryant 290–91; Heller 374–75, 415–16, 433–34; Mahoney 455–56, 489–90; Berry 1458–62). Indeed, when discussing products with multiple uses, manufacturers identify different products as competitive depending upon use. Thus, Sterling's Phillips' Milk of Mag-

nesia competes with antacids and laxatives (Berry 1461–62). Norwich's Pepto-Bismol competes against antacids, anti-diarrheals and motion sickness products (Mahoney 489–90). Miles Laboratories identifies competitors of Alka-Seltzer in the analgesic and the antacid uses; its official attested that "Competition in this area is a matter of product line by product line" (Bryant 290–91).

33. Since manufacturers consider themselves as engaged in producing and selling products within use categories, they do not recognize "health and beauty aids" as a meaningful term at the producer level. As the head of Miles Laboratories' Consumer Products Group testified, a manufacturer "does not refer to itself as a health and beauty aid company" (Bryant 293). The term is not used in the normal course of business by manufacturers (Berry 1455–56). When a manufacturer refers to selling in the "health and beauty aids" market, he is simply referring to that part of his distribution that goes principally to food stores (Bryant 237). This does not refer to a market in terms of the manufacturer's product distribution, since he also sells through drugstores, candy and tobacco jobbers, and department stores (Bryant 235; Mahoney 461, 494–95).

34. The record indicates that "health and beauty aids" generally have the following common characteristics:

(a) They are used in, on or near the human body for purposes of treating minor ills or for purposes of personal care and hygiene or beautification (Elson 156, Campbell 316, Heller 376–77).

(b) They have a relatively high rate of turnover, small size, low price, and self-service type presentation to the consumer (Johnson 196, Bryant 233–34, Campbell 316–17, Heller 382–83, Mahoney 461).

(c) They are displayed together for sale to the consumer primarily in drug and variety stores or on health and beauty aid racks in grocery stores and supermarkets (Johnson 209, Bryant 234, Heller 381, Mahoney 494–95, Elliott 515), although there are some stores which specialize in carrying primarily or exclusively health and beauty aid products (Johnson 208–09).

(d) They are consumed in use and are repurchased by the consumer with a degree of regularity (Bryant 234, 256).

(e) Many require a high degree of preselling as well as a high degree of initial and continual advertising and promotional support (Elson 179, Johnson 208, Bryant 237–38, Heller 382–83, Mahoney 461).

Although all or some of these characteristics may be helpful in determining a broad product market, they do not in and of themselves constitute the sole criteria or even the primary basis on which to determine the boundaries of a product market. Examination of the

record as a whole does not support the use of the term "health and beauty aids" as a product market in which to assess competitive effects of this acquisition.

(3) Dr. Narver's "Supply Space" Theory

35. Dr. John Colin Narver, an associate professor at the University of Washington Graduate School of Business Administration, was called by complaint counsel as an expert witness to testify concerning his "supply space" theory and its application to the "health and beauty aids" product market alleged in the complaint herein. Dr. Narver's "supply space" theory is set forth in an article entitled "Supply Space and Horizontality in Firms and Mergers" published in a special edition of the St. John's Law Review in the spring of 1970. Dr. Narver's testimony consists of approximately four hundred pages of transcript (Narver 788–1198) and five exhibits (CX 61(a)–(c); CX 62 (a)–(h); CX 63(a)–(o); CX 64(a)–(k); and CX 65(a)–(d)). In view of the length of Dr. Narver's testimony and the complexity of the "supply space" theory, the hearing examiner has hereinafter set forth as a summary of that theory the proposed findings of the complaint counsel (CPF 21–33, Findings 36–48, *infra*).

36. The most realistic view of a firm is the range of inputs it could utilize and the range of outputs it has the capability to supply. Such a view captures the "essence" of a firm, which a short-run analysis, concerned only with the immediate, particular output or input of the firm, is unable to do. We are thus able to view the firm as essentially a pool of productive resources, which permits it to engage in a range of activities, or to respond to a variety of demands (Narver 862).

37. A firm's pool of resources is the pool of productive capability from which the firm draws as it continually assesses how to maximize profits or the present market value of the firm. Those resources consist of the managerial, financial, production, research and marketing inputs on hand or easily accessible and which can be addressed to a variety of activities (Narver 868).

38. Resources are flexible in every firm and are utilized so as to maximize the productivity, efficiency and hence, profitability of the firm. And because management does try to maximize the profits of the firm, no management is emotionally committed to any particular product or geographic area, but is willing to readdress its resources if the profit potential is greater in some other practicable product or products, or geographic area (Narver 869).

39. Through a utilization of its resources, a firm acquires expertise and develops market responsiveness. The firm establishes bases of specialization such as technical superiority, managerial expertise and marketing skills. By means of one or more bases of specialization, a firm is not only able to employ its resources more efficiently, but is afforded a continuing foundation for it to differentiate itself in the market (Narver 873).

40. It is, of course, not an infinite range of demands to which a firm's pool of resources can be addressed. Firms have a finite range of flexibility, and thus for profit maximization they confine their endeavors within specific ranges. Specifically, a firm concentrates its activities around its bases of specialization (Narver 878).

41. A firm's reallocation of its resources is dictated, not merely by managerial choice, but by a complex of forces which suggest to management a more profitable utilization of resources. Forces which lead a firm to reallocate its resources include continual changes in customer tastes and continual changes in production and marketing technology. Since resources are flexible, and firms have the opportunity to apply their resources over a range of demands, management can and does bring about a new employment of resources whenever it is more profitable to do so (Narver 881–82).

42. A "supply space" is the range of demands to which a pool of resources (*i.e.*, the firm) can respond. A firm's ability to supply has two time frameworks: the ability to supply in the very near term with its current (on hand and accessible) pool of resources, and future supply ability through some alteration of that pool of resources (Narver 886).

43. The technological capability of a firm represents its near term ability to supply a variety of demands through those resources on hand in the firm as well as those resources to which it has ready access. The "logic of supply," or the firm's future ability to supply, represents those current demands to which the firm cannot so readily address itself as well as other unforeseen demands (Narver 888–89).

44. To illustrate how the supply space concept applies to the merger of Firm A and Firm B, assume that both A and B can supply to demands 1 and 2. Further assume Firm A is only marketing to demand 1 and Firm B is only marketing to demand 2. Both firms have the identical supply capability (supply space) in that each can market to demands 1 and 2. Because the essence of each firm, and the substance of their merger, is their total supply capability, what markets they can easily market to is far more important than merely the markets they happen to be marketing to. If one focuses solely on

the current supply, these two firms will be perceived as different, but in fact, the difference is merely in form, not substance. Accordingly, the merger of these two firms is a horizontal merger, since it has simply been managerial choice at an instant of time that Firm A markets to demand 1 and Firm B to demand 2 (Narver 891–92).

45. The growth patterns of firms, and in particular the diversification and merger patterns of firms, provide empirical data from which to define supply spaces. A significant tendency for firms in product market A to move (diversify) into product market B suggests a technological relationship between product markets A and B, and demonstrates that the pool of resources for those firms can be allocated to a variety of demands in both A and B (Narver 896–97, 899–900).

46. Weakly significant diversification patterns, that is a pattern somewhat greater than a random distribution, between firms in product markets A and B suggest that firms in product market A are potential competitors to firms in product market B (Narver 901).

47. Up to a point at least, the larger the firm, the greater is its technological capability to supply and hence, the broader its supply space. For many supply spaces it is only the relatively large firm that has the most pronounced ability to address the total range of demands in the supply space, and thus within the supply space to enter any short-run market where there are excess profits to be competed away (Narver 903–05).

48. In order to maintain competition in the short-run markets within the supply space, it is necessary to have a maximum number of firms capable of addressing any demand in the space. Preservation of a maximum number of such large or viable firms in the space not only maintains competition in each of the short-run markets within the space but throughout the supply space as well (Narver 905–06).

(4) Application of "Supply Space" Theory—Failure of Dr. Narver's Testimony and Exhibits to Demonstrate that "Health and Beauty Aids" Constitute an Appropriate Product Market

49. Dr. Narver testified that in terms of his "supply space" theory, a market consisting of the combination of SIC 2834 and SIC 2844 would comprise a group of products which can be supplied by the same "pools of resources." He then by reference to Fortune Plant and Product Directory, as will hereinafter be set forth, sought to identify the important or "viable" participants in such market or "supply space," that is, the firms with the technological capability

to supply the range of products throughout the 2834–2844 market (Narver 816, 877, 888–89, 905, 1105).

50. Dr. Narver testified that the definition of a product market or supply space requires empirical study and investigation, and that the market should instruct us (Narver 814, 1130). He also acknowledged that the determination of a firm's technological capability is to be determined on objective evidence of such factors as technical know-how, production capacity, raw materials supply, financial strength, marketing resources and distribution channels (Narver 1126–27). The record shows that Dr. Narver did not make any empirical study of the products in SIC 2834 and SIC 2844, the resources required to produce and market them, the resources of the companies allegedly found in the market or the resources of any other companies.

51. Dr. Narver when questioned, had no knowledge of the meaning in the trade of the terms "health and beauty aids," "proprietary drugs," and "personal care products." He did not know the distinction between "proprietary drugs" and "over-the-counter ethical drugs." Moreover, he did not know whether "franchised cosmetics" were included in SIC 2844 (Narver 796–97, 840–42). As shown by the record, the market advanced by Dr. Narver does not correspond to the products grouped under "health and beauty aids" in the trade (see Findings 28–34).

52. Dr. Narver's proposed market also does not correspond to the markets alleged in the complaint as "health and beauty aids." Dr. Narver's testimony and exhibits refer to SIC 2834, as a whole, *i.e.*, all pharmaceutical products, and he makes no distinction between proprietary and ethical drugs, or between prescription and non-prescription drugs (CX 61–CX 65; Narver 920, 961–62; Tr. 1056–57). The complaint refers only to the "proprietary drugs" portion of 2834. Dr. Narver recognized this problem and stated that he planned to speak to the implications of 2834 data for the proprietary section of 2834 (Narver 817). He failed to testify on this point at any time in the hearing.

53. While Dr. Narver sought to study a relationship between SIC 2834 and SIC 2844, he assumed, without any study, that the two four-digit categories themselves constituted meaningful competitive categories (Narver 1127–30). The expert testimony in this case established that such assumption is without any basis.

(a) Dr. Narver himself acknowledged that one can never start with census categories, and conceded that one must start with the market. He admitted that it would be "rare" if particular census four-digit categories were "precisely congruent" with a market (Narver 820–21, 1153).

(b) The census official responsible for data in Major Group 28 stated that the Bureau is an agency composed not of commodity specialists or experts in particular industries, but of statisticians, and that census officials are not equipped to render opinions concerning the compatibility of four-digit census categories and actual competitive market conditions (Morgan 1222).

(c) Respondent's expert, Dr. Almarin Phillips, pointed out that census classifications are not devised to show markets. What is meant by "industry" in the census is not necessarily the same as what is meant by "market" in merger cases (Phillips 1786–89). Dr. Phillips gave a number of examples of situations where census categories proved useless (Phillips 1787–89, 1816).

(d) There is "great heterogeneity within these four-digit classes." If such census categories are used, firms may be included which are not actual or potential competitors in any sense, while excluding firms outside the category which might well be competitive (Phillips 1795). In order to determine an appropriate market, it is necessary to examine the facts about an industry and to ascertain such factors as cross-elasticity of demand, interchangeability of use, production processes, distribution techniques, methods of promotion, and numerous other factors (Phillips 1786).

(e) The record shows that SIC 2834 and SIC 2844 are each composed of disparate product categories; that they are not substitutes for one another, and that they are made and marketed differently, so that the separate four-digit categories are not acceptable as competitive product markets (see Findings 73, 80).

54. Dr. Narver's evidence of diversification trends does not indicate any significant relationship between SIC 2834 and SIC 2844.

(a) Dr. Narver principally relies upon CX 61 to establish his SIC 2834–2844 supply space (Narver 913–28, 1110). This exhibit lists for the years 1961 and 1966 those firms which engaged in both SIC 2834 and SIC 2844 as shown in the Fortune Plant and Product Directory. CX 61(a) shows nine such firms in 1961, and CX 61(b) shows 24 firms for 1966 (Narver 846–47, 914–20). CX 61(c) shows that Fortune reported seven firms which engaged in both 2834 and 2844 in 1961 and 1966, and that they had activity in about the same number of five-digit categories in both years.

(b) CX 61 has no probative value because, contrary to Dr. Narver's own theory, which requires "significant" diversification patterns in excess of "random distribution," he failed to apply any test of significance to the patterns shown on CX 61 (Narver 899–901, 1111–14, 1121–22, 1141). Dr. Narver admitted that he has no

way of knowing whether the increase in number of firms in 2834–2844 from 1961 to 1966 shown on CX 61, and the persistence of certain firms, was unusual or greater than the average. He acknowledged that the early 1960's was an era of diversification and explicitly admitted that the increase in number of firms between 1961 and 1966 shown in CX 61 could be true of any pair of four-digit categories (Narver 920–21, 1111–14, 1121, 1141).[2]

(c) It is now clear that CX 61 greatly exaggerates the diversification trend between 2834 and 2844 because of Dr. Narver's erroneous understanding and use of the Fortune data. There are many companies found on 61(b) for 1966, which were in the same business in 1961 but were omitted from the 1961 Directory (and from 61(a)) only because of limitations in the Fortune Directory. The 1961 edition covered only "The *500* Largest U.S. Industrial Corporations," while the 1966 edition covered "The *1,000* Largest U.S. Industrial Corporations."[3] Thus, the 1961 and 1966 data are not comparable. The increase in firms from CX 61(a) to CX 61(b) could be, and is, largely attributable only *to the doubling of the coverage of the Fortune Directory.*

(d) Dr. Narver could not say whether the 2834–2844 diversification pattern shown on CX 61 was any more significant than a pattern of diversification pairing industrial chemicals and drugs, toiletries and soap, or toiletries and food (Narver 1121–22). In another listing of firms engaged in 2834 and 2844 in 1961 and 1966 (CX 64), Dr. Narver had the information that these firms were also engaged in a great number of activities reported in census categories elsewhere within Major Group 28, and in other industries (see CX 64(f), (j)–(k)). Nevertheless, Dr. Narver failed to make any study to consider which diversification patterns were significant (Narver 1014–18, 1020–21).

(e) Comparing CX 61 with data on CX 64, it is possible to determine the extent to which firms which in 1961 engaged only in 2834, or only in 2844, diversified into products in the other category by 1966. The Fortune Directory shows seven firms reporting only in

[2] Moreover, two, or 22 percent, of the nine firms allegedly engaging in both SIC 2834 and SIC 2844 in 1961, according to 61(a), dropped off the list by 1966 and no longer "spanned" the 2834–2844 "supply space;" Dr. Narver failed to deal with this fact at all.

[3] The appendix to respondent's Proposed Findings contains the introductory pages to the Fortune Plant and Product Directory editions for 1961, 1963–64, and 1966, and shows that the directory coverage was doubled in the latter two editions. This change in coverage of the Fortune Directory came to the knowledge of respondent only after the hearing, when it obtained access to copies of the 1961 and 1963–64 directories in the New York Public Library.

At the hearing, there was discussion only of the possibility that companies may have been omitted because they were privately held or smaller in sales than the top 1,000 (Narver 1012–14, 1136–37).

2844 in 1961; none of these firms moved into 2834 by 1966. The directory shows 16 firms reporting only in 2834 in 1961; in 1966, four of these firms are shown to be also in 2844, while three dropped out entirely (Narver 1114–20). This does not show a significant pattern or relationship (Narver 1121). Nor is there any evidence whether the small movement from one four-digit category to another was the result of acquisition or internal growth.

55. Dr. Narver's data on mergers fail to indicate any significant relationship between SIC 2834 and SIC 2844.

(a) CX 62(a)–(d) summarizes acquisitions by, and of, firms primarily classified in SIC 283, drug companies, and SIC 284, in the years 1948 through 1969. It is derived from a Federal Trade Commission report entitled "Large Mergers in Manufacturing and Mining, 1948–1969" (Narver 933–40).

(b) The exhibit is not probative of any relationship between 2834 and 2844 because the merger data are based upon three-digit classifications of firms. Dr. Narver did not know how many firms indicated as 283 were in 2831 and 2833 rather than 2834; or how many firms indicated as 284 were in 2841, 2842 or 2843 rather than 2844 (Narver 943–45). One merger shown as a 283–284 transaction was the acquisition by Norwich Pharmacal of Texize Chemicals; Narver did not know whether Texize was in 2844 (Narver 945), and the record shows that it is not in 2844 but makes household products which are cleaning products (Mahoney 503; CX 187, p. 16), classified elsewhere in SIC 28. Dr. Narver conceded that because of the three-digit level of data, it is impossible to state which are in the relevant field, and no inference can be drawn from this exhibit (Narver 1134, 1136).

(c) In any event, Dr. Narver had proposed that a standard of significance in mergers, to justify finding a supply space, would have to be 300 percent of random distribution. Even at the three-digit level, there are merger patterns other than 283–284 which are as strong or stronger (*e.g.*, with chemical companies, food companies (CX 62)). Dr. Narver stated there was not enough in the merger data to even ask the question of significance (Narver 1136, see 946–47).

56. Dr. Narver's data on employment distribution fails to show any significant relationship between SIC 2834 and SIC 2844.

(a) CX 62(e)–(h) tabulates the employees in multi-industry companies engaged in SIC 283 and SIC 284, and shows the distribution of such employees among various industries (Narver 951–55).

(b) The exhibit is not probative of any relationship between 2834 and 2844 because, as with the merger data, the employee dis-

tribution data is at the three-digit level and there is no way to break out employees or firms engaged in 2834 and 2844 (Narver 957–62). No relevant inferences can be drawn.

(c) Even at the three-digit level, the exhibit indicates relationships in other directions (basic chemicals, fats and oils, foods), as strong or stronger than between drugs and cleaning and toilet goods (CX 62(e)–(h)).

57. Even if Dr. Narver's evidence could be interpreted to show the existence of significant diversification trends between SIC 2834 and SIC 2844, this would not support a conclusion that the range of products in these four-digit categories can be produced by the resources available to every substantial size firm reporting in either category.

(a) Under Dr. Narver's theory, the existence of significant diversification trends would demonstrate that all firms above a certain size reporting in either or both 2834 and 2844 share a common "technological ability" to supply—*i.e.*, they can supply all products in 2834 and 2844 at present or in the near-term, and they share a current or ready access to the necessary financial, research and development, production, promotion, marketing, and distribution resources (Narver 886–87, 900, 1126–28).

(b) There is no way to determine from Dr. Narver's diversification data whether entry into any field was accomplished by internal growth or by merger, and whether—if by internal growth—the firm used existing resources or had to acquire the resources needed for such entry (Narver 1122; Phillips 1804–06). If the latter were the case,[4] the diversification would demonstrate—contrary to Dr. Narver's testimony—that there were no common resources.

(c) At most, the finding of a significant diversification trend would show a "profit interest" in expansion into the particular field (Narver 1139). This interest might be shared by many firms elsewhere in the economy, if these fields were attractive (Phillips 1801–02). Dr. Narver failed to make the necessary analysis to indicate any relationship or commonality in the resources required for the manufacture and sale of products in 2834 and 2844. Dr. Narver admitted, for example, that he does not know any particular range of plant capabilities; he cannot say whether a 2834 plant could make 2844 products (Narver 1137). The record shows, in fact, that the technology required to produce and sell internal medicines differs greatly from that needed to manufacture and market cosmetics and external medicines (see Findings 73(b), 80(c)).

[4] In fact, the record shows, for example, that Morton-Norwich diversified into cosmetics by acquiring the Jean D'Albret-Orlane line in 1968 (CX 187, p. 3).

58. Even if there were a "health and beauty aids" market consisting of all products reported in SIC 2834 and SIC 2844, Dr. Narver's exhibit, CX 64(j)-(k), does not show the structure of that market. It does not represent the actual competitors in such market in any meaningful way.

(a) CX 64(j)-(k) purports to list "Firms among the 1000 largest industrials with the capability of engaging in both 2834 and 2844" in 1966. Fifty-nine firms are listed in order of their size in total assets; two firms, Lever Brothers and Mennen Co. are indicated in a footnote as belonging on the list, but omitted because financial data are unavailable. The exhibit, therefore, purports to show 61 firms with the stated capability to engage in 2834 and 2844 in 1966 (Narver 1103, 1167). This list was compiled from the Fortune Plant and Product Directory by taking the smallest firm (in total assets) shown as engaged in both SIC 2834 and SIC 2844, and listing all larger firms shown as engaged in either or both four-digit categories (Narver 979, 1027).

(b) Dr. Narver acknowledged that because of the data base used, some "palpably viable firms" were omitted from CX 64(j)-(k) (Narver 1101). He agreed that it would be necessary to add the four firms shown on CX 59 as among the leading advertisers in drugs and cosmetics. These are J. B. Williams Co., estimated sales of $60 million; Block Drug Co., estimated domestic sales of $31 million; Noxell Corp., sales of $31 million; and Beecham Products, sales of $216 million (CX 59). He stated that there could be other firms which should be listed but which were omitted because they are privately held, and hence not listed in the Fortune Directory, or have smaller total sales than the top 1,000 firms (Narver 1012-14, 1136-37). This means that there are more than 65 such firms in the alleged "supply space" according to Narver (Narver 1136-37).

(c) CX 64(j)-(k) is meaningless as a description of market structure, because it lists firms by total assets, without regard to the extent of their activity in 2834 and 2844. Dr. Narver does not know, and there is no way of knowing from these data, the extent to which any of these firms has sales or profits from activities in 2834 and 2844, or the extent to which they have assets devoted to 2834 and 2844 business, whether plant facilities, research and development, personnel, marketing or other resources (Narver 989, 1003, 1005-06, 1010-11, 1023-25, 1028-31, 1142). The assets shown on the exhibit could represent a conglomeration of assets spread throughout the economy (Narver 1004). Companies at the top of the list could have smaller resource in drugs (2834) and toilet preparations (2844)

than smaller firms shown (Narver 1029). Firms off the list, like Noxell Corp. and others, could have greater sales and actual resources in 2834 and 2844, than firms on CX 64(j)-(k) (Narver 1014).

(d) Lehn & Fink is the "cut-off" point, the "marginal" firm on CX 64(j)-(k) (Narver 1103, 1167) because it is the smallest firm shown in the Fortune Directory as engaged in 2834 and 2844. Dr. Narver did not know how much of its sales and assets were in these fields, and he attached no significance to these facts so long as they were present (Narver 1142-43). In fact, of Lehn & Fink's total sales, more than half were outside 2834 and 2844; its sales in those categories were about $4.2 million in proprietary drugs, and $20 million in cosmetics (CX 44). The amount of its sales in 2834 and 2844 would not have been sufficient for a listing in the Fortune Directory. Because they sold two medicated external products (Medi-Quik and Stri-Dex), Dr. Narver infers that they could "span the supply space" and had the technological capability in 1966 to compete throughout the field of pharmaceuticals, including internal medicines. If they did not sell these two products, Dr. Narver would not so conclude (Narver 1143–46). This line of reasoning is unsound, and demonstrates the meaninglessness of the Narver data and testimony.

(e) Use of CX 64(j)-(k) to measure competitive effect of mergers is highly misleading and confusing. Thus, if duPont entered 2834 or 2844 by internal growth, or with a miniscule acquisition, its overall size would put it at the top of CX 64 (j)-(k), regardless of the extent of its operations in these categories. Concentration ratios computed from CX 64(j)-(k) would then indicate a tremendous increase, even though duPont's entry actually increased competition. And if duPont sold out to a drug firm, concentration of the leaders could show a steep decline, even though competition in product categories were decreasing (Narver 1004–08, 1158–59). This confirms the lack of probative value or utility to the Narver data and testimony.

(f) Without examining the kind of assets involved, it would be "sheer coincidence" if Dr. Narver's approach of using total assets would give a "proper picture" of the market; apart from such coincidence, the data "are misleading in the sense that they don't really tell you what you are looking for" (Phillips 1800). Dr. Narver first sought to justify his use of total assets on the ground that this is the way the data exist, there is no published information as to assets related to Census categories (Narver 1009–10, 1038–40). He eventually retreated from his use of total assets, and acknowledged that

any inference was subject to the question whether it was proper to assume "that all the assets represented in this column were in fact assets that legitimately belonged to health and beauty aids" (Narver 1181–82, 1185).

59. CX 64(j)–(k) does not indicate the potential competitors in any product category within 2834 and 2844 in any meaningful way.

(a) Dr. Narver's theory is that a maintenance of competitive structure or low concentration in the "supply space" will ensure competition in the short-run product markets (Narver 904–05). This could be described as consideration of potential competitors along with the actual competitors in the product markets (Phillips 1791).

(b) It is clear that CX 64(j)–(k) excludes numerous firms reporting in Census categories other than 2834 and 2844 which are more likely to enter product lines in 2834 and 2844 than those firms listed. For example, Monsanto Chemical Co. is a large producer of bulk aspirin, which is reported in SIC 2833 (not 2834); it plainly has more capability to produce aspirin than does Lehn & Fink (Narver 1155–56; Berry 1458; Morgan 1214). Kimberly-Clark Co. has actually entered the feminine hygiene spray market, from the forest products industry; its position as a leading manufacturer of sanitary napkins made it a much more likely entrant than firms shown on CX 64(j)–(k) (Heller 425–26; Narver 1156–58). Furthermore, CX 64(j)–(k) includes numbers of soap companies (Procter & Gamble, Lever Brothers, Purex, Colgate), food companies (Borden, Armour, Ralston-Purina, Beechnut-Lifesavers) and chemical companies (Olin-Mathieson, Cyanamid, Merck & Co., others). This suggests that other companies in those fields have to be closely scrutinized as potential entrants (Narver 1146–52, 1154–55). Dr. Narver conceded, referring to these fields, that firms outside 2834 and 2844 "that are on the razor's edge of the market" would have to be considered (Narver 1154).[5]

60. None of Dr. Narver's other exhibits provides significant or meaningful evidence for this case.

(a)(i) CX 63(a)–(e) purports to show the ratio of net income to assets and the ratio of advertising to sales for various industries, including "drugs" and "cosmetics, perfumes and other toiletries preparations." derived from Internal Revenue Service data for fiscal 1966. These data are not probative or significant in this case.

[5] Complaint counsel in their filing (p. 55) misleadingly quote the examiner's words regarding firms "on the razor's edge" as if he were referring to the competitive ability of all firms listed on CX 64(j)–(k) to enter all the short-run markets classified in 2834 and 2844. No such reference was made, and it is obviously impossible to ascertain from the Narver exhibits which firms on or off CX 64(j)–(k) presently have such capability. The examiner was referring to soap, chemical and food companies, and to the likelihood that they were potential entrants.

(ii) These data classify each firm in one category, that of its principal activity, and include in such category all of the firm's income, assets, advertising, etc. Thus the exhibit does not include in the drug data, for example, many firms which are very important in the drug field, but are principally in chemicals or other lines. Moreover, for those firms included in drugs, the data incorporate their revenues and advertising from the many other fields in which these firms are engaged. Furthermore, with regard to drugs, the data do not distinguish between ethical and proprietary drug operations, and only the latter is within the allegations of the complaint (Narver 967–70).

(b)(i) CX 63(f)–(m) purports to set forth the profitability of firms listed in the Fortune Directory as engaged in 2834 and 2844 in 1961 and 1966; and CX 63(n)–(o) purports to present correlation coefficients showing the extent of association between profitability and the number of five-digit categories in which these firms were engaged in 2834, 2844 and both, and between profitability rank and asset rank, in 1961 and 1966. These data are not probative or significant in this case.

(ii) The profitability data are inadequate and inapplicable, and the correlations based upon them are therefore without significance. Dr. Narver took as the profitability of the firms in the Fortune Directory the ratio of total profits to total assets and of total profits to total equity. He conceded that, with respect to these firms, he had no knowledge of the extent to which these profits came from activities in 2834, 2844 or elsewhere, and he had no knowledge of the extent to which their assets were in 2834, 2844 or elsewhere (Narver 989–90, 1004–05). There is thus no way of relating the data to the fields with which this case is concerned.

(iii) Dr. Narver acknowledged that the type of correlations derived in CX 63(n)–(o) did not show any dynamic relationship, or the extent to which it might increase or decrease over time; it did not show the strength of the relationship and there was no necessary causation implied (Narver 990–91). Consequently, the correlations cannot be used to infer any incentives on the part of firms in 2834 and 2844.

(c)(i) CX 64(a)–(b) purports to show the companies primarily engaged in 2834 and 2844 in 1960 and 1966, and to show asset universes and industry concentration ratios for such firms. These data are not probative or significant in this case, and are incomplete and misleading.

(ii) The listing in CX 64(a)–(b) of firms primarily engaged in 2834 and 2844 omits many firms which were very important in these

census categories, including leading proprietary drug and toiletries firms who are diversified and have principal activities elsewhere (Narver 1033–37, comparing CX 64(b) to CX 64(g) and (h) to show the omitted firms). In computing concentration ratios, the universe of assets for 2834 and 2844 shown on CX 64(a) and (b) does not include the great amount of relevant assets of such companies (Narver 1032–33, 1037). In addition, for those firms listed on CX 64(a)–(b) as primarily engaged in the respective categories, their total assets are listed, even though large amounts, for some perhaps more than half, were outside 2834 and 2844; in addition, some of the 2834 firms were mostly or exclusively in ethical drugs (Narver 1030–31). Since the assets of listed companies include many assets outside 2834 and 2844, and the universe excludes many assets devoted to 2833 and 2834, the concentration ratios are greatly exaggerated and are meaningless as indicating the structure of any market (Tr. 1037).

(5) Even if "Health and Beauty Aids" Constitutes a Line of Commerce, There is No Likelihood of Adverse Effects on Competition in That Line of Commerce

61. If health and beauty aids is a line of commerce, there is no likelihood or possibility of adverse competitive effects as a result of this merger because of the many companies in the field, the small position of the merging companies, and the difference in their businesses. Dr. Narver would classify any merger between two firms on CX 64(j)–(k) as a horizontal merger (Narver 1188). Even in terms of Dr. Narver's theory, however, no likelihood of significant adverse competitive effect was indicated, as shown by the following:

(a) Dr. Narver concedes the need, for enforcement purposes, of examining the relative positions of merging firms in the market, and stated that a determination of market shares is significant, as is the firms' ranking on the list (Narver 1168–69, 1174, 1180–87). He admitted that it does not follow from CX 64(j)–(k) that a merger of any two firms on the list would violate the law (Narver 1169).

(b) Lehn & Fink is the "marginal" or "least viable" firm on CX 64(j)–(k) (Narver 1103, 1187). On CX 64(j)–(k), Sterling is 20th, Lehn & Fink is last or 59th; adding the two firms in the footnote would make Sterling 21st, Lehn & Fink 61st (see CX 59). Dr. Narver stated that he would be "hard pressed" to show precisely the effects of the elimination of the marginal firm on CX 64(j)–(k), and the reduction from 61 to 60 "viable" firms (Narver 1167). On the basis of Narver's data, no adverse effect is likely or possible. Any possible impact is further obviated by the addition of the

four firms from CX 59, and of other firms engaged in 2834 and 2844 but not presented in the Fortune Directory although "palpably viable" in Dr. Narver's terms (see Findings 58(a), (b)).

(c) In the asset universe represented on CX 64(j)–(k), the shares of Sterling and Lehn & Fink are about 1.7 percent and 0.16 percent respectively, about 1.85 percent combined (Narver 1180–81). Narver acknowledged that this is "relatively small," as indication of the competitive implications of the acquisition (Narver 1181).

(d) Dr. Narver referred to the concentration ratios which he computed on CX 64(j)–(k) as "moderate" (Narver 1104–05). In fact, his computation of concentration ratios showed a steep decline from the levels in 1961 (CX 64(f)).

(e) Not only are there many competitors in the "supply space," and are the market shares of the merging firms miniscule, but any competitive effect would be mitigated by the presence of significant potential entrants "on the razor's edge," such as soap companies, chemical companies and food companies not yet in 2834 and 2844 (Narver 1154, 1188–89).

62. The record evidence of sales data shows that the market shares of Sterling and Lehn & Fink are miniscule and that concentration is relatively low and not increasing.

(a) The market alleged in the complaint consists of proprietary drugs and toilet preparations, a total of $3,626.4 million (CX 67; Morgan 1218). In this alleged market, Sterling had $81.2 million in proprietary drug products (CX 34), Lehn & Fink had cosmetics amounting to $20 million (CX 31), and proprietaries amounting to $4.1 million (CX 44(b), (c)) for a total of $24 million, or 2.2 percent and 0.7 percent respectively. Insofar as the "health and beauty aids" grouping of products in the trade is concerned, it is not possible on this record to ascertain Sterling's and Lehn & Fink's market position based on sales, but it is clear that such shares were miniscule and substantially less than 2.2 percent and 0.7 percent. The universe would consist of sales of proprietary drugs (in 2834)—$1,080.3 million (CX 67), toilet preparations (2844)—$2,545.1 million (Morgan 1218), OTC ethical drugs, and products outside 2834 and 2844. The sales of OTC ethical drugs cannot be ascertained on this record, but it is undoubtedly substantial, in hundreds of millions of dollars (see Finding 28(a)(b)). Some of the products outside 2834 and 2844 can be obtained from published census data—in 1966, the value of shipments of razors and razor blades (SIC 3421) was $162.9 million; and the value of shipments of sanitary napkins and tampons (SIC 26471) was $161.9 million

(1966 Annual Survey of Manufacturers, Value of Shipments by Classes of Products). In addition, at the seven-digit level, in 1967, shipments of toilet soap (2841311) were $253.3 million; toothbrushes (3991321)were $22.4 million; gauze (3842126) were $3.7 million; cotton, including cotton balls, sterile and non-sterile, were $15.6 million; adhesive bandages including band-aids (3842124) were $83.3 million (1967 Census of Manufacturers).

(b) As indicated by CX 188, the concentration ratios in SIC 2834 are lower than they were in the 1940's and 1950's and show no signs of an increasing trend. Concentration ratios in 2844 have increased in the past, but show decreases in recent years.

(c) Within the "health and beauty aids" industry, Sterling and Lehn & Fink make different products, and possess different skills and competencies, thus eliminating any possibility of adverse competitive effects.

63. Product differentiation, that is, the creation or existence of buyers' preferences for one or several particular commodities or brands out of several similar or substitute brands or commodities, represents an important structural element in the alleged "health and beauty aids" market (Greer 701). "Preselling," that is, the promotional activity by a manufacturer to acquaint the public with a product is also an important element in the marketing of "health and beauty aids" (Elson 179, Johnson 208, Campbell 317, Elliott 526–27, Friedman 556). Extensive advertising therefore plays an important role in creating "product differentiation" and "preselling" of "health and beauty aids" (Elson 161, 179, Bryant 238, 254–55, Campbell 328).

Once a manufacturer of health and beauty aids products determines generally a target audience, *i.e.*, the people he is trying to reach to sell the product to, the manufacturer then must decide which is the best media, *e.g.*, television, newspapers, radio, magazines, etc., for reaching the target audience (Mahoney 505).

64. The television media is effective in advertising health and beauty aids products by the manufacturer. This advertising results in strong brand allegiance which assures customer recognition of the advertiser's product (Johnson 202, Campbell 328). Manufacturers in the health and beauty aids field rely extensively on television advertising as a method of preselling their products to the public (Johnson 202, Bryant 255, Heller 394–95, Elliott 521, Friedman 562).

There is a direct relationship between the movement of a health and beauty aids item and the amount of television advertising done

of that item (Bryant 256, Heller 398, Mahoney 466). Also, the customers with whom health and beauty aids manufacturers deal—food chains, drug chains, etc.—are influenced whether to grant a manufacturer's product additional display space by the amount of advertising the manufacturer does of that product (Bryant 260–61).

The buyers, with whom manufacturers' representatives in the health and beauty aids field deal, are extremely interested in the amount of television advertising done by the manufacturer and whether it is prime time or daytime advertising (Campbell 329). Manufacturers, by informing these customers of a television commercial plan, are able to create in the customers the impression that the manufacturer makes substantial expenditures in television advertising (Heller 401).

Retailers evaluate proposed advertising campaigns of health and beauty aids manufacturers in deciding whether or not to purchase their products (Elson 168, Johnson 200, 203. Bryant 260–61, Campbell 325–26, 327, Heller 401, Elliott 518–19. Friedman 556–57, 562).

In order for a company to use television advertising campaigns for the sale of products with low unit value, such as health and beauty aids, it is necessary, because of the high cost of television advertising, for a company to have a broad distribution and the type of products that will respond to repeat purchasing (Bryant 256).

65. There is a direct relationship between the differentiability of a product and that product's market share (Greer 709). There is also a direct relationship between the profit on a product and that product's advertising to sales ratio (Greer 703).

The advertising of a product may enhance the product's profit by creating brand allegiance through product differentiation (Greer 703). Profits may be increased because (a) advertising fosters concentration; (b) advertising raises barriers to entry; (c) advertising allows firms to establish a price differential for their product; and (d) advertising reduces the lag time between introduction of a product and the public's acceptance of the product (Greer 704–05).

66. Health and beauty aids manufacturers have what is commonly referred to as an advertising to sales ratio for their products. The advertising to sales ratio of most health and beauty aids products would be approximately 25 percent (Bryant 238). The advertising to sales ratio is determined by testing to see what advertising to sale ratio is required to maintain sales or to increase sales at a given rate (Mahoney 478–79).

67. Of all industries, the health and beauty aids industry has the highest advertising to sales ratio (CX 63(a)-(b)). As may be seen by examining CX 59(a), health and beauty aids manufacturers (drugs and cosmetics) make a very substantial dollar investment in the advertising of their products. Most of the advertising investment for these firms went to network television (CX 59(b)).

The importance of television advertising of health and beauty aids products is exemplified by the health and beauty aids manufacturers' close watch over the advertising expenditures of their competitors. There are research firms who furnish information to companies concerning their competitors' spending for all forms of advertising (Heller 397).

68. Sterling's advertising to sales ratio during 1965 was 21.6 percent and Lehn & Fink's was 18.7 percent (CX 59(a)). Considering that the advertising to sales ratio for most consumer products is 2 to 3 percent, this is a large capital investment (Tr. 736).

Indeed, when the individual product lines of Sterling and Lehn & Fink are examined, the advertising investment becomes even more striking. For example, the advertising to sales ratio for Bayer Aspirin—Regular, during 1965 was 30 percent, while that of Phillips Milk of Magnesia—Liquid, was 29 percent. The advertising to sales ratios for Medi-Quik and Stri-Dex during 1965 were 50 percent and 33 percent, respectively (CX 44).

69. Network television advertising is extremely expensive (CX 81(b)). The charge to show an advertisement during a network movie is one of the highest (CX 108(a), 110(a), 111(a)). Also very expensive are those well-received television programs such as the "Red Skelton Show" and "Gunsmoke." A minute on "Red Skelton" during the period of October 1, 1968 through April 29, 1969, cost $60,000 (CXs 109(a), 113(a)).

70. There is no dispute that in the "health and beauty aids" market, advertising, especially television advertising, plays an important role in the promotion and sale of these products. But there is no evidence of significance as to the relevance of advertising in this case. There is no showing as to whether advertising constitutes a barrier to entry into these product lines and no showing as to any effect of the merger on advertising aspects of the market.

(a) Complaint counsel's expert witness, Dr. Douglas F. Greer, testified generally about advertising and product differentiation. He acknowledged, however, that it is possible that advertising would not create barriers to entry in a particular market, would not entrench a particular brand, and would not foster concentration and high profits (Greer 774–75). Whether advertising is pro-competitive

or anti-competitive depends on the facts and circumstances existing in the market, as to market structure, the need for new products, the type of products and an entire range of considerations (Greer 765). Conclusions as to the effect of advertising upon entry barriers cannot be reached until one is aware of all the different factors in each particular industry (Greer 771–80). Dr. Greer had no knowledge of the industries involved in this case or of the effect of advertising in these industries (Greer 756–57, 771, 780).

(b) The importance of financial resources in obtaining television advertising is minimized by several factors (see also Findings 130–136, *infra*).

(i) Various other media, such as radio, and magazines, in addition to television, are valuable in gaining exposure for a particular product. Radio is particularly useful with certain products (*e.g.*, teenage proprietary products) and audiences (Elson 169–70; Bryant 298; Mahoney 505–06; Campbell 328, 359; Friedman 556; Elliott 519–39; Dorkin 1653).

(ii) Although television advertising requires substantial expenditures, television can be less expensive than other media in terms of efficiency in audience reach (cost per thousand) and in effectiveness. More important than expenditure for advertising and television advertising is the creativity of the message, the quality of both the product and the message (Bryant 257; Heller 401, 431, 445; Allen 1557).

(iii) Adequate exposure on network and spot television has always been available for any company and any new product (Allen 1554–55, 1617; Dorkin 1655).

(iv) Advertising agencies solicit small and large advertisers and give equal treatment. Small advertisers get the same service as large advertisers (Dorkin 1552–56, 1589–90; Allen 1651).

(v) Networks do not discriminate between large and small advertisers in terms of rates, availability of programs, or contract terms (Dorkin 1651, 1677–78; Allen 1556–57; 1575–76, 1579, 1588–91).

(c) Advertising and television advertising can be pro-competitive in the sense that they provide a means of entry into a product market. Examples of single-line, relatively small, companies which used television to successfully enter markets include Alberto-Culver; Lestoil; Papermate Pens; Texize; Bic Pens; and Tanya (Mahoney 501–03, Bryant 298; Dorkin 1652). Examples of successful products that were introduced without the use of television include Di-Gel by Plough and Compoz by Jeffrey Martin. These products used spot and regional radio exclusively (Bryant 298; Dorkin 1653); Tanya used some television and extensive outdoor billboards (Mahoney 427,

502). Thus, far from being a barrier, advertising can be the means of entry.

(d) In the "health and beauty aids" grouping, witnesses identified a substantial number of small and single-line companies which had continued and substantial success. These included Tums, Tampax, Mentholatum, Absorbine, Jr., B. C. Headache Powders, Ex-Lax, Q-Tips and Tanya (Bryant 275, 298, 301; Heller 426–27; Mahoney 485, 501–03).

71. The merger of Warner-Lambert Pharmaceutical Company and the "Wet Shave" business of Eversharp, Inc., shows that mergers between firms in SIC 2834 and 2844 do not *per se* involve significant horizontal competition.

(a) Warner-Lambert manufactures and sells proprietary pharmaceuticals, reported in SIC 2834 and toiletries and cosmetics, reported in SIC 2844. Its principal proprietaries are Listerine, Bromo-Seltzer, Anahist cold preparations, Rolaids antacid tablets, Corn Huskers Hand Lotion, and Sloan's Liniment. Its toiletries and cosmetics include the Richard Hudnut, Fashion Quik, Mary Sherman, and DuBarry Lines. It sells these products to drug wholesalers, through chain and retail drugstores, through supermarkets and food chains, and through miscellaneous outlets. Warner-Lambert has substantial resources and capabilities in these fields (RX 15(z)(2)–15(z)(3)). It is a substantial advertiser and television advertiser; in 1965, it was the 15th largest advertiser in the United States, the 23rd largest buyer of network advertising time (CX 59). In 1967, Warner-Lambert had net sales of $656,822,000 (RX 15(q)). As of December 31, 1969, Warner-Lambert had total assets of $571,515,000 (RX 15(z)(12)).

(b) Prior to 1967, Eversharp manufactured and sold, among other products, safety razor blades, safety razors, shaving cream and lather and electronic hot lather dispensers; this portion of its operations was referred to as its "wet shave" business. Shaving cream and lather is reported in SIC category 2844. Eversharp used television advertising extensively for its "wet shave" business and sold its products through all outlets which normally sell shaving products, including drugstores, grocery stores, department stores, variety stores, and mass-merchandise outlets (RX 15(w)). Net sales of the "wet shave" business of Eversharp, Inc., for the year ending December 31, 1969, amounted to $68,478,780 (RX 15(s)). Total assets of the "wet shave" business of Eversharp, Inc., as of December 31, 1969, amounted to $48,616,847 (RX 15(z)(21)).

(c) Pursuant to the terms of a final judgment entered in the United States District Court for the Eastern District of Pennsylvania in 1967, and subsequently amended, Eversharp was required

by October 24, 1969, to dispose of the "wet shave" portion of its business (the assets of its Schick safety razor division) to a purchaser or purchasers approved by the United States. The United States Department of Justice approved the merger of the wet shave business of Eversharp, Inc., into Warner-Lambert Pharmaceutical Company as satisfying the divestiture provisions of that final judgment (RX 15(m)).

(d) In this connection it is interesting to note that in 1966 Warner-Lambert had total assets of $321 million and was ranked by Dr. Narver number 16 among the 1000 largest industrials with the capability to engage in both SIC 2834 and 2844 (CX 64(j)). In contrast, in 1966 Sterling Drug had total assets of $280 million and ranked number 19, and Lehn & Fink ranked number 59 and had total assets of $28 million (CX 64(j)).

B. Alleged Primary Submarkets of Health and Beauty Aids

72. The complaint alleges that "the health and beauty aid market encompasses two primary submarkets: (1) proprietary drugs (pharmaceutical preparations advertised to the public); and (2) personal care products (including perfumes, cosmetics, and other toilet preparations advertised to the public)" (Complaint, Pars. 22, 27). The complaint also alleges that "all of the statements contained in Paragraphs 23, 25 and 26, *supra*, describing competitive conditions in the health and beauty aid market, are applicable to each of the submarkets" (Complaint, Par. 29). The complaint further alleges that "it is logical to expect manufacturers of proprietary drugs to continue to expand into personal care products and, conversely, to expect manufacturers of personal care products to continue to expand into proprietary drugs." (Complaint, Par. 30). Complaint counsel admittedly is relying on the "supply space" theory of Dr. Narver and the evidence adduced thereon in support of these allegations of the complaint (Tr. 1054–55).

Complaint counsel likewise, has submitted no separate findings with respect to these two submarkets, but presumably is relying on the same evidence and proposed findings submitted with respect to the primary market of "health and beauty aids."

To the extent that the findings heretofore made relate to both the primary market of health and beauty aids and the two submarkets: proprietary drugs and personal care products; they will not be repeated. However, a few specific findings will be made:

(1) Proprietary Drugs as a Line of Commerce

73. Proprietary drugs is not acceptable as a line of commerce, because it would erroneously include diverse and unrelated products, and it would erroneously exclude OTC ethical drugs, private-label and generic products.

(a) Proprietary drugs include products used for the relief of cough and colds, analgesics for the relief of pain, antacids and laxatives, first-aid items, skin medications, somnolents, vitamins and other products (RX 7; Elson 154, 180, 190; Mahoney 453; Berry 1491). Plainly, there is no interchangeability in use among the different types of products classified in proprietary drugs.

(b) Proprietary drugs include many products which are manufactured differently, and require substantially different capabilities and resources. For example, internal medicines require different production and quality controls, different research and development, and require a different expertise than do externally applied products (Tainter 1751–60; Prindle 1521–22).

(c) Proprietary drug manufacturers do not view other proprietary firms as competitors except within product use categories (Bryant 290–91; Mahoney 455). Retailers also view proprietary drug products as competitive only within product use categories. Competition for shelf space takes place primarily among products within each of these use categories (Campbell 343; Elliott 514–17; Mahoney 480–83; Berry 1495).

(d) The record clearly establishes that OTC ethical drugs, private-label drugs and generic products compete with proprietary drug products used for the same purposes. They are manufactured, distributed, marketed, displayed by retailers and purchased by consumers in the same way as competitive proprietary drugs within the same use category; these non-proprietaries include leading products and very substantial selling items in many product use categories (see Finding 28(a), (b)).

74. In view of the above facts, the appropriate drug lines of commerce in which to assess actual or potential competition between Sterling and Lehn & Fink are specific product lines—*e.g.*, analgesics, antacids, laxatives, external antiseptics, acne aids, including in each category proprietaries and OTC ethicals, generics and private-label products.

(2) There is No Likelihood of Adverse Competitive Effects in Any Proprietary Drug Line of Commerce

75. The complaint alleges the elimination of potential competition between Sterling and Lehn & Fink within the proprietary drug field (Complaint, Par. 36(b)), and the elimination of actual competition in acne aids and external antiseptics (Complaint, Par. 36(c)).

76. The alleged effects of the merger upon actual competition in acne aids and external antiseptics are discussed *infra*, Findings 85–98.

77. The record clearly shows that Lehn & Fink was not a likely or potential competitor of Sterling in Sterling's principal proprietary drug business.

(a) Sterling's principal business in the proprietary drug field, comprising 95 percent of the sales of the Glenbrook Laboratories Division, consists of products in analgesics and antacids/laxatives (Berry 1457; Finding 5(a)).

(b) Lehn & Fink was never a potential producer of analgesics, antacids/laxatives, or, for that matter, of any internal medicine. Lehn & Fink did not have the technical capabilities or the sales, distribution, research and manufacturing resources to manufacture and sell internal medicines. It did not have any medical doctor or pharmacologist on its staff and had no expertise or know-how in internal medicines (Kirk 1361–62; Prindle 1522).

(c) Lehn & Fink's only proprietary drug products were, at the time of the merger, and are today, external skin treatment products, Medi-Quik and Stri-Dex, with total sales in 1965 of $4,161,000 (CX 44). Medi-Quik, an external antiseptic, was not developed by Lehn & Fink but was brought to it as a formulation by a chemical supplier, Stalfort (Kirk 1361, 1451). Stri-Dex, an acne treatment product, was developed by Lehn & Fink as a result of its background in skin care and medicated cosmetics (Kirk 1365). The records of Lehn & Fink's research and development efforts in the proprietary field were limited to external skin care products and did not include any project proposal or idea in internal medicines (CX 29, CX 51; Kirk 1362; Prindle 1522).

(d) Lehn & Fink did not have any intent to enter, or any interest in entering, the analgesic, antacid/laxative or any internal medicine field (Kirk 1361–62).

(e) Prior to the merger, Sterling never considered Lehn & Fink a potential entrant into the analgesic, antacid/laxative or any internal medicine field, because Lehn & Fink lacked the capability and the resources to enter those fields (Berry 1477). Sterling was aware that its proprietary business, Glenbrook Laboratories, operated under much more rigid controls than Lehn & Fink's proprietary business. Glenbrook had physicians, pharmacologists and scientists on its staff which Lehn & Fink did not have (Berry 1477). Glenbrook also could and did, utilize the resources of the Sterling-Winthrop Research Institute, including medical doctors, biologists, chemists, pharmacologists and toxicologists (Tainter 1750–55, 1773).

78. Lehn & Fink's market share in any broader market of proprietary or non-prescription drugs would not show that it had the capabilities and resources to enter the fields of analgesics or antacids/laxatives in which Sterling was engaged. In any event, its sales of

Medi-Quik and Stri-Dex amounted to less than one-half of one percent of the sales of proprietary drugs in 1965 (see CX 67); Lehn & Fink had a very substantially smaller share of the sales of all nonprescription drugs (proprietaries and OTC ethicals, private-label and generic drugs).

(3) Personal Care Products as a Line of Commerce

79. The complaint alleges that within the overall health and beauty aids market, there is a personal care products submarket, consisting of all products classified in SIC category 2844, which includes perfumes, cosmetics and other toilet preparations advertised to the public by the manufacturer (Complaint, Pars. 22, 27).

80. Personal care products as defined in the complaint is not acceptable as a line of commerce because it would erroneously include diverse and unrelated products, and it would erroneously exclude non-chemical products.

(a) The Standard Industrial Classification Manual published by the Bureau of the Census (1967) lists about 40 types of products as the principal products found within 2844, as follows:

Bath salts
Bay Rum
Bleaches, hair
Body powder
Colognes
Concentrates, perfume
Cosmetic creams
Cosmetic lotions and oils
Cosmetics
Cupranol
Dentrifrices
Denture cleaners
Deodorants, personal
Depilatories
Dressings, cosmetic
Dyes, hair
Face creams and lotions
Face powders
Hair dressings, dyes, bleaches, tonics, and removers
Home permanent kits
Lipsticks
Manicure preparations
Mouth washes
Perfume bases, blending and compounding
Perfumes, natural and synthetic
Powder: baby, face, talcum, toilet
Rouge, cosmetic
Sachet
Shampoos
Shaving preparations: cakes, creams, lotions, powders, tablets, etc.
Talcum powders
Toilet creams, powders, and waters
Toilet preparations
Tooth pastes and powders
Washes, cosmetic

(b) Plainly there is no interchangeability in use among the different types of products classified in 2844.

(c) SIC 2844 includes many products which are manufactured differently and require very different capabilities and resources. Creams and colognes are not manufactured similarly (Kirk 1354). Producing the many hundreds of formulations in a line of franchised cosmetics is quite different than mass production of a toiletry item (Kirk 1357). As admitted by complaint counsel's own expert witness, "production functions for toothpaste and perfume are different" (Narver 1127–29).

(d) SIC 2844 includes products that require different distribution, marketing and promotion. In particular, the record shows such distinction between franchised cosmetic lines of the type sold by Lehn & Fink and mass-merchandised toiletries. Among other things, franchised cosmetics are distributed in different outlets where they are sold by specially trained personnel; cosmetics are not found in the health and beauty aids rack or section of the supermarket, where mass-merchandised toiletries are sold; and unlike toiletries, franchised cosmetics are not significantly advertised on television (Finding 29(a).

(e) The record clearly establishes that the trade usage and understanding of personal care products or toiletries is not limited to chemical items classified in 2844. For example, cosmetics include makeup accessories such as emery boards, manicure implements, and eyebrow pencils (Elson 187; Heller 433). Grooming products include hair brushes and toothbrushes, combs, hair setting kits (Elliott 527; Campbell 334). Shaving products include razors and razor blades (RX 6; Johnson 215; Bryant 246; Campbell 335; Elson 184; Berry 1455–56). In terms of the health and beauty aids rack or section of a supermarket, personal care products include additional non-chemically based items such as sanitary napkins, and cotton swabs and cotton balls (Johnson 215; Bryant 246; Campbell 337; Elliott 528; Friedman 568–69; Berry 1455–56). Chemical products outside SIC 2844, such as toilet soap, would also be included in the overall category "personal care products" (RX 6).

81. Cosmetic products would be an appropriate line of commerce in this case.

(a) Cosmetics is the particular field in which Lehn & Fink was engaged (CX 31; Kirk 1351).

(b) The cosmetics business is recognized in the trade as a distinctive field. It is clearly distinguishable from the class of mass-merchandised toiletries (Finding 29). And it includes non-chemical cosmetics implements and accessories (Finding 29(c)).

(4) There is No Likelihood of Adverse Competitive Effects in Any Personal Care Products Line of Commerce

82. The complaint alleges an elimination of potential competition between Sterling and Lehn & Fink in the personal care products market (Complaint, Par. 56(b)).

83. The record shows that Sterling was not a likely or potential entrant by internal growth in the cosmetics line of commerce in which Lehn & Fink was engaged.

(a) Sterling did not have the manufacturing capabilities and resources necessary to enter the cosmetics market by internal growth. Sterling did not have the marketing capabilities and resources needed to sell cosmetics. Requirements, in terms of product development, manufacturing, packaging, distribution, marketing and promotion are different in the cosmetics business than they are in Sterling's line of business (Kirk 1355–57; Berry 1474–76; 1503; Tainter 1763, 1768–69).

(b) Sterling never considered entering the cosmetics market by internal growth (Berry 1474–75).

(c) Lehn & Fink never considered Sterling a potential entrant by internal growth into cosmetics, because Sterling lacked the capabilities and resources necessary to enter that market (Kirk 1357).

(d) While prior to the acquisition of Lehn & Fink, Sterling considered entering the cosmetics market by acquisition (Pfister 1260), and Sterling had the financial resources to do so (Tr. 410), this would also be true of many other firms.

(e) The difficulties of entry by internal growth into cosmetics for drug companies was attested by an official from Norwich Pharmacal. He relates that Norwich entered by acquiring a French cosmetic manufacturer, and any effort to develop a cosmetics line internally would have been "long, laborious, and risky" (Mahoney 455).[6]

84. Lehn & Fink was a minor factor in cosmetics and, consequently, its acquisition by Sterling did not and could not cause any significant adverse competitive effects.

(a) The only evidence in the record of Lehn & Fink's position in cosmetics is CX 32, which lists a group of 16 cosmetics firms, including Lehn & Fink, comparing their sales for 1965. In that list Lehn & Fink ranked 14th, with only 1.4 percent of the sales of this group of 16 cosmetics firms. CX 32 is incomplete, and was limited to those

[6] Although an official of Chesebrough-Pond's indicated that Chesebrough had the capability of filling any consumer need it found in the toiletry, cosmetics or proprietary drug fields (Heller 375–76), this statement must be considered in light of the fact that Chesebrough has long been engaged in all these businesses (Heller 370, 374–76).

companies about which Lehn & Fink was able to obtain information —*i.e.*, publicly held companies, specializing in cosmetics (Kirk 1358–59).

(b) The record shows that CX 32 omits numerous firms with very important and substantial cosmetic operations which are larger than Lehn & Fink's cosmetic business. Some of the omitted firms identified by trade witnesses were divisions of larger companies, such as Coty, of Pfizer; Breck, of American Cyanamid; Maybelline, originally part of Squibb Beech-Nut and later acquired by Plough; the Prince Matchabelli and Ponds lines, of Chesebrough-Pond's; the Toni Corporation, of Gillette; Germaine Monteil and Scandia, of British American Tobacco; Jean Patou, of the Borden Company; Caron, of A. H. Robbins; and Clairol of Bristol-Myers. Other important firms omitted from CX 32 were privately held cosmetics companies, such as Estee Lauder, Elizabeth Arden, Ozon, John Robert Powers, and Mennen (Heller 416–23; Mahoney 500–01; Kirk 1358–59).

(c) The firms listed in (b) above would have to be included in the cosmetic line of commerce. Among them are leading firms in the field, much larger than Lehn & Fink. In the cosmetics market, therefore, Lehn & Fink's market share is substantially smaller than the 1.4 percent shown on CX 32.

(d) If any broader line of commerce of personal care products was to be considered—*e.g.*, including toothpaste, shaving preparations and other products embraced in SIC 2844, Lehn & Fink's share in such market (since it does not produce any significant 2844 product besides cosmetics) would be even more miniscule than its share in cosmetics.

C. Acne Aids As a Line of Commerce

(1) Allegations of the Complaint

85. The complaint in this case alleges an acne aid market within the larger class of proprietary drug products. Thus, the alleged market is restricted to those acne aids which are promoted directly by the manufacturer to the consumer (Complaint, Par. 31).

(2) Respondent's Participation in the Market

86. Within this alleged market, there was no competition between Sterling and Lehn & Fink, because Sterling had no proprietary acne aid product.

(a) Lehn & Fink manufactures Stri-Dex, an invisible liquid, dispensed in pad form and medicated, for the treatment of acne (Kirk 1365).

(b) Prior to the merger, Sterling did not manufacture or sell a proprietary acne aid product, and it does not do so today (apart from Lehn & Fink). There is no such product in Glenbrook Laboratories, Sterling's proprietary drug division, or in any other Sterling division (Berry 1469).

(c) Sterling's Winthrop Laboratories Division, which produces ethical drugs, manufactures and sells pHisoHex. pHisoHex is an over-the-counter ethical preparation used as a germicidal skin cleanser and sold primarily to hospitals for use as a surgical scrub, and also to consumers for use as a skin cleanser. pHisoHex is used in part for the treatment of acne. It is generally considered as a supplement to specialized acne treatment products, in that pHisoHex would be used as a germicidal cleanser prior to the application of a product like Stri-Dex (Elson 172; Friedman 573; Kirk 1366; Tainter 1763; CX 34, 35). When Lehn & Fink surveyed comparative sales of Stri-Dex and other brand-name acne aids, it did not include pHisoHex or other medicated soaps in the coverage of the survey (Kirk 1366).

(d) The record is clear that pHisoHex is not classified as a proprietary drug, because it is not promoted by Sterling to the consumer, but is promoted primarily to the health professions. None of the numerous exhibits introduced by complaint counsel which deal with Sterling's advertising plans and schedules make any reference to pHisoHex. Complaint counsel conceded that there was no evidence that pHisoHex is advertised by the manufacturer directly to the public (Tr. 1229). Consequently, pHisoHex is classified as an OTC ethical drug and not as a proprietary drug item (CX 35; Friedman 573; Morgan 1205; Kirk 1366).[7]

87. Complaint counsel's contention that pHisoHex and Stri-Dex do in fact compete, despite the fact that pHisoHex is not a proprietary drug, suggests that they are now advancing a line of commerce in acne aids not limited to proprietary products (see complaint counsel's proposed findings 130 and 134, CPF p. 58). This is an impermissible extension of the Commission's complaint in this case, and is inconsistent with the position taken by complaint counsel in the course of the hearing (Tr. 1232).

88. If a broad market is to be considered, not limited to proprietary drug products, such a market would have to include, in addition to pHisoHex, all other OTC ethicals used for treatment of

[7] Retailers may use newspaper advertising to promote successful OTC ethical drug products, and this has occurred with pHisoHex; but this does not change the classification of the product as an OTC ethical drug for census reporting or other purposes (RX 6; Elson 172; Johnson 212; Morgan 1205).

acne. It would also include medicated soaps, medicated cosmetics and skin cleansers used for acne treatment (Heller 442; Kirk 1366).

(3) There is No Likelihood of Adverse Competitive Effects in Any Acne Aid Line of Commerce

89. The complaint alleges that the acquisition of Lehn & Fink by respondent eliminated actual competition between the two companies in the manufacture and sale of acne aids (Complaint, Par. 36(c)).

90. Insofar as the alleged proprietary acne aid market is concerned, there was clearly no anticompetitive effect as a result of the merger because, contrary to the complaint, there was no competition between respondent and Lehn & Fink in this line of commerce (see Finding 86).

91. If consideration is given to a broad market not confined to proprietary acne aid products, then there is an absolute failure of proof as to the size of this overall line of commerce and as to the shares of the two companies. The record shows only that, in 1965, Stri-Dex had $2,125,000 in sales (CX 44(c)), and that pHisoHex had $14,504,000 in sales, of which $2,850,000 was estimated as attributable to acne care (CX 34). Without knowing the sales of all the other products included in the market including other germicidals, medicated soaps, skin cleansers and medicated cosmetics, it would be impossible to ascertain the total size of this broad market, or the shares of any products.[8]

92. The record shows that a market consisting of products used for treatment of acne would include, among others, proprietary products such as Fostex, Tackle, Fresh Start, Ten-O-Six, and Clearasil, medicated creams sold and used for acne purposes such as Noxzema and Bactine cream, soaps such as Cuticura, Safeguard, and Dial, cleansers such as pHisoHex and Noxzema, medicated cosmetics like Chesebrough-Pond's Angel Face, and pads such as Stri-

[8] Complaint counsel, in Proposed Finding No. 137 (CPF, p. 59), cite CX 2(e)–(f) for the proposition that Stri-Dex, as of 1965, was the number two teenage skin treatment product in the United States. This statement was contained in a speech by Walter N. Plaut, then president of Lehn & Fink, at the 1965 annual stockholders meeting. There is no evidence of what market or brands Mr. Plaut had in mind when he made this statement. On the basis of the record, it is possible that he was limiting himself to brands solely promoted for acne purposes, but it is clear that the market is far broader (Finding 92).

Mr. Plaut's statement is even inconsistent with the survey report (CX 13) which was excluded from the record because it did not cover pHisoHex or any Sterling product (CX 13; Tr.1227). Lehn & Fink's market research in this field did not cover any medicated soaps (Kirk1366). Even that incomplete and inadequate survey shows Stri-Dex tied for sixth place among the limited range of brands surveyed.

Complaint counsel also seek to describe that excluded survey report indirectly, by citing another exhibit which had been withdrawn by complaint counsel on the first day of the hearing (CX 57, withdrawn at Tr. 118; see complaint counsel's Proposed Finding 138, CPF, p. 59).

Dex (Bryant 239, 293; Campbell 344–45; Friedman 558; Kirk 1366). The Chesebrough-Pond's witness testified that when he asked Nielsen, a recognized market authority, for a survey of acne aids, Nielsen estimated that to study the entire acne aid market, 500 products would have to be surveyed (Heller 440–41). Since the expense of a complete survey would have been unwarranted, he limited the study to comparing his proprietary acne product (Fresh Start) against the major competitor, Clearasil (Heller 441). In this large and diverse market, the acquisition could not have had any significant effect.

Complaint counsel's observation, in the argument portion of their filing (CPF, p. 64), that Sterling "now has a dominant position in the [acne aid] market" is unsupported by their own proposed findings. Complaint counsel's proposed finding was based in part on CX 57 which was voluntarily withdrawn before it was ever offered (Tr. 118).

D. External Antiseptics As a Line of Commerce

(1) Allegations of the Complaint

93. The complaint in this case alleges an external antiseptic market within the larger class of proprietary drug products. Thus, the alleged market is restricted to those external antiseptic products which are promoted directly by the manufacturer to the consumer (Complaint, Par. 31).

(2) Respondent's Participation in the Market

94. The record shows that there is an appropriate line of commerce in external antiseptics. The scope of the external antiseptic market does not correspond to the allegations of the complaint.

(a) External antiseptics is a product category recognized by manufacturers and retailers. It encompasses those non-prescription drugs designed to treat minor external wounds as a first-aid measure; external antiseptics are used to kill infections caused by various skin disorders (Elson 201; Friedman 559).

(b) In addition to brand-name external antiseptics, the external antiseptic market clearly includes generic products such as iodine, mercurochrome, merthialate, alcohol, witch hazel, tincture green soap and hydrogen peroxide, all of which are manufactured and sold for external antiseptic purposes. These products are displayed together or close to one another in the store, and are found in the home medicine cabinet (Campbell 355; Elliott 532; Friedman 559; Kirk 1362–63). When asked to name the leading sellers in the external antiseptics field in Korvette's, Mr. Friedman named the generic items iodine, mercurochrome, merthiolate, rubbing alcohol, hydrogen peroxide, tincture green soap (Friedman 559).

95. At the time of the merger, Sterling and Lehn & Fink both manufactured and sold external antiseptic products; they continue to do so. Glenbrook's products include the external antiseptic known as Campho-Phenique (Berry 1464–69; Answer, par. 6). Lehn & Fink produces and sells Medi-Quik (Kirk 1361; Answer, par. 15). As shown below, however, Campho-Phenique and Medi-Quik are largely used for different purposes.

(3) There is No Likelihood of Adverse Competitive Effects in the External Antiseptic Line of Commerce

96. The complaint in this case alleges an elimination of actual competition between Sterling and Lehn & Fink in the manufacture and sale of external antiseptics (Complaint, Par. 36(c)).

Sterling's Campho-Phenique had sales in 1963 of $1,167,000; in 1964, $1,273,000; and in 1965, $1,369,000. The advertising to sales ratio for Campho-Phenique was 32 percent in 1963, 30 percent in 1964, and 34 percent in 1965 (CX 44(f)).

Lehn & Fink's Medi-Quik had sales in 1963 of $2,453,000; in 1964 of $2,021,000; and in 1965 of $2,036,000. The advertising to sales ratio for Medi-Quik during 1963 was 48.4 percent, during 1964, 47.3 percent, and during 1965, 39.6 percent (CX 44(b)).

According to complaint counsel the structure of the external antiseptic market is as follows (CX 12(e)):

Product	Year	Dollar value of total sales	Percent of total sales accounted for by: 4 largest companies	8 largest companies
External Antiseptics	1964	$41 million	41	55

Share of Market of Companies Surveyed

	Year of 1964	August 1965
Medi-Quik	10	12
J & J Brands	13	13
Bactine	9	9
Unguentine	9	9
Solarcaine	5	8
Safeguard	3	2
Nupercainal	3	3
Campho-Phenique	3	3
Rhuli	3	2
Tichfmor	2	2
Sea Breeze	2	2
Foille	2	2
Isodine	2	1
ST-37	2	1
All others	30	29

97. The external antiseptic market as portrayed by CX 12(e) shows only a part of the external antiseptic market and is not complete.

(a) The only evidence upon which complaint counsel relies for market shares in the external antiseptic line of commerce is CX

12(e), an audits and survey report on external antiseptics prepared for Lehn & Fink in August 1965.

(b) In requesting the audits and surveys report, Lehn & Fink did not intend to measure the whole market. The report was designed merely to track the movement of Medi-Quik against sales trends of certain other brand-name products such as Solarcaine, Unguentine, Bactine, and Johnson & Johnson First Aid Spray, and to ascertain the kind of shelf positions and inventory these other products had at retail. The report's main purpose was to upgrade Medi-Quik's performance within Lehn & Fink's organization. The report was not designed or intended to measure the outside parameters of the external antiseptic market. The study had a limited purpose and it was not intended or usable as a delineation of the market or of market shares. Lehn & Fink would have liked a report covering the entire market, but a product such as Medi-Quik cannot afford this research cost (Kirk 1363–64).

(c) CX 12(e) does not include products such as iodine, mercurochrome, merthiolate, alcohol, hydrogen peroxide, witch hazel or green soap—all of which are normally used as first-aid remedies to treat wounds and certainly account for substantial sales in the external antiseptics market (Kirk 1364; see Finding 94(b)). CX 12(e) is therefore not coterminous with the external antiseptics market nor does it show the overall size or volume of that market.

(d) CX 12(e) shows only that when compared with certain brand-name products, Campho-Phenique had about 3 percent of the total sales of that group in 1964 and Medi-Quik had about 10 percent, combining the sales of its aerosol, squeeze bottle and cream. The leading brand is Johnson & Johnson with about 13 percent; other prominent brands are Bactine with about 9 percent, Unguentine with 9 percent, Solarcaine with 5 percent, Safeguard, Nupercainal and Rhuli with 3 percent (CX 12(e)). Once the generic products are included in the market, the respective market shares for Campho-Phenique and Medi-Quik as of the time of the merger would fall far below the percentage indicated on CX 12(e).

98. Moreover, any market shares obtained for Campho-Phenique and Medi-Quik, even after including the generic products, would overstate competition between these two products, because they are used largely for different purposes.

(a) Medi-Quik is a first-aid product mostly sold in aerosol form, used for cuts, burns, and scrapes. Medi-Quik Spray was first produced by Lehn & Fink and test marketed in 1959 and introduced nationally in 1960 (Kirk 1294, 1361, 1442).

(b) Campho-Phenique is an older product. It is a camphor and phenol formula in an oil base. The primary use of the product is for cold sores and fever blisters; it is secondarily used for insect bites. It is also a topical antiseptic, but because of its form and its oily substance, it has been used less in past years than other products introduced in aerosol form (Berry 1464–65). In the area of fever blisters and insect bites, the principal competitors of Campho-Phenique are Chapstick and Blistex. The spray products do not lend themselves to application to areas such as the lips, and Campho-Phenique has an advantage in this application. Spray forms, on the other hand, have an advantage where cuts and abrasions are concerned, because Campho-Phenique, with its oily base, gets messy and rubs off on clothing (Berry 1465–66). Consumer research shows that Campho Phenique's competition with aerosol sprays is much less significant than in the other areas of Campho-Phenique's use (Berry 1466).

(c) Competition between Campho-Phenique and Medi-Quik is very limited for other reasons. Whereas Medi-Quik is advertised on television, Campho-Phenique is a slow-moving product which is not promoted much by the manufacturer (Campbell 355). Campho-Phenique is not advertised on television (Berry 1469).

(d) Since 1965, Campho-Phenique has not kept up with the growth of competitive brands in the external antiseptic market. The spray categories are up about 30 percent in growth during this period, and the lip-aids have enjoyed similar growth. Since overall sales of external antiseptics have increased substantially, due to the increased popularity of spray forms of antiseptics, while Campho-Phenique sales have not increased much, its market share has declined since 1965 (Berry 1468–69). In 1969, Miles Laboratories claimed that its Bactine had strengthened its position as the number one brand first-aid antiseptic in the United States and continued to increase its share of the market (RX 5, p. 16).

(e) Campho-Phenique and Medi-Quik have never been marketed together. Lehn & Fink has been a division operating on its own, and it has continued to market its products as it did before the merger. While it is conceivable that Campho-Phenique and Medi-Quik could be marketed together, this has not been done, and it is not likely that it will be done, because it would not be advantageous to either product to do so (Kirk 1367; Berry 1472).

E. Household Aerosol Deodorizers as a Line of Commerce

(1) Allegations of the Complaint

99. The complaint alleges a market of household aerosol deodorizers, defined as those products in aerosol form which purify

air in the household by removing odors or destroying germs (Complaint, Par. 33; Duke 628–29).

(2) Respondent's Product "Lysol Spray Disinfectant"—Its Properties and Uses

100. Lysol Spray Disinfectant was introduced by Lehn & Fink in 1962 as the aerosol form of an established brand liquid disinfectant (Complaint, Par. 19; Answer, par. 19). Roger Kirk, of Lehn & Fink, felt that Lysol had great potential in spray form, and proposed the application of aerosol technology to expand the Lysol market. Although his idea was initially resisted by management, a small consumer test showed that Lysol Spray would sell and the product was taken to test market. Managerial approval was then obtained to introduce it nationally (Kirk 1314).

101. Lysol Spray Disinfectant had distinctive properties as a disinfectant because it kills germs, including germs which cause odors. Lysol is a full spectrum disinfectant which kills both gram positive and gram negative bacteria, kills mold and mildew and is tuberculardidal. When Lysol is sprayed on surfaces, a coarse spray is deposited which acts as a surface disinfectant. When Lysol is sprayed in the air, its droplets "wash" the air and neutralize or combine chemically with odor-producing particles. Consequently, Lysol Spray has a dual use—as a surface disinfectant and as an air deodorizer—and it is sold for both purposes (Kirk 1303–05, 1428–30).

102. The dual use of Lysol Spray has always been the distinctive feature of its advertising and promotion. The label on the Lysol aerosol can identifies the product as "Lysol Spray Disinfectant" and claims that the product "eliminates odors" and "kills household germs;" that it "kills influenza virus and dangerous staph and strep germs on environmental surfaces;" and that it "prevents mold and mildew." The Lysol can recommends use for germ killing in bathroom basins, toilet seats, garbage receptacles, animal areas and other places. Disinfectant use against mold and mildew is recommended for basements, closets, laundry rooms, summer cottages, boat interiors, shower stalls, and other places (RX 16; Kirk 1310–13).

103. Complaint counsel propose a broad finding (No. 167, CPF p. 67) that Lehn & Fink had "continuously" referred to Lysol Spray as being in the "household deodorizer market" and that Sterling also so considered it. A careful examination of the corporate documents cited by complaint counsel stresses Lysol's disinfectant properties and dual use. Like the can label, they refer to the product as a "combination room deodorizer and disinfectant" (CX 6, p. 2),

"disinfectant room deodorizer" (CX 8, p. 3) and "household spray disinfectant-deodorizer" (CX 26, p. 5). One also refers to Lysol Spray as the leading "household room deodorizer" (CX 8, p. 3) but the product is identified as a "disinfectant room deodorizer" in that field (*ibid.*).

104. Lehn & Fink has studied the consumer use of Lysol. The product is used as a disinfectant on surfaces—for example, to kill athlete's foot germs in showers and bath tubs, to prevent mold and mildew on shower curtains and tile, on the floor, toilet bowl, toilet seat, closet, diaper pails, garbage pails, basements and other musty areas, on boats, etc. As a result of studies by an outside consultant, the Home Testing Institute, Lehn & Fink found that over 50 percent of the consumer uses of Lysol Spray is as a disinfectant (Kirk 1304–05, 1350, 1427–30).[9] The president of Lehn & Fink considers the product primarily a disinfectant, rather than a deodorizer (Kirk 1348).

105. Lysol Spray has been perceived as a competitor by companies selling non-aerosol surface disinfectants, such as Clorox. Clorox has refused to permit brokers who handle its product to also sell Lysol Spray for that reason (Kirk 1307). The direct competition with Clorox is shown by comparing RX 21, a label from a Clorox bottle, with RX 16, photographs of a Lysol Spray can. Very similar disinfectant claims are made for both products, and their use is recommended in the same household areas for the same purposes. As a disinfectant, Lysol Spray competes with liquid disinfectants such as Clorox, Lysol Liquid, Pine-Sol and other pine oils and with Creolin (Kirk 1305).

106. Lysol Spray is also used for deodorizing by spraying the air, where its fragrance combines with its air-washing and neutralizing qualities. Deodorizing also results in surface disinfection. A consumer who sprays a garbage can kills germs and bacteria; one who sprays basement surfaces kills the mold and mildew. The result is also to eliminate garbage and basement odors (Kirk 1428–29).

107. Deodorizing can be accomplished by other means than disinfection. One is to mask or cover up the undesirable odor with a

[9] Complaint counsel propose a finding (No. 163, SPF p. 66) that "Although Lysol Spray has disinfectant qualities, it is used primarily as a deodorizer," citing Tr. 1350 and CX 28, p. 17. CX 28 is the 1969 Sterling Annual Report which simply pictures a Lysol Spray can and repeats the dual claims for deodorizing and disinfection quoted in Findings 102, 103. At Tr. 1350, Roger Kirk, the president of Lehn & Fink, referred to the study result that "47 percent of the people who use Lysol use it mostly as a disinfectant." This is consistent with his reference to "over 50 percent" at another point (Tr. 1428–29) because of the number of users who reported use equally as a deodorizer and disinfectant.

perfume stronger than the odor. Second is to dull or numb the human olfactory nerves with an aldehyde so that the odor cannot be detected (Kirk 1309). Products of the perfume or aldehyde type obviously would not be applied to surfaces such as garbage cans, basements, toilet seats, or any of the other locations where Lysol use as a disinfectant is recommended.[10]

108. The non-disinfectant household aerosol deodorizer products which use the two methods specified in the above finding included, at the time of the merger, Glade Deodorizer of S. C. Johnson; Florient of Colgate-Palmolive; Wizard of American Home Products; Renuzit of the Renuzit Co. (now in the Drackett Division of Bristol-Myers); and Air-Wick, distributed at the time by Lever Bros. These products have no disinfecting qualities; make no disinfectant claims; make no claims for deodorization based on disinfectant action; and are not sold for surface disinfection use (Kirk 1308–09(1410–14). These products compete with Lysol Spray in its deodorizing applications but not in surface disinfection (Kirk 1308).

109. Lysol Spray Disinfectant is sold primarily through food and drug outlets. Sales through food outlets account for 65 percent of the total sales of Lysol Spray Disinfectant and sales through drug outlets account for 16 percent (CX 15(a), (c); CX 69(f). Lysol Spray Disinfectant and other household aerosol deodorizers are sold in the household section of grocery stores (Kirk 1326). Lehn & Fink's purpose in placing Lysol Spray Disinfectant in that location was to place it next to other aerosol deodorizers, and because in this location the aerosol deodorizers secure the greatest velocity of movement, *i.e.*, turnover (Kirk 1410–11). Preliminary testing by placing Lysol Spray Disinfectant with drain openers and bleaches indicated "wrong positioning for Lysol aerosol" and now only Lysol liquid is positioned with such products as Pine-Sol (Kirk 1412). However, it appears that Air-Wick, a non-aerosol deodorizer is also placed on the same shelf with the aerosol deodorizers (Kirk 1412).

110. Recognition of the distinctive character of Lysol Spray as a disinfectant is also established by the entry into the market, since the acquisition, of a number of aerosol disinfectant-deodorizer prod-

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[10] Complaint counsel propose a finding (No. 157, CPF, p. 65) that household aerosol deodorizers "functionally are fragrance products" and that there were "only two elements capable of differentiation, namely, label design and product fragrance." This is true only of the perfume-type products, not of the other types, and certainly not of Lysol. Glade, Florient, Wizard, Renuzit are perfume-type products. Air-Wick is an aldehyde product. Lysol is a disinfectant, and it deodorizes in large part by use of disinfectant properties, like the other aerosol disinfectant-deodorizers.

ucts which make claims identical to those made by Lysol Spray. These include Virex, of S. C. Johnson Co.; Contrair, of Gillette Co.; Staphene, of Noxell Corp.; Bathroom Disinfectant Spray, of Dow Chemical Co. Photographs of the labels of these products, in the record, show the identity of the claims and recommended uses with those of Lysol Spray (Compare RX 16 with RX 17; RX 18; RX 19; RX 20; Kirk 1308). There are, in addition, many private label disinfectant-deodorizer products on the market, such as A&P's (Kirk 1308, 1422).

111. Lysol Spray Disinfectant sells at a higher price than the other advertised brands of non-disinfectant aerosol deodorizers, most of which are only perfumes. The 7 oz. can of Lysol Spray sells for 98¢ and the 14 oz. can sells for $1.49. The non-disinfectant aerosol deodorizers have an average price of 69¢ a can (Kirk 1417). Other disinfectant-deodorizer sprays sell at approximately the same price as Lysol Spray (RX 17(a)(b)).

The record does not explicitly provide the reasons for the higher price of Lysol Spray and other aerosol spray disinfectant-deodorizers. Respondent's explanation for this price difference is based on a reasonable inference that Lysol Spray's property as a disinfectant as well as a deodorizer accounts for such price differential. When introduced, Lysol Spray was selling for almost 150 percent of the price of other highly advertised larger companies' products, such as Colgate, American Home Products, and S. C. Johnson (see Finding 108; Kirk 1417). Complaint counsel attribute Lysol Spray's higher price to the fact that it has been highly differentiated through large TV advertising (Greer 704–05). Respondent does not agree that differentiation is the answer, since the established deodorizer brands were also extensively advertised and highly differentiated. Moreover, when a highly advertised brand competes with an unadvertised private label, only a 20 percent differentiation in price usually exists (Campbell 333). Respondent proposes that there is a reasonable inference that Lysol Spray costs more to produce because of its added disinfectant ingredients (see RX 16(b)), and consequently, commands a higher price because consumers recognize, and are willing to pay for Lysol Spray's added disinfectant properties. Similarly, respondent points out that the contents of the more recently introduced aerosol disinfectant-deodorizers (RX 17(b); RX 18(b); RX 19(b); RX 20(b)) also explain why they sell at the Lysol Spray price level. The hearing examiner finds that both explanations, that is, product differentiation and the disinfectant content, account for the higher price for Lysol Spray and other aerosol disinfectant-deodorizers on the market.

(3) The Actual Market in Which Lysol Spray Competes Does Not Correspond Exactly to the Line of Commerce Alleged in the Complaint

112. The complaint defines household aerosol deodorizers as "products in aerosol form which are designed to purify air in the household by removing odors or destroying germs" (Complaint, Pars. 1(d); 33). As heretofore found, this definition is not accurate since many aerosol deodorizing products on the market competing with Lysol Spray do not remove odors or destroy germs (see Findings 106–108). There is also a larger market in which Lysol Spray competes comprised of all deodorizers and disinfectants used for the same purpose (Kirk 1409). Such market consists of all products used for deodorizing purposes including these products, liquid as well as aerosol, which deodorize by means of surface disinfection.

113. While the examiner rejects the larger market, he also finds the market definition in the complaint to be inaccurate. Consequently, Lysol Spray will hereinafter be considered to compete in a more limited market, consisting of all products used for deodorizing purposes by spraying the air, *i.e.*, by means other than surface disinfection and are generally these products found on the shelves in the household section of grocery stores (see Finding 109).

(4) Sterling Was Not a Likely or Potential Entrant By Internal Growth Into Any Household Deodorizing Market

114. The manufacture of a household aerosol deodorizer requires highspeed automated filling equipment. These products are manufactured without human hands ever touching them (Kirk 1318). The cost of the highspeed facilities needed to manufacture aerosol deodorizers is substantial. The equipment used by Lehn & Fink in the manufacture of their aerosol deodorizer, Lysol, cost approximately $500,000 (Kirk 1392).

115. The Lysol Spray mixture, prior to being placed in the aerosol container, is mixed in large tanks. Once it is mixed, it is filtered and then stored in a second group of tanks. This requires a considerable amount of special equipment which is necessary for the manufacturing and for the handling of the raw material (Kirk 1395).

116. The manufacture of aerosol products is an extremely complicated matter. It requires specially trained personnel who are knowledgeable in and who have experience in aerosol technology (Kirk 1439–40).

117. Sterling did not have the manufacturing, marketing or other capabilities and resources to produce and sell a household aerosol deodorizer as shown by the following:

(a) Among the numerous industrial chemicals sold by Sterling's subsidiary, Sterwin Chemicals, are certain quarternary ammonium

compounds. Roccal is the trade name for Sterwin's industrial-grade quarternary ammonium products. Although it has disinfectant qualities, Roccal is not adaptable for use as a household product because it is incompatible with soap. This is an inherent property in the chemical substance; soap detoxifies or antagonizes quarternaries, so that, if there is soap present, it is no longer effective as a disinfectant. For most household purposes, the housewife must clean as well as disinfect (CX 54; Tainter 1963–66, 1768). Most of the basic disinfectant materials used in household products are phenolics, and Sterling has done little research in phenolics (Tainter 1764). Lysol Spray is a phenolic base disinfectant (RX 16(b)).

(b) Sterling did not have the experience, capability, or resources to produce, market, distribute, and sell a household product like Lysol Spray. The Sterwin Division does not market consumer products of any sort (Tainter 1766). Sterling's principal consumer products organization, Glenbrook Laboratories, did not have the capabilities or resources required for a household product like Lysol (Berry 1476–77). The manufacture and sale of a household product like Lysol Spray requires production facilities, product development, marketing techniques, distribution arrangements and sales organization entirely different from those required for Sterling's drug business prior to the acquisition (see Findings 120–126).

(c) Sterling never contemplated or considered entry into any household deodorizer market prior to its merger with Lehn & Fink (Pfister 1260; Berry 1477).

(d) Lehn & Fink did not consider Sterling a potential entrant into any household deodorizer market at any time (Kirk 1346, 1432). Lehn & Fink considered as prime potential entrants other firms which had grocery capability plus aerosol capability (Kirk 1346, 1432, 1437). Grocery capability refers to the organization and know-how to handle distribution and sales as a grocery supplier (Kirk 1432–33). Aerosol capability refers to technical competence in aerosol design and technology (Kirk 1395–97). Because Lehn & Fink considered Lysol a disinfectant rather than a deodorizer product, it also considered as potential entrants those companies with products such as Clorox, which had disinfectant connotations in the consumer's mind (Kirk 1347–48, 1435). Sterling did not have any grocery capability; the sales and distribution arrangements of suppliers to the supermarkets' "health and beauty aids" rack are entirely different than the requirements for food and household products (Finding 124). Sterling had no aerosol capability at all (Kirk 1318, 1385, 1395). Sterling had no consumer product with disinfectant connotations.

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Complaint counsel conceded that Sterling "does not have aerosol capacity presently" (Proposed Finding 190, CPF p. 72). Yet they also point to Sterling's introduction of an "aerosol" product called Bronkometer, and of the sale by Sterling's English subsidiary of an aerosol oven cleaner (Proposed Finding 189, CPF p. 72).

The Bronkometer is a prescription product incorporating a device for the delivery of a measured dose of medication for inhalation by persons suffering from asthmatic conditions, like the Isuprel Mistometer pictured in the 1967 Annual Report (CX 26, p. 15). It is made on equipment and by a process not applicable to any household product. The oven cleaner was not based on Sterling technology, but was obtained from an aerosol packager in England.

Complaint counsel urge that Sterling could purchase aerosol capacity. The ability to purchase a product from an aerosol packager is not distinctive to Sterling, and is available to any company. Moreover, the technical aspects of the aerosol valve cannot be contracted out; the purchased has to have technical expertise. Lysol Spray's valve (and the resulting droplet size and spray pattern) is part of its success (Kirk 1308, 1440–41).

(e) The firms which Lehn & Fink considered as potential entrants into the household deodorizer market with a product like Lysol Spray included S. C. Johnson; Corn Products (now C.P.C. International); Lever Brothers; Clorox (then with Procter & Gamble); the Drackett Division of Bristol-Myers; Colgate-Palmolive; and American Cyanamid's Dumas Miller operation, which was producing Pine-Sol (Kirk 1346). Of the firms with which Lehn & Fink had merger negotiations prior to the merger with Sterling, only Borden had aerosol capability (Kirk 1347).

(5) The Acquisition of Lehn & Fink by Sterling Did Not Have the Alleged Effect of Entrenching Lehn & Fink as the Dominant Firm in Any Household Deodorizer Market or of Creating Any Significant Barriers to Entry in Such Market.

118. The complaint alleges that "Lehn & Fink's position as the dominant firm in the household [aerosol] deodorizer market has been, or may be, further entrenched to the detriment of actual and potential competition" by the merger (Complaint, Par. 36(d)).

119. The record shows that in 1965, Lehn & Fink itself had all the resources necessary to maintain Lysol Spray as a successful product. The acquisition was not intended to add significant resources to Lysol Spray and, because of the differences between Lysol Spray's requirements and Sterling's operations, Sterling could not bring ad-

vantages to Lysol Spray (Findings 120–124, 130, *infra.*). Because of the differences in the businesses, after the merger Sterling let Lehn & Fink's management operate as it saw fit and continue to make its own independent decisions (Kirk 1379).

120. The testimony shows that Sterling could not contribute anything significant to Lysol Spray in terms of financial strength and did not contribute anything. Prior to the merger, Lehn & Fink had a strong balance sheet and enjoyed good relationships with banks and the financial community. It had just negotiated a $4 million loan at 4⅞ percent. Lehn & Fink had no problem obtaining funds to finance its growth and could have met the financial requirements for any growth foreseen at the time of the merger (Kirk 1299–1300, 1317). Like other Sterling divisions, Lehn & Fink operates autonomously and manages its own plans, programs and budgets with its own total responsibility for sales, profits and the carrying on of the business (Kirk 1366–67; Berry 1456).

121. The testimony also shows that Sterling did not, and could not, contribute anything to Lysol Spray in production capabilities and resources. Prior to the merger, Lehn & Fink had the production capability, in terms of aerosol technology and plant capacity, that it needed to produce Lysol successfully. Since the merger, Lehn & Fink has carried out prior plans to build a new manufacturing facility. The acquisition did not contribute to that planned facility and, in fact, in the view of Lehn & Fink management, retarded its construction. Sterling's plant facilities and processes are entirely different from the facilities and processes used by Lehn & Fink for Lysol Spray, and are not adaptable for such use. Sterling had no aerosol capability at all; it did not have high-speed filling equipment of the type needed for Lysol Spray. Lehn & Fink mixes Lysol Spray completely differently from the ways in which Sterling mixes its products. It purchases its raw materials differently from Sterling. Because of the stricter controls required, drug manufacturing is quite different from the manufacture of household products like Lysol Spray. Sterling's overhead is higher than Lehn & Fink's because of disciplines needed in the drug business; these are not disciplines which Lehn & Fink needs or could use in its Lysol business (Kirk 1318–19, 1386–92; Berry 1474–75, 1476–77).

122. It was also demonstrated that Sterling did not, and could not, contribute anything to Lysol Spray in distribution capabilities and resources. Lysol Spray is warehoused and distributed very differently from Sterling's drug products. These differences are inherent in the nature of the product lines involved.

(a) Lehn & Fink uses a different size case or cube for Lysol than any used by Sterling. Household products use a standard grocery industry pallet that differs from pallets used for Sterling's drug products. Lehn & Fink uses different rolling equipment than that used for Sterling's drug products. Warehousemen must handle Lysol Spray faster and must use different sized slip sheets and clamps in view of the size of the pallet (Kirk 1320).

(b) Lehn & Fink has geographic requirements for warehousing of Lysol, which Sterling does not have for its products. Lehn & Fink warehouses and ships Lysol with grocery items in the food and household categories, which have a faster turnover than drug products. It is imperative that Lehn & Fink shipments to the grocery trade are picked up and delivered at the appropriate time at the customer's dock. Drug products are not received at the same times or as often (Kirk 1318–21).

(c) Warehousing for Lysol Spray must also be strategically located to minimize distribution and shipment costs. This is important for a bulky household product like Lysol Spray. Lehn & Fink uses warehousing space in its own plants and in public warehouses in Atlanta, Dallas, Kansas City, Lima, Ohio, Harrisburg, Pennsylvania, San Francisco, Los Angeles and Portland. Sterling has six warehouses of its own throughout the country (Berry 1472). No warehouses are used by both Sterling and Lehn & Fink (Kirk 1321–22).

(d) Sterling and Lehn & Fink have never jointly negotiated for public warehouse rates. There would be no advantage to Lehn & Fink in negotiating for storage in a public warehouse together with Sterling since rates depend on the product's category, its cube, and how it is stored and shipped (Kirk 1320–22).

(e) Since Lysol Spray is a bulky, heavy product (unlike Sterling's small lightweight items), Lehn & Fink is very concerned about attaining commodity shipping rates which are lower generally than for Sterling products. Joint transportation of Lysol products and Sterling products would not be advantageous to Lehn & Fink. While Sterling operates some of its own trucks, joint transportation would unduly delay Lysol shipments. Using its own mechanical loading equipment, Lehn & Fink can load the same amount in half an hour which takes 3 hours to load by hand on Sterling trucks. Lysol Spray is shipped in carload lots, not in the smaller quantities used by Sterling (Kirk 1320–23).

123. The record shows that Sterling did not, and could not, contribute anything to Lysol Spray in sales capabilities and resources.

Prior to the merger, Lehn & Fink used 91 brokers who have 2,000 men contacting retail accounts, Lysol Spray being in over 250,000 retail outlets. It would be disadvantageous for Lehn & Fink to sell Lysol Spray jointly with Sterling products. Lehn & Fink has found it difficult to accommodate even its own proprietary drug products with Lysol. Sterling's selling policy and Sterling's sales organization are not oriented toward the type of delivery, terms and promotional allowances required for a household product like Lysol. The Sterling organization could not reach or accommodate the number of outlets required for Lysol. In addition, Lysol Spray is not sold to the same buyer personnel as Sterling products; the household products buyer differs from the drug buyer or the health and beauty aids buyer. Lysol Spray does not occupy the same shelf space in food stores that Sterling's products occupy; Lysol is found in the household products section while Sterling products are in the health and beauty aids section. For these reasons, there has not been and cannot be any combination of the sales forces of Lehn & Fink with those of Glenbrook or other Sterling divisions. There has not been and cannot be any joint billing or invoicing, or any joint or cross-promotions between Lehn & Fink and Glenbrook or other Sterling divisions (Kirk 1326, 1366–67, 1432–33; Berry 1456).

124. The record also shows that Sterling did not, and could not, contribute anything significant to Lysol Spray in research and development. Lehn & Fink's research and development is "cookbook research" or product development which involves using existing scientific knowledge and ingredients for a product or process. Packaging plays a large part in Lehn & Fink's research and development; package design and engineering functions are important. Sterling, on the other hand, is involved in basic medical research and works in areas foreign to Lehn & Fink and on long-term projects. Lehn & Fink could not use Sterling's research and development facilities. Since the merger, on those occasions where Lehn & Fink's research and development resources were not adequate for the task, Lehn & Fink went to outside laboratories. No help could be obtained from the Sterling research center in Rensselaer, whereas desired expertise could be obtained on the outside (Kirk 1324–25; Prindle 1520–22; Tainter 1763).

125. Testimony demonstrates that the failure of Sterling to jointly develop, produce, distribute, or sell its products with Lysol Spray is inherent in the differences between the drug business and the household products business; this separation of functions between Sterling and Lehn & Fink, therefore, may not be attributed to the pendency

of the instant proceeding. For example, Sterling's relationship to Lysol Spray is very similar to the relationship between Miles Laboratories, Inc., and the S.O.S. Company. As testified by the head of Miles' Consumer Products Group, different public warehouses are used for Miles proprietary drugs and for its S.O.S. or other household products. The system of marketing used for Miles' proprietary drugs is not used for household products sold by other divisions of Miles. Miles believes it is far more effective to use a network of food brokers for its household products than to use proprietary drug salesmen who could not even cover the number of retail outlets required for household products. In Miles' experience, buying personnel in the food chain stores are different for household products than they are for drugs (Bryant 280, 304–06).

126. For the year ending June 30, 1965, Lehn & Fink expended $11,676,400 on domestic advertising of its products (CX 17). During that same period, Lehn & Fink's total sales (domestic) were $57,906,200 (CX 31). Network television was the most extensive advertising media used (CX 17).

127. Lehn & Fink expended the following on network television for the years indicated:

1965	$3,921,100
1967	$3,567,713
1968	$5,194,758

Source: CX 53(c).

128. Lysol Spray is supported by major, national television advertising campaigns (CX 6, p. 4). Lysol Spray had the largest advertising budget of any Lehn & Fink product. During 1965 its advertising budget was $2,300,000, most of which was invested in network television (CX 59(f)). During 1966 Lysol Spray's advertising budget was $2,925,200, of which $1,649,000 was for network television (CX 70(b)). Lysol Spray's advertising budget for 1967 was $3,215,000 (CX 93(d)). During 1967, $2,130,000 was spent on network television. For the year 1968 Lysol Spray's advertising budget was $4,480,000 of which $2,505,000 was spent on network television (CX 93(d)). Spot television, if included, would further increase the percentage of Lysol Spray's advertising budget spent on television (CX 101; see also Greer 711, 714).

129. The advertising to sales ratio of Lysol Spray was 45.2 percent in 1963, 32.4 percent in 1964 and 19.1 percent in 1965 (CX 44). These are high advertising ratios to sales ratios. The average advertising to sales ratio for all consumer commodities is approximately two to three percent (Greer 736).

130. Admittedly, large television advertising expenditures are required to maintain and promote the sales of Lysol Spray, but Sterling did not contribute anything significant to Lysol Spray in advertising capabilities and resources that it did not already possess.

(a) Prior to the merger, Lehn & Fink was making effective use of advertising for Lysol Spray, including television advertising, using it to the maximum extent it thought necessary or appropriate (Kirk 1327). As heretofore found, Lehn & Fink's advertising budget for Lysol Spray in 1965 was $2,331,000 (CX 44(b)). The advertising to sales ratio for Lysol Spray was 32.4 percent in 1964, 19.1 percent in 1965, declining from the high ratio used for product introduction (CX 44(b)); after the acquisition, the advertising to sales ratio declined further, to 16 percent in 1970 (Kirk 1345).

(b) When Lehn & Fink introduced Lysol Spray, it was in competition with other companies much larger than Lehn & Fink which were multi-product firms with significantly larger television advertising budgets. At that time, Lehn & Fink considered Lysol to be competitive with products produced by Colgate-Palmolive, American Home Products, S. C. Johnson, Chemway, Procter & Gamble and Dumas Miller. (Some of these were larger firms and larger television advertisers than Sterling and Lehn & Fink combined.) The presence of these large companies did not deter Lehn & Fink from entering the market with Lysol, because Lehn & Fink felt it had a unique product and was confident that it had the marketing ability to sell its product. There were no barriers stemming from the fact that other products already on the market were produced by multi-product companies (Kirk 1314–16).

(c) Lehn & Fink management did not foresee any advantage from the merger in television advertising. On the contrary, they were concerned about the possible loss of flexibility, higher costs, and the difference in demographics between its needs and those of Sterling's products (Kirk 1302–03).

131. The record shows that since the merger, Lehn & Fink has continued to operate independently in determining its advertising budget and approach, as it has in other areas of operation. Lehn & Fink has its own advertising agency, Sullivan, Stauffer, Caldwell & Bayles, which makes its own television buy on the basis of the particular needs of the Lehn & Fink Division. Lehn & Fink does not use and has not used any advertising agency that also handles Sterling products (Kirk 1328, 1379; Ross 1507; Dorkin 1656). There has been a limited coordination between Lehn & Fink in television advertising by (a) Lehn & Fink's limited and experimental

participation in Sterling's network package purchase; and (b) piggybacking of Lysol Spray with Glenbrook products. As the following findings show, neither of these practices did, or could, provide significant competitive advantage to Lysol Spray or create or raise barriers to entry.

132. Since the merger, Lehn & Fink has participated on a very limited basis with Sterling's Glenbrook Laboratories in the latter's buying of prime commercial time on network television on an "up front" basis, that is, by a contract made in advance for the full network year. This began when Louis Dorkin of Glenbrook's agency, Dancer-Fitzgerald-Sample, put together a Glenbrook network package for the 1967–68 season and invited Lehn & Fink's agency to participate. This suggestion did not come from Sterling management and was not known to them when made. Lehn & Fink was entirely free to decide whether or not it desired to participate in this buy with funds from its own budget; and it decided to do so, to the extent of one 30-second commercial a week. For three years, from 1967–68 to the current season, Lehn & Fink has allocated some of its own advertising funds to take part of the Glenbrook's "up front" network purchase. Typically, if Glenbrook has purchased eight announcements per week, one 30-second commercial each week would be piggybacked with Lysol in a 60-second time slot (Kirk 1328; Berry 1477–78, 1480; Dorkin 1661, 1720). Apart from this participation with Glenbrook, Lehn & Fink continued to make independent purchases of network and spot television time for Lysol Spray. The participation was about 20 percent of its nighttime network television budget, and Lehn & Fink continued to buy the great majority of its television time independently (Kirk 1329).

133. The limited participation with Glenbrook represented an experiment for Lehn & Fink, which had been following a philosophy of "scatter plan" buying. It purchased network time for just one quarter of the year or less at a time, usually buying just before the quarter began. Lehn & Fink normally obtained network time at a lower cost per thousand than the cost of the Glenbrook package buy (Kirk 1329; Dorkin 1662–63). Lehn & Fink regards its participation with Glenbrook in "up front buying" as having been more disadvantageous than advantageous. In addition to the disadvantage of higher cost, the package purchased by Glenbrook tended to be aimed at older segments of the population, whereas the demographics of Lehn & Fink were aimed at young housewives (Kirk 1302–03, 1330). Lehn & Fink does not plan to participate in the Glenbrook package buy after the current advertising year (Kirk 1329).

134. Piggybacking is the practice whereby two television commercials for products produced by one company are placed together to share one 60-second time slot (Bryant 259; Sherman 1627). When television time was sold only in 60-second units, the ability to piggyback commercials was considered advantageous because it was possible to obtain exposure for two products at the 60-second price (Heller 399; Allen 1544). Piggybacking was useful to the extent that 30 seconds of exposure may be more than half as beneficial as 60 seconds o fexposure (Bryant 257; Heller 399, 438).[11]

135. After the merger, Lehn & Fink piggybacked network television commercials for Lysol Spray with those of certain Glenbrook products to a limited extent (RX 22). This practice has no competitive significance in this case, for the following reasons:

(a) Lehn & Fink used piggybacking prior to its acquisition by Sterling; it piggybacked Lysol Spray commercials with other Lehn & Fink products in 30–30 and 40–20 configurations. Thus, prior to the merger, Lehn & Fink had no difficulty utilizing any advantages which piggybacking might offer (Kirk 1327). After the merger, Lehn & Fink continued to do substantial piggybacking of Lysol Spray with Lehn & Fink products (*e.g.*, RX 22). A company needs only two advertised products to utilize piggybacking (Dorkin 1702). Consequently, piggybacking of Lysol Spray with Glenbrook products was principally a matter of convenient scheduling (Dorkin 1700).

(b) The disadvantage to Lehn & Fink of piggybacking Lysol with Glenbrook products stems from the fact that Lysol Spray and Glenbrook products are aimed at different target audiences. The demographics of the desired Lysol audience are such that younger women are more desirable, principally ages 18–49, while Glenbrook's audience is "skewed" to an older age group. For Lehn & Fink, sharing time with advertisers other than Glenbrook, who shared Lehn & Fink's demographics, better suited the objectives of the Lysol media plan (Kirk 1330).

(c) Any limited benefits that piggybacking Lysol with Glenbrook products brought to Lehn & Fink terminated in 1968 when it became generally possible to utilize 30-second commercials by sharing 60-second time slots with commercials for products of unaffiliated

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[11] One witness stated that piggybacking had the effect of cutting a $4 cost per thousand to $2 (Dorkin 1733). He simply divided in half, reflecting the fact that piggybacking permitted two commercials instead of one. But a 30-second commercial has less impact than a full minute; the relative value of the commercials depends upon the relative impact (see Bryant 257; Heller 401, 428). Recognizing the need for the impact of longer messages, Lehn & Fink has always used substantial numbers of 60-second commercials (*e.g.*, CX 70(e)).

companies. Earlier, such "shared 30's" had been used for about 4–5 percent of the total network time amounting to about 500 network commercial availabilities per month (Sherman 1631). Beginning in the fall of 1968, the networks began matching the product of one advertiser with the product of another unaffiliated advertiser as a matter of general practice. Each advertiser would buy a minute, and they would be able to share the 30's with the commercials of another advertiser (Allen 1549; Sherman 1628; Dorkin 1700).

(d) Broadcast Advertisers Reports, a well-recognized source of data on television commercials, provided a report tabulating the growth of "shared 30's" on network evening time. Since the fall of 1968, the number of shared 30's has increased rapidly, reaching 1,542 commercials a month in September 1970, or 32 percent of all network evening commercials, so that single-product companies could fully utilize 30-second commercials, if they so desired, and could obtain any benefit previously available from piggybacking. As a result, the limited benefit of piggybacking which once may have existed is no longer of any significance (RX 23; Sherman 1531).

(e) Lehn & Fink has increasingly used shared 30's for Lysol rather than piggybacking with Glenbrook products. In 1970, by extensive use of shared 30's with unaffiliated products of other companies, and piggybacking with its own products, Lehn & Fink ran the greater part of its network commercials independently of any products of other Sterling divisions (RX 22). This shift to shared 30's shows that piggybacking with Glenbrook products was not significantly desirable or advantageous for Lysol Spray (Kirk 1327, 1330).

(f) Broadcast Advertisers Reports also compiled data identifying the users of shared 30's during sample weeks in 1969 and 1970. The use of shared 30's by single-product advertisers (such as the manufacturers of Tums and Bic pens) confirms that such firms have been able, since the fall of 1968, to obtain the same benefits as a multi-product company from piggybacking (RX 24; Sherman 1636). Shared 30's were also extensively used by multi-product companies (such as American Home Products Co. and Bristol-Myers) indicating little or no benefit or advantage to these companies from piggybacking their own products (RX 24; Sherman 1636–37). The Miles Laboratories witness testified that since shared 30's became available, Miles has also used them for Alka-Seltzer, splitting minutes with commercials for products of other manufacturers; it finds shared 30's more advantageous than piggybacking because the products are often more compatible (Bryant 301–02).

136. The recent adoption of 30 seconds as the basic unit of sale by the networks, at one-half the cost of 60 seconds, eliminates any need for, or benefit from either piggybacking or shared 30's. This new development follows a long-standing trend in the spot television market, where 30 seconds has long been the standard unit of sale available to small and large advertisers alike (RX 25; Sherman 1641–42; Dorkin 1668). Since December 1970, the isolated 30 has been established as the basic unit of sale on all three major networks to all advertisers, large and small, and this is a development which is not reversible in any foreseeable future (Heller 388; Berry 1483; Allen 1551).

137. The record shows that since the merger, at least four major companies with brands directly competitive with Lysol Spray, *e.g.*, aerosol disinfectant-deodorizers making the same claims as Lysol Spray, have entered the product market in addition to A&P and other private labels (Finding 110; RX 17–20; Kirk 1337, 1338–44). The actual entry of new products competitive with Lysol Spray, while not conclusive, is strong corroborating evidence that the subject merger did not create any substantial barriers to entry (Finding 110; RX 17–20; Kirk 1337, 1338–44).

138. Many of Lysol's competitors in 1965, and today, were and are large and capable companies, many substantially larger than Sterling and Lehn & Fink combined. In 1969, Sterling, including Lehn & Fink, had $370 million in total assets (CX 28, p. 19). Lysol Spray's competitors include, among the non-disinfectant aerosol deodorizers, Colgate-Palmolive, with total 1968 assets $531 million (RX 10, p. 18); Bristol-Myers, total 1969 assets $606 million (RX 9, p. 46); and American Home Products, total 1969 assets $725 million (RX 8, p. 10). Among the aerosol disinfectant-deodorizers, Lysol Spray's competitors now include Dow Chemical Co., total 1969 assets $2.6 billion (RX 12, p. 30); Gillette Co., total 1969 assets $446 million (RX 13, p. 28); American Cyanamid, total 1969 assets $1 billion (RX 11, p. 18); Noxell Corp., total 1969 assets $27 million (RX 14, p. 14).[12] These companies have full ability to utilize advertising and television advertising, and are also able to piggyback their deodorizer or disinfectant-deodorizer products with other consumer goods which they sell and advertise on television (Dorkin 1702–05; see also RX 24).

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[12] Since S. C. Johnson is a privately held company, its financial data is not publicly available. However, an excerpt from Advertising Age in the record estimated its 1965 sales at $175 million (CX 59(a)).

139. The examiner finds that complaint counsel's theory that the mere addition of Sterling's resources to Lehn & Fink has entrenched Lysol Spray is without any substantial basis. The evidence as a whole shows that Lysol Spray would have been able to increase its sales as hereinafter found irrespective of the merger.

(6) Structure of Household Aerosol Deodorizer Market as Adopted in Finding 113

140. Lysol Spray, *i.e.*, aerosol deodorizer, was introduced in 1961 (Complaint, Par. 19, Answer, par. 19, CX 44(b), Finding 100). Soon after its introduction it captured a large share of the household deodorizer market (CX 6, p. 2). Indeed, after less than two years on the market, Lysol Spray was the largest selling household aerosol deodorizer in the United States (CX 8, p. 3). Lysol Spray continues to be the leading product in the household aerosol deodorizer market (CX 28, p. 17).

141. Lysol Spray had net sales of $2,522,000 in 1963, $6,907,000 in 1964 and $12,230,000 in 1965 (CX 44(b)). Concentration by Lehn & Fink on nationally advertised brands resulted in record sales and profits. The outstanding acceptance of Lysol Spray deodorizer and the continued growth of Lysol liquid disinfectant encouraged the development of additional products under the "Lysol" brand name (CX 7, p. 3).

142. The manufacture and sale of household aerosol deodorizers is highly concentrated and has been dominated since 1965 by two firms: Lehn & Fink with its product, Lysol Spray, and S. C. Johnson with its products, Glade Deodorizer, Glade Aerosol Disinfectant and Sun Country. The following tabulations show the various market shares (CX 38(e), Duke 617–22):

	1965	1966	1967	First 8 months 1968
Lehn & Fink Lysol Spray	28%	34%	34%	41%
S. C. Johnson:				
Glade Deodorizer	20	18	21	16
Glade Aerosol Disinfectant	6	4	3	2
Sun Country [1]				7
Colgate-Palmolive Florient	14	12	9	7
Airwick [2]		2	1	
Pine-Sol [2]	3	4	2	
Renuzit	5	5	5	4
American Home Products Wizard	12	9	9	7
All Others	12	12	16	16
Total	100%	100%	100%	100%

[1] Included in Glade Deodorizer prior to 1968.
[2] Included in all others commencing in 1968.

Year	Dollar Value of Total Sales	Percent of Total Sales Accounted For By—			
		"Lysol"	S. C. Johnson	2 Largest Companies	7 Largest Companies
1965	$62 million	28%	26%	54%	88%
1966	73 million	34	22	56	88
1967	77 million	34	24	58	84
1968 (8 mos.)	54 million	41	25	66	84*

*5 Largest Companies.

143. Lysol's share of this market increased 31 percent during the last 12-month reporting period. The market share for all other producers specifically declined during this period (Duke 622–23).

144. The household aerosol deodorizer market is highly concentrated. The two top producers during the last reporting period shown on CX 38(e) controlled 66 percent of the market, the top 5, 84 percent. This market was characterized as being an oligopoly (Duke 623).

145. Respondent seeks to discredit the market share figures set forth above on the basis that "at least 50 percent of the sales of Lysol Spray are attributable to its *use* as a surface disinfectant and would have to be excluded from this market." (Emphasis supplied) (Proposed Finding 107(b), RPF, p. 58; see also Finding 104, *supra*). Respondent admits that the market study (CX 38(e)) upon which the figures were based was made upon Lehn & Fink's specific instructions to "study the progress of Lysol Spray * * * by comparing its sales to the household products found alongside Lysol on the [same] grocery shelves" (see Respondent's Proposed Finding 107(b)(i), (ii), (iii), RPF, pp. 58–59). As previously found, Lehn & Fink originally placed Lysol Spray with drain openers and bleaches, but studies indicated this was "wrong positioning for Lysol aerosol" and it was then positioned next to the other household aerosol deodorizers (see Finding 109, *supra*). It is clear therefore that *at the point of purchase* respondent deliberately elected to make its product competitive with other aerosol room deodorizers rather than surface disinfectants. This fact, together with the fact that respondent itself in requesting the survey only sought to measure Lysol Spray's market share in relation to like products on the same shelf, establishes the relevance of the figures to the product market herein considered to be the appropriate line of commerce (see Finding 113, *supra*).

(7) Comparison of Some Operative Facts in Miles-S.O.S. Acquisition and Sterling-Lehn & Fink "Lysol" Acquisition

146. Many factual similarities exist between the Miles Laboratories, Inc.-S.O.S. Company acquisition approved by the Commission and the Sterling-"Lysol" acquisition.

(a) Miles Laboratories manufactures and sells proprietary drugs, which account for most of its sales. Among its established products are Alka-Seltzer, One-A-Day vitamins, Bactine antiseptic, Bactine skin cream and Sungard lotion. It also sells medical diagnostic equipment and materials, ethical pharmaceuticals, biological products for medical use, chemicals for food processing, and, since 1968, household products. For the year ending December 31, 1967, total sales of Miles Laboratories Inc., were $197,401,000. As of the close of business in that calendar year, total assets of Miles Laboratories amounted to $135,728,000 (RX 5, p. 24).

(b) Miles is a substantial user of advertising and of television advertising, for its proprietary drug products (CX 185, pp. 11, 16; RX 5, pp. 16, 23; Bryant 254–55; Berry 1460). In 1965, it was the 39th largest advertiser in the United States, with total advertising expenditures of $33 million, 24 percent of its sales. More than 90 percent of Miles' advertising expenditures was in television, and it was the 21st largest buyer of network television advertising (CX 59(a)–(c)).

(c) Miles' Alka-Seltzer is a principal competitor of Sterling's Bayer Aspirin in the analgesic field (Bryant 290; Berry 1458). The market shares of Alka-Seltzer and Bayer Aspirin were relatively equivalent; in 1965, for example, Bayer had about 16 percent of the analgesic market and Alka-Seltzer had about 15 percent (Berry 1459–60). Both products are advertised directly to the public by the manufacturer and the advtrtising expenditures (and advertising to sales ratios) are comparable. Thus, in 1967, Sterling spent approximately $16 million in advertising Bayer, and Miles spent approximately $18 million in advertising Alka-Seltzer (Berry 1459–60). Miles has used piggybacking for Alka-Seltzer; its commercials have been piggybacked since 1968 with commercials for S.O.S. household products, produced by another division of Miles Laboratories (Bryant 302–04). Piggybacking of Alka-Seltzer and S.O.S. television commercials has been the only relationship between Miles' proprietary drug and household products businesses; these businesses have been operated entirely separately because of the differences between them in manufacturing, marketing, sales, etc. (Bryant 302, 304–06).

(d) Before its acquisition, the S.O.S. Company was an independent firm, manufacturing and selling household steel wool pads. This activity represented the major source of income for the S.O.S. Company, and in 1957, the sales of S.O.S. amounted to $14,600,000

or 51 percent of the steel wool industry,[13] whose total sales were $28,600,000, and it spent about $2.2 million in advertising. When acquired by General Foods Corp. in December 1957, S.O.S. had net assets of almost $6 million (*General Foods Corp.* v. *FTC*, 386 F.2d 936, 937–38 (3d Cir., 1967)).

(e) In 1968, pursuant to an FTC decree ordering General Foods Corp. to divest itself of the S.O.S. Company, the S.O.S. business was purchased from General Foods Corporation by Miles Laboratories for $55 million. This acquisition represented Miles' first significant entry into any household products line (RX 5, pp. 7, 20). On July 11, 1968, as part of its final disposition of the *General Foods Corp.* case, Docket No. 8600, the Federal Trade Commission approved Miles Laboratories, Inc., as a purchaser of the S.O.S. Company.

DISCUSSION

The complaint in this case alleges a violation of Section 7 of the Clayton Act because of the claimed likelihood of substantial anticompetitive effects in the following alleged markets: (a) health and beauty aids, (b) proprietary drugs, (c) personal care products, (d) acne aids, (e) external antiseptics and (f) household aerosol deodorizers. Elimination of actual competition is alleged with regard to health and beauty aids, acne aids and external antiseptics; elimination of potential competition is alleged with regard to personal care products and proprietary drugs; and entrenchment of the acquired company's product is alleged in the household aerosol deodorizer market. Complaint counsel also claim elimination of potential competition in household aerosol deodorizers.

I Health and Beauty Aids is not an Acceptable Line of Commerce and no Violation was Shown with Regard to this Miscellaneous Grouping of Diverse Goods

A. Health and Beauty Aids is Not a Relevant Market in This Case

The basic criteria for determining a broad product market, and submarkets, were expounded in *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 (1962), as follows:

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product

[13] The sales of Brillo accounted for 47.6 percent of the household steel wool industry and the remaining 1.4 percent of the market was accounted for by three small companies with net assets of less than $500,000 each (In the Matter of *General Foods Corporation*, Docket 8600, Opinion of the Commission, March 11, 1966, at p. 19 [69 F.T.C. at p. 419]; see also Appendix A, p. 3 [69 F.T.C. at 430–431]).

itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes * * *. 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.

In *Brown Shoe* and in all other cases decided under the Clayton Act by courts and Commission, it has been emphasized that the definition of product markets is a factual judgment based upon close study of trade realities. The purpose of the process is "to recognize competition where, in fact, competition exists" (*Brown Shoe Co.* v. *United States*, 370 U.S. at 326). Market definition has to be "meaningful in terms of trade realities" (*United States* v. *Philadelphia National Bank*, 374 U.S. 321, 357 (1963)). And the *Brown Shoe* criteria, intended to "recognize meaningful competition," "necessitate * * * careful consideration based upon the entire record" (*United States* v. *Continental Can Co.*, 378 U.S. 441, 449 (1964)). The Commission in an exhaustive discussion of "the criteria for determining the appropriate product market" said (In the Matter of *General Foods Corporation*, Docket 8600, Opinion of the Commission, March 11, 1966, pp. 3–17, at p. 4) [69 F.T.C. pp. 408–418, at pp. 408–409]:

The fact that different products may in some sense be competitive with each other is not sufficient to place them in the same market if by themselves they constitute distinct product lines.

Since the definition of product markets requires analysis of economic and competitive factors, it is well settled that census categories cannot be used as determinants of lines of commerce. It was thus the unanimous expert opinion expressed in the hearing that census categories are likely to be too broad or too narrow for antitrust purposes, in that they would improperly include non-competing products and exclude competitive products. Indeed, this is inherent in the census process, which does not purport to describe markets (Finding 53). The same point has also been uniformly made in every case in which the issue has arisen. The courts have uniformly rejected proposals that census categories should be taken as lines of commerce. *E.g.*, *A. G. Spalding & Bros., Inc.* v. *FTC*, 301 F.2d 585, 605 (3rd Cir. 1962); *Crown Zellerbach Corp.* v. *FTC*, 296 F.2d 800, 807 (9th Cir. 1961). As the Ninth Circuit stated, "the Census classification does not settle what constitutes a relevant market * * * * [W]e think it plain that what is important as an aid to the determination of what is the relevant market is a consideration of what are the facts concerning competition in the market place. To that we address our attention" (*Crown Zellerbach*, 296 F.2d at 807).

(1) The Complaint Counsel's Expert Testimony

The applicable legal authorities demonstrate the inappropriateness of the broad line of commerce advanced by complaint counsel, which is alleged to be a "health and beauty aids" market, consisting of proprietary drugs (those products within SIC 2834 promoted directly to the consumer by the manufacturer), and the cosmetics, toiletries, and other products classified in SIC 2844. This alleged line of commerce is principally supported by the expert testimony of Dr. John C. Narver.

Dr. Narver admittedly had no knowledge of the meaning in the trade of the product categories here at issue. He had no knowledge, and had made no study, of the competitive relationships in these various fields (Finding 51). Dr. Narver purported to emphasize the supply side of the market—but he had no knowledge of the resources required to produce and market the products in SIC 2834 and SIC 2844, or the products within the trade grouping of "health and beauty aids" (Finding 51). Dr. Narver further purported to identify the significant participants in the alleged markets from the standpoint of supply capability, that is, the firms with the technological capability, technical know-how, production capacity, personnel, marketing and distribution facilities to supply the range of products throughout 2834 and 2844. But he had no idea of what resources were needed, and he had no idea of the actual capabilities and resources of the firms which he listed in his alleged market (Finding 57(c)). Dr. Narver's proposed "supply space" does not even correspond to the market advanced in the complaint, which contains only the proprietary drug portion of 2834. Accordingly, Dr. Narver provides no information on interchangeability of products, peculiar characteristics and uses, production facilities, price behavior, public or trade recognition of markets or any of the other factors set forth in *Brown Shoe* and discussed in the governing authorities.

The deficiencies and fallacies in Dr. Narver's testimony and exhibits are set forth at length in Findings 50–61. Without restating all those facts, it is briefly noted that Dr. Narver's testimony and exhibits are based upon a series of assumptions which are entirely unwarranteed and incorrect. He assumes without discussion that the two four-digit categories can be each regarded as containing products supplied by identical or similar capabilities and resources. This is contrary to the cases cited above. And, in fact, there is "great heterogeneity within these four-digit classes;" for example, internal medicines require much different development and production re-

sources than skin salves,[14] cosmetics lines are produced and marketed much differently than toothpaste or mass-merchandised toiletries, etc. (Findings 73(b), 80(c), 83). He next assumed that there were diversification trends between 2834 and 2844, by comparing listings in the 1961 and 1966 editions of the Fortune Plant and Product Directory, which do not support any such inference (Finding 54).[15] He then assumed, without making any distinction between internal growth or acquisition, that diversification trends could be used to infer that similar firms, before diversifying, already have the technical production and marketing and other competencies to make and sell products in the fields of diversification. This is unsupported by any factual proof and is even contrary to the evidence in this case (Finding 55).

Finally, Dr. Narver compiled his view of the market solely by listing companies from the Fortune Directory shown to engage in the sale of products in either 2834 or 2844 or both, and to be above a minimum size; and his exhibit (CX 64(j)-(k)) assumes their position in the alleged market to be shown by taking total assets, without any scrutiny of actual sales in these areas, or of plant facilities, research and development, marketing, or any other resources.[16] This exhibit omits firms which are much more important in proprietary drugs and cosmetics than many listed; it omits firms which are more important potential entrants than many listed (Findings 58, 59). CX 64(j)-(k), in short, is almost totally useless since it does not

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[14] The fact that a Census relationship does not show the existence of competition is also demonstrated by the recent approval by the Department of Justice of Warner-Lambert's acquisition of the Schick "wet shave" business. Warner-Lambert makes products in SIC 2834 and SIC 2844, Schick makes products in 2844. Yet, evidently no significant horizontal competition was perceived (see Finding 71).

[15] Dr. Narver relied upon the increase in the number of firms shown to engage in both 2834 and 2844 between 1961 and 1966. Contrary to the requirement of his own theory, however, he had not tested the data against any standard of significance and could not tell whether the increase in the number of 2834–2844 firms was greater or less than soap-cosmetics, drugs-chemicals, food-toiletries. For that matter, he conceded that any pair of four-digit categories could show such an increase, in the light of the diversification trends in the early 1960's (Findings 54(b), (d)).

In fact, it now appears that the main reason for the increase in 2834–2844 firms between the 1961 and 1966 Fortune Directory, which Dr. Narver reported, was that the 1961 edition covered only the *top 500 industrials* while the 1966 edition covered the *top 1,000 industrials!* (Finding 54(c); see also Appendix to Respondent's Proposed Findings).

[16] Dr. Narver assumed that the minimum size required for the "technological capability" to supply all products in 2834 and 2844 was the size of the smallest firm shown by the Fortune Directory as reporting in both four-digit categories. The smallest firm on CX 64(j)-(k) in 1966 is the acquired firm, Lehn & Fink. In fact, most of Lehn & Fink's sales were entirely outside either 2834 or 2844. It qualified as the bottom line in Dr. Narver's exhibit only because of its sales of two medicated skin treatment products in the amount of $4.2 million; otherwise it would not have been on the list. Yet, because of such sales, Dr. Narver considers that it had the capacity to make and sell all products within the two four-digit categories (see Findings 58(d)).

indicate actual and potential competitors in any meaningful way.[17]

Respondent called Dr. Almarin Phillips, chairman of the department of economics, as well as a professor of economics and law at the University of Pennsylvania, as an expert witness to comment in general on Dr. Narver's "supply space" theory and in particular on Dr. Narver's testimony and exhibits.

Dr. Phillips agreed in principle that the attention which Dr. Narver calls to the supply side of the market is proper, but, once attention is so directed, Dr. Phillips felt that Dr. Narver's approach and data are not particularly useful (Phillips 1792, 1828). Dr. Phillips stated that among other deficiencies, Dr. Narver relied solely on four-digit Census classifications which do not meaningfully describe competitive relations (Phillips 1794–95, 1801–02). Dr. Phillips testified that Dr. Narver does not distinguish between diversification by merger or internal growth (Phillips 1804–05); that he does not turn to the actual market situation, and that he uses total assets, which, except by "sheer coincidence," is "misleading" (Phillips 1800, 1806). Dr. Phillips concluded that there is no way to approach an assessment of competitive effects of a merger without study of the actual market and a familiarity with competitive conditions, including product interchangeability, relative position of firms in the market, capacities and resources of potential competitors, and other factors (Phillips 1781–83, 1789, 1808–10, 1823–24). That no such empirical study was made here is evident from the total absence of such evidence in the record.

(2) The Evidence on "Health and Beauty Aids"

Turning to the evidence of record concerning "health and beauty aids," it is clear that the term covers groupings of products which

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[17] At various points in his testimony, Dr. Narver conceded deficiencies in the data presented in this case. Thus, for example, he admitted that his use of total assets was subject to the assumption "that all the assets represented [on CX 64(j)–(k)] were in fact assets that legitimately belonged to health and beauty aids" (Narver 1181–82, 1185). Of course, any such assumption is contrary to fact, since the exhibit itself shows the listed companies to be highly diversified in other markets.

Complaint counsel propose various findings which are inconsistent with Dr. Narver's own statements and admissions. Thus, they assert that all the firms listed on CX 64(j) "produce products commanding significant market shares" (CPF, p. 54), notwithstanding Dr. Narver's admission that he had no knowledge of what those companies produced, and, particularly, of the extent of their activities in the markets here involved. Complain counsel also contend that the firms on CX 64(j) had "the capability * * * to enter any of the short run markets" in 2834 and 2844 and that "they remained, in the examiner's words, 'on the razor's edge' of * * * these short-run markets in the overall health and beauty aid market" (CPF, p. 55). Again, there is no evidence of the capability of the listed firms to enter into the manufacture and sale of products in 2834 and 2844 or of the products in the trade grouping of "health and beauty aids." The examiner's reference to firms "on the razor's edge" was made, not with regard to those firms, but with regard to the potentiality of soap, food and chemical companies not listed on CX 64(j) to enter these markets (Tr. 1154).

do not at all correspond to the Census categories advanced by complaint counsel, and that these products cannot be lumped together to constitute a line of commerce for purposes of this case.

These facts were abundantly established by the trade witnesses tendered by complaint counsel themselves.

The phrase "health and beauty aids" was developed initially by supermarkets as a designation for a section or counter in the store, in which were sold items customarily available in drugstores, related to health, grooming and other purposes. It was adopted by other non-pharmacy outlets (*e.g.*, discount houses), and is now used by some drugstores for advertising purposes, although not generally considered by them as appropriate for in-store classification of product or departments. As such, "health and beauty aids" is simply a term used by some retailers for a miscellany of goods, like notions, sundries, or housewares. The trade witnesses referred to it as a "catch-all," and were in agreement that there was no commonly accepted definition of the term. Its coverage varied with the particular retailer (Findings 26, 27).

As might be expected from the history and usage, "health and beauty aids" departments or product groupings do not correspond to the alleged market based upon two four-digit categories. In the first place, the complaint proposes to include only proprietary drugs, promoted by the manufacturer directly to the retailer. But "health and beauty aids" in the unanimous understanding of the trade embrace over-the-counter ethical drugs (*i.e.*, non-prescription products which are not promoted by the manufacturer to the consumer), as well as generic and private-label drugs; and these categories of drug products include some of the leaders in their respective fields, such as Maalox among antacids, Coricidin among cold remedies (Findings 28(a), (b)). These products are absolutely "functionally interchangeable" with proporietary drugs in their respective product categories and they are bought from the same shelves. See *Erie Sand & Gravel Co.* v. *FTC*, 291 F.2d 279, 281 (3d Cir. 1961); *United States* v. *Continental Can Co.*, 378 U.S. at 449.

In addition, notwithstanding diversity among retailers, the grouping of "health and beauty aids" always includes many products outside 2834 and 2844 It includes toilet soap, classified in 2841. It also includes non-chemical products, from many classifications, *e.g.*, band-aids, toothbrushes, combs, razor blades, nail files and many others (Findings 28(c), (d)). And although classified in 2844, franchised cosmetics clearly fall outside the trade category of "health and beauty aids" (Finding 29). Complaint counsel's statement that

"All the products * * * on the retailer's health and beauty aid rack were found to be either proprietary drugs or personal care products, classified by the Bureau of Census as falling in either SIC 2834 or SIC 2844" (CPF, p. 52) is refuted by every witness who testified on the subject.

Moreover, the record clearly shows that the "catch-all" miscellany of products grouped as "health and beauty aids" cannot constitute a line of commerce for antitrust purposes in this case. Analgesics are not interchangeable with foot powder which is not interchangeable with toothpaste or baid-aids, etc. Outside the respective product use categories, there is no "functional interchangeability" (*Erie Sand & Gravel Co., supra*) or "interchangeability of use" (*Continental Can Co., supra*) from the consumer's standpoint. The producer and retailer witnesses attested that, from their standpoints as well, competition is understood to take place within product use categories. Manufacturers identify their competitors according to product categories—analgesics with analgesics, toothpaste with toothpaste, razor blades with razor blades, etc. As testified by the head of Miles Laboratories' Consumer Products Group, "Competition is a matter of product line by product line" (Finding 32).

The manufacturer "does not refer to itself as a health and beauty aids company" and the term has no meaning as descriptive of the field in which he is engaged (Finding 33).[18] Retailers have similar understanding of competition among these products, and their allocation of shelf space is principally within product use categories. As one retailer expressly concluded, "There is no such thing as the health and beauty aid market" (Findings 27, 33).

It is also clear that there is no commonality of production facilities, distribution arrangements and marketing methods that could be said to cover either the combined four-digit categories or the trade grouping of "health and beauty aids." Complaint counsel's filing asks rhetorically, "What manufacturers have the capability of producing proprietary drugs and cosmetics?" (CPF, p. 48). Dr. Narver did not answer this question or even ask it insofar as the actual capabilities and resources of firms are concerned. The record shows that very diverse capabilities and resources are required for different

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[18] One witness, Donald Heller of Chesebrough-Ponds, testified he was general manager of the health and beauty products division of the company, which included proprietary drugs, the mass cosmetics and toiletries as well as other products like Q-Tips (Tr. 369–370). However, when asked who his competitors were, Heller replied: "I think our competitors can be defined by product category" (Tr. 374; see also Tr. 378, line 1). Heller also admitted that Q-Tips are not a chemically based health and beauty aid (Tr. 426).

product lines in the proprietary drug and toiletries fields.[19] As already noted, there is no commonality covering the separate four-digit categories; differences are even more marked between them. In short, neither the *Brown Shoe* standard for an overall market, nor its criteria for definition of submarkets, support the alleged "health and beauty aids" market.

Complaint counsel urge that the market is supported by the fact that the alleged range of products is grouped together in health and beauty aids racks or sections of certain stores. Perhaps, in terms of the *Brown Shoe* criteria for submarkets, it is being suggested that the products grouped as health and beauty aids are sold to "distinct customers," in the sense of the distinct store sections or racks. However, the alleged distinctiveness is belied by the record. Many products outside the proprietary drugs portion of SIC 2834 and the products in SIC 2844 are also found on the health and beauty racks. Franchised cosmetics lines, a large part of 2844, are not found on the racks (Finding 29). Moreover, the same goods are sold through channels of trade other than the health and beauty aids sections or racks. From the standpoint of manufacturers, these are simply one type of outlet, among others, through which their products reach the consumer (Finding 33).

It is clear from the cases, moreover, that a common retail establishment does not prove a line of commerce in which to assess competitive effects of a merger among manufacturers. Retail selling of a variety of goods can constitute a line of commerce, as for department store operations in such cases as *Federated Department Stores*, FTC Docket No. C-981 [68 F.T.C. 367], and for grocery store operations in such cases as *National Tea Co.*, Docket No. 7453 [69 F.T.C. 226]. But this does not mean that companies marketing and selling disparate and no-competing products to department stores (*e.g.*, apparel and appliances) are thereby in the same line. Neither are companies making and selling wholly disparate and non-competing

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[19] This fact, and the trade understanding that there are no such things as "health and beauty aids" manufacturers show the inapplicability here of the cases cited to support the health and beauty aids market on the ground that "a cluster of specific products" can be considered a line of commerce, *e.g.*, *A. G. Spalding & Bros., Inc.* v. *FTC*, 301 F.2d 585, 603-04 (3d Cir. 1962); *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963). Unlike the present case, the *Spalding and Philadelphia National Bank* cases involved fields recognized as separate and distinct in the trade (commercial banking and athletic goods); and in each of those cases, the merger was between two companies dealing in the full range of competing goods so recognized. It is clear that the broad line would not be appropriate to measure competition between companies dealing in different and non-competing products and services. *Compare, e.g.*, the treatment of financial services in *Philadelphia National Bank* with *United States* v. *Wachovia Corp.*, 313 F.Supp. 632 (W.D.N.C. 1970).

products to stores which put them in a "health and beauty aids" department.[20]

B. There Were No Adverse Competitive Effects in "Health and Beauty Aids"

The absence of any direct or coherent competitive relationship among the miscellany of products reported in SIC 2834 and SIC 2844, or among the quite different miscellany of products found on the health and beauty aids shelves, demonstrate that neither of these groupings can be held to be a line of commerce. These facts further show that even if for some purpose an overall line of commerce were to be considered, no adverse competitive effects have been or can be shown in this large and well-populated field. Complaint counsel strenuously urge the broad overall market but fail to indicate the market shares of Sterling and Lehn & Fink in such market or any other facts which would be likely to indicate any adverse competitive effect. On Dr. Narver's own theory, no possible adverse effects can be perceived—his market shares for the two companies based on asset computations were miniscule (1.7 percent and 0.16 percent); the number of competitors he saw in the market was very large (more than 65); they were accompanied by numerous strong and well-equipped potential competitors; and Lehn & Fink, the acquired company, was a "marginal" firm whose acquisition he would not venture to say had any significance (Finding 61(b)).

Taking the more conventional view that market shares should be related to actual activity in the market as indicated by sales, it is also apparent that the companies' positions so computed are also miniscule, far below any threshold of illegality.[21]

Moreover, for whatever purpose the "health and beauty aids" concept may be utilized, the fact that it contains non-competing and unrelated goods would mean that even these minute percentages would overstate the competitive relationship of these two companies. Sterling's proprietary drugs do not compete with Lehn & Fink's cosmetics. There is no horizontality of realistic significance relating these main product lines.

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[20] Even the closely related laundry products of Procter & Gamble and Clorox were properly considered to present a "product extension" problem, not a horizontal merger between actual competitors. *Procter & Gamble Co.*, 63 F.T.C. 1465 (1963), affirmed 386 U.S. 568 (1967).

[21] For the standard of illegality, see Point III, *infra*. In the alleged line consisting of the proprietary drugs portion of 2834 and the products in 2844, the percentages are about 2.2 percent (Sterling) and 0.7 percent (Lehn & Fink). The trade grouping of "health and beauty aids" would include hundreds of millions of dollars in sales outside these categories, and the shares would be very substantially reduced (Finding 62).

II There was no showing of any violation in any proprietary drugs or personal care products line of commerce

The complaint alleges the elimination of potential competition between Sterling and Lehn & Fink in "proprietary drugs" and in "personal care products." For the reasons stated in Point I, *supra*, these two categories are not appropriate lines of commerce in which to assess the merger's competitive effects. These two broad submarkets contain a heterogeneous diversity of products made and used for different purposes. In addition, "proprietary drugs" would erroneously exclude over-the-counter ethical drugs, private-label and generic products, used for the same purposes. And "personal care products" as defined would erroneously exclude many nonchemical items, such as cosmetics implements (see Findings 73, 80).

As previously discussed, the relevant lines of commerce are to be defined in terms of product use categories. Insofar as proprietary drugs are concerned, the relevant markets for considering Lehn & Fink's potential competition are the lines which make up nearly all (95 percent) of the business of Sterling's Glenbrook Laboratories Division, analgesics and antacids/laxatives.[22] In the area of "personal care products," the relevant market for evaluating Sterling's potential competition consists of the cosmetics business in which Lehn & Fink was engaged.

The leading cases dealing with potential competition in mergers found invalidity in situations where the merging firm was virtually the only likely or potential entrant. *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *FTC* v. *Procter & Gamble* ("P&G–Clorox"), 386 U.S. 568 (1967). These decisions and subsequent authorities have developed the applicable principles, so that, for a merger to be barred because of its effect in eliminating potential competition between the merging companies, the following four factors must be established: (1) The particular market must be shown to be substantially concentrated; (2) the merging firm within the market must be shown to be a leading or major factor in that market; (3) the merging firm outside the market must be shown to be a likely entrant by internal growth or by a relatively small acquisition as an alternative to the proposed merger; and (4) the

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[22] It is also alleged that the merger had adverse effects upon *actual* competition in two drug lines—acne aids and external antiseptics. This aspect of the case is discussed in Point III, *infra*.

latter must be shown to be the most likely entrant, or one of few such likely entrants.[23]

To expand on the factors principally relevant here, the firm within the market must be a leading or major factor, so that the merger cannot be justified as entry by a valid "foothold" or "toehold" acquisition.[24] A company outside the market will be viewed as a likely or potential entrant if it is shown to have distinctive capabilities, resources, incentives, and interests to enter the particular market. Thus, in *United States* v. *El Paso Natural Gas Co.*, 376 U.S. at 651, 660, the Supreme Court called for an assessment of a company's "nearness" to the market, its "eagerness" to enter that market, its "resourcefulness," and so on. In *United States* v. *Penn-Olin Chemical Co., 378 U.S.* 158, 175 (1964), the Court in remanding directed attention to such factors as the outside company's resources and know-how, its capacity to enter, its long-sustained interest in entering and its competitive and economic reasons to do so. Furthermore, it is essential to show that the merging firm's resources and incentives are distinctive and unusual, to establish that it is one of few likely entrants. If there were many firms similarly situated, the elimination of only one (who entered by merger) would not significantly reduce the number of potential entrants or the likelihood of such entry.[25]

In *Penn-Olin*, cited above, the district court, at the first trial, had proceeded on the premise that unless *both* companies would have entered the market independently, the joint venture could not have eliminated potential competition between them (217 F.Supp. 110, D. Del. 1963). In holding this premise erroneous, the Supreme Court recognized that if neither company would have entered alone, illegality could not be established, but it went on to rule that if one would have gone in with the other remaining "at the edge of the market continually threatening to enter," (378 U.S. 158) potential competition might have been foreclosed. The Court remanded the case to the district court for findings on two crucial issues: The existence of potential competition between Penn-Olin on the one hand, and Pennsalt Chemicals Corp. on the other hand, and in the

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[23] See, *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964), 389 U.S. 308 (1967); *FTC* v. *Procter & Gamble Co.*, 386 U.S. 568 (1967); *Bendix Corp.*, FTC Docket No. 8739, opinion, June 18, 1970 [77 F.T.C. 731], 3 CCH Trade Reg. Rep. ¶ 19,288 ("Bendix-Fram"); Department of Justice Merger Guidelines, Sec. 18.

[24] Bendix-Fram, *supra;* Department of Justice Merger Guidelines, Sec. 18.

[25] See cases in footnote 23, *supra.* See also *United States* v. *Ford Motor Co.*, 286 F.Supp. 407 (E.D. Mich. 1968); *United States* v. *Crocker-Anglo National Bank*, 277 F.Supp. 133 (N.D. Cal. 1967).

event such potential competition was found to have been present, the reasonable likelihood of an adverse competitive effect resulting from the combination. On the first question, the Court explicitly directed that the lower court was to make a finding "as to the reasonable probability that either one of the corporations would have entered the market by building a plant, while the other would have remained a significant potential competitor." (378 U.S. 158 at 175–176). The remand on the second issue was equally plain. If one of the companies would have entered on its own, the district court was to examine all of the relevant facts and determine whether a consequent substantial lessening of competition was likely. In the hearing held by the district court, the Government chose to rest on the record of the first trial and introduced no new evidence (246 F. Supp. 917, 919 (D. Del. 1965)). Relying on the testimony and contemporaneous documentary evidence that neither Pennsalt nor Olin *actually* intended to enter the market absent the joint venture, the district court found that, as a matter of reasonable probability, neither would have done so (246 F.Supp. 917, 928, 934). Having answered the first question in the negative, it was unnecessary for the Court to decide the second remanded question.

In its brief on appeal, the Government challenged the district court's reliance on the record evidence stating that "evidence which shows that [the defendants] expressly rejected the alternative of independent entry—is far less probative than objective economic evidence relating primarily to the co-venturers' capability and incentive to enter the relevant market on their own." The Solicitor General in his brief candidly admitted that his premise was based solely on the assumption that "it is reasonable to assume that management—whatever its disclaimers—will not persist in a cause that is contrary to the objective economic evidence of the company's needs and opportunities." In an argument remarkably similar to Dr. Narver's "supply space" theory (see Findings 36–48), the Government stated in its brief to the Court:

> Our fundamental premise * * * is that businessmen by and large act rationally—that is, in accordance with the relevant economic conditions. Thus, we assume that if the facts, viewed objectively, indicate that it is in the best interest of Company A to enter Market X, the company will, in all probability, enter the market, even if company officials initially advise against such a course. If not immediately, then in the foreseeable future, the objective realities of the situation should persuade management to follow the course that will promote the prosperity and growth of their firm.

The Government's position on the other issue on remand, *i.e.*, the competitive effect, was that "the elimination of important potential

competition in a highly concentrated market meets the standard of adverse competitive effect proscribed by Section 7." The Court refused to adopt these arguments and in a *per curiam* decision affirmed the district court (389 U.S. 308, December 11, 1967; see discussion in 57 California Law Review 204–207).

Although complaint counsel in their proposed findings did not separately discuss the elimination of potential competition in the personal care products and proprietary drug lines, they did state during the hearing that they were relying on the "supply space" theory to support this allegation in the complaint (Tr. 1054–1055, Complaint, Par. 36(b)). For the reasons previously indicated with respect to the health and beauty aids primary line of commerce, Dr. Narver's approach and data are not particularly helpful in determining whether Sterling was a potential entrant in the personal care products market or whether Lehn & Fink was a potential entrant in the proprietary drug market. Without a factual examination of the capabilities, resources and incentives of each of the merged companies, as will hereinafter be discussed, it cannot be concluded from economic theory alone that either company was a potential or likely entrant into the other's field.

A. Proprietary Drug Products—Analgesics and Antacids/Laxatives

Application of the above principles to the record shows that the acquisition had no significant effect on potential competition, because the two companies lacked the capabilities, resources or incentives to be potential or likely entrants into each other's fields, and there were many more likely entrants.

Complaint counsel, as already indicated, have failed to prove and do not even advance any proposed findings that Lehn & Fink had the capabilities, resources and incentives to produce analgesics and antacids/laxatives competitive with Sterling, or, for that matter, any internal medicine. In fact, the record is clear that Lehn & Fink lacked such capabilities and resources; and that it never had any intent or interest in entering the analgesics, antacid/laxatives or any internal medicine field. Its small operations in external skin treatment products did not give it the competence to enter those fields. Prior to the merger, Sterling never considered Lehn & Fink a potential entrant into the field of its principal proprietary drug business because Lehn & Fink lacked capabilities and resources to do so (Finding 77(e)). Clearly, there were many more likely and significant potential entrants into Sterling's lines—these would be companies engaged in the manufacture and sale of ethical drug products (like American Cyanamid and Eli Lilly), companies en-

gaged in the manufacture and sale of bulk aspirin or other related chemical products (like Monsanto and Dow), and other large proprietary drug firms (like Warner-Lambert and Richardson-Merrill) with competence in internal medicines (Finding 59(b)).

B. Personal Care Products—Cosmetics

It is conceded that Sterling was interested in acquiring a cosmetic firm, particularly to distribute these lines through its overseas business operations. But it was considering entry only by means of the acquisition of a going cosmetics business. It was not a likely or potential entrant by internal growth into cosmetics, because it did not have the capabilities and resources needed to develop these products, market, distribute and promote them. Marketing of franchised cosmetics lines, for example, is entirely different than marketing proprietary drugs. While the record indicates that cosmetics manufacturing facilities are not unduly complicated to develop, Sterling plainly lacked any appropriate manufacturing facilities, and its drug plants were not adaptable to the production of cosmetics formulations. The uncontradicted testimony is that Sterling never considered entering cosmetics by internal growth and that Lehn & Fink never perceived Sterling as a potential entrant into cosmetics by internal growth. The great differences between the proprietary drug business and the cosmetics field were confirmed by the testimony of the witness from Norwich Pharmacal, who described his firm's entry into cosmetics by acquisition, because effort to enter by internal growth would have been "long, laborious and risky" (Finding 83).

In any event, any finding of anticompetitive effects is precluded by Lehn & Fink's very small position in the cosmetics market. The only evidence of Lehn & Fink's market position is CX 32, which shows that it had 1.4 percent of the sales of a limited group of 16 cosmetics firms, among whom it ranked 14th. The testimony at the hearing explained that CX 32 was limited to those companies about which reliable public data was available, *i.e.*, public companies specializing in cosmetics. It was established that there were numerous additional firms not on CX 32, including firms with important and substantial cosmetcis operations which were very much larger than Lehn & Fink's cosmetics business. These include divisions of larger companies, such as Coty of Pfizer, Maybelline of Plough, Breck of American Cyanamid, Clairol of Bristol-Myers, Toni of Gillette, Prince Matchabelli and Ponds of Chesebrough-Pond's and, also, important privately held companies, such as Estee Lauder, Mennen, John Robert Powers and Elizabeth Arden (Finding 84). In the

cosmetics market, therefore, Lehn & Fink's share is very substantially smaller than 1.4 percent. An acquisition of such a company is a minute toehold entry into cosmetics, the kind of entry which would be encouraged by the Commission even if the outside firm was one of few likely entrants, as recognized in the *Bendix-Fram* decision. Plainly, such an acquisition by Sterling does not have any significant adverse consequences.

III No violation was shown in the acne aids and external antiseptics lines of commerce

The complaint alleges the elimination of actual competition in two specific product lines, acne aids and external antiseptics (Par. 36(c)). However, there has been a complete failure of proof with regard to the existence and substantiality of such competition which would be required to prove a violation, or to assess the competitive consequences. Complaint counsel have failed to establish essential facts as to the size of the product market within which to assess competitive consequences; and have failed to establish the market shares of the merging companies. To the extent the record permits any evaluation, it appears evident that competitive overlap between the merging companies is small, and their market positions in these two fields are far below the standard or threshold of violation as developed in the governing cases.

Complaint counsel evidently accept the basic principle that market shares and market concentration must be demonstrated to prove the substantiality of a horizontal merger. For they cite the leading opinion of the Supreme Court in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 363 (1963), holding that:

> a merger which produces a firm controlling an undue percentage of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing the merger is not likely to have such anticompetitive effects. (CPF, p. 64).

In *Philadelphia Bank*, the Court found "at least 30 percent" to be "an undue percentage" of the market and "more than 33 percent" to be a "significant increase" in concentration in that case. Subsequent cases have followed the principle of *Philadelphia Bank*, that "[m]arket shares are the primary indicia of market power" (*United States* v. *Continental Can Co.*, 378 U.S. at 458), finding illegality on the basis of smaller percentages (*e.g.*, 25 percent combined in *Continental Can*). The Court has found illegality when combined market shares were in a range as low as 5–10 percent, but this required an explicit and persuasive showing that the industry was

characterized by a strong tendency to increasing concentration (*United States* v. *Von's Grocery Co.*, 384 U.S. 270 (1966)); see *United States* v. *Pabst Brewing Co.*, 384 U.S. 546 (1966)). It is clear therefore that there is a threshold below which no presumption of violation arises. In *Brown Shoe*, the district court held that the merger of Brown's and Kinney's manufacturing facilities, amounting to 5 percent of the national market, was "economically to insignificant to come within the prohibition of the Clayton Act;" the Supreme Court noted that the government did not appeal from this aspect of the lower court decision. (*Brown Shoe Co.* v. *United States*, 370 U.S. at 335).

A. Acne Aids

There is confusion in the case as to the definition of the market being alleged by complaint counsel. The complaint asserts a line of commerce of acne aids to be within "the proprietary drug submarket" (Complaint, Par. 31). At the hearing, it was established only that Lehn & Fink had a proprietary acne aid, Stri-Dex. Sterling did not have any proprietary product used for this purpose; its germicidal skin cleanser, pHisoHex, is an ethical, not a proprietary product (Findings 86(c), (d)). Complaint counsel's brief does not claim that pHisoHex is a proprietary item.[26] Yet, it urges that pHisoHex "competes directly with Stri-Dex in the acne aid market" (CPF 134, p. 58, and p. 64).

Accordingly, it is impossible to discern whether complaint counsel still assert a proprietary drug line of acne treatment products as alleged in the complaint, or now seek to abandon that allegation and advance a broader line in order to include pHisoHex. In any event, there is no showing, or contention, as to the size of the market or as to the shares of the two companies in it.

The only facts cited are that, in the year prior to the merger, Lehn & Fink had sales of Stri-Dex in the amount of $2,125,000 and Sterling estimated its sales of pHisoHex attributable to use for acne treatment at $2,850,000 (about 20 percent of pHisoHex sales). Any claim of violation based upon these sales figures is defeated by the absence of any total market data against which the companies' position can be assessed and by the fact that these two products have largely different uses for skin treatment purposes.

[26] Complaint counsel's filing acknowledges that pHisoHex "at the time of the merger was not advertised directly to the public on network television" (CPF, p 54). Indeed the record is clear that it was not advertised to the public by Sterling through any medium and that its over-the-counter ethical status has continued (Findings 86(c), (d)). Retailers may use newspaper advertising to promote successful over-the-counter ethical drug products and this has occurred with pHisoHex, but it clearly does not change the product's classification as an ethical drug for census classification and other purposes (Finding 86(d), footnote 7).

The record shows that the group of products used for treatment of acne is large and diverse, estimated by Neilsen to contain 500 products. These include proprietary products such as Fostex Tackle, Fresh Start, Ten-O-Six, and Clearasil, medicated creams such as Noxzema and Bactine, cream, soaps such as Cuticura, Safeguard, and Dial, cleansers such as pHisoHex medicated cosmetics like Chesebrough-Pond's Angel Face, and pads such as Stri-Dex (Finding 91).[27] Many of these are multiple-use products. This would be true of medicated soaps and of skin cleansers such as Sterling's pHisoHex (Finding 86(c)). It is also clear that the cleanser products are not interchangeable with specialized products. It was specifically testified by one of complaint counsel's witnesses, a Korvette's official, that pHisoHex as a germicidal cleanser is "just an adjunct to an acne aid approach," "[i]t is used in conjunction with acne products" (Friedman 573). The reason is that specialized acne products, such as Stri-Dex, typically recommend application after the skin has been cleansed.

Complaint counsel rely on a 1965 speech of the then president of Lehn & Fink, Walter N. Plaut, wherein he stated that Stri-Dex was the number 2 teenage acne aid product (CPF 137, p. 59, and p. 64). There is no explanation of the basis of this statement and respondent suggests that Mr. Plaut could only have been referring to a very narrow range of very specialized products. In support of its position, respondent points to the fact that in any event he could not have been including pHisoHex and medicated soaps or cosmetics, since they were never even surveyed by Lehn & Fink (Kirk 1366).[28] More seriously, however, complaint counsel are in the untenable position of asserting a narrow market in which Stri-Dex may have a significant rank but in which Sterling does not appear, and asserting a broad market in which the positions are unproven and are obviously very small. The cited statement, standing alone, cannot make up for the absence of any record evidence on the market and market positions. There is simply a failure of proof.

B. External Antiseptics

The complaint asserts a line of commerce in external antiseptics, alleged to be within "the proprietary drug submarket" (Complaint,

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[27] Market studies in this area are customarily limited to a few specialized acne products and do not cover medicated soaps or cleansers. This was testified by witnesses from Chesebrough-Pond's and Lehn & Fink (Findings 86(c), 91).

[28] Complaint counsel's reliance on this single statement is curious, since even their proposed exhibit on the acne aid market, excluded because it did not cover any Sterling product, placed Stri-Dex sixth among the limited range of brands surveyed (Finding 91, footnote 8).

Par. 31). The uncertainty about the scope of this market arises from the fact that, in the field of external antiseptics, there is a large number of very important generic products—that is, products sold under a descriptive name rather than a trade name, such as iodine, mercurochrome, merthiolate and hydrogen peroxide (Finding 94(b)). While it is clear that these generic products are in the market, being functionally interchangeable with brand-name items and displayed and purchased in the same way, it is not clear from the record whether generic products are classified as proprietary items.[29] Although there is no doubt that external antiseptics is an acceptable line of commerce, it is unclear whether it is contained within the class of proprietary drugs.

In the year prior to the merger, Lehn & Fink's Medi-Quik had sales of about $2,036,000 and Sterling's Campho-Phenique had sales of $1,369,000 (Finding 96). Unlike acne aids, there is some information in the record about competing products in external antiseptics, but it is clearly quite incomplete as a picture of the overall market (Findings 96, 97). The record is sufficient, however, to show that the sales of Sterling and Lehn & Fink constituted such a small share of the external antiseptics market that no anti-competitive effects can be found or presumed. Moreover, Medi-Quik and Campho-Phenique are largely used for different purposes so that even their small market shares have to be further discounted.

Complaint counsel rely for market shares in external antiseptics on a market research report prepared for Lehn & Fink, CX 12(e), which indicates shares of about 3 percent for Campho-Phenique and 10 percent for Medi-Quik of the brands studied. The limited purpose of CX 12(e) was to measure Medi-Quik against a specified group of brand-name products, as was testified, and it was not intended or usable as a delineation of the entire field of external antiseptics, a project which was more costly than could be justified. In particular, the market survey did not include the generic products which account for substantial sales in the external antiseptics market (Findings 94(b), 97(b)). The Korvette's official, when asked to identify the leading sellers in the external antiseptics field, named the generics—iodine, mercurochrome, merthiolate, alcohol, hydrogen peroxide and tincture of green soap (Finding 94(b)). Thus, the actual market universe was far larger, the shares of the merging companies far smaller, than shown on CX 12(e).

[29] A census official testified that private-label products, *e.g.*, goods packaged under the label of a drugstore or supermarket, could be reported to the Census as either proprietaries or ethical products. It was up to the packager (Morgan 1213–15). It is not clear how generics are classified.

The record furthermore shows that Campho-Phenique and Medi-Quik are largely used for different purposes. Medi-Quik is a first-aid product mostly sold in aerosol form, and used for cuts, burns and scrapes. Campho-Phenique is a camphor formula in an oil base, principally used for cold sores, fever blisters and insect bites; in those areas its principal competitors are Chapstick and Blistex. Because of its oil substance, it has disadvantages for use on cuts and abrasions, where aerosols are used. Campho-Phenique is a slow-moving product which is not advertised on television and its market position has been declining steadily (Finding 98).

Because of the lack of reliable market share data due to the failure to include substantial sales of generic products; the differences in uses and methods of promotion of the two products, and the absence of any persuasive evidence clearly showing the merger with regard to external antiseptics is likely to have any serious anti-competitive effects, the examiner is of the opinion that no violation of Section 7 has been shown in this particular line of commerce. But even assuming the market universe relied upon by complaint counsel; the market shares for Campho-Phenique and Medi-Quik in external antiseptics, when viewed in the overall market structure, were below any threshold violation of Section 7, particularly since no significant anticompetitive effect has been demonstrated or can possibly be foreseen.

IV No violation was shown in the household aerosol deodorizer line of commerce

With respect to Lysol Spray, the complaint alleges that the merger of Sterling and Lehn & Fink is unlawful in that "Lehn & Fink's position as the dominant firm in the household [aerosol] deodorizer market has been, or may be, further entrenched to the detriment of actual and potential competition" (Complaint, Par. 36(d)).[30] Complaint counsel take the position that the acquisition was a product extension merger (CPF, p. 74) which resulted in (a) the elimination of Sterling as a potential competitor in the household aerosol deodorizer market, which it had "the ability to enter" (CPF 188–189, p. 72, and p. 73), and (b) the further "entrenchment" of Lysol Spray "to the detriment of not only its existent competitors but also to potential entrants" (CPF, pp. 75–76).

Respondent objected at the hearing and renews its objection here to the inclusion of the issue of whether Sterling was a potential

[30] Paragraph 36(d) refers to the "household deodorizer market," but the complaint elsewhere defines the applicable market as the household *aerosol* deodorizer market (Pars. 33–35) and complaint counsel stated that this was intended in the allegation of violation (Tr. 628–29).

competitor or entrant into the Lysol Spray market on the ground that it was not alleged in the complaint. In this regard, respondent points to the language of subparagraph 36(b) of the complaint which specifically alleges that "potential competition between respondent and Lehn & Fink has been eliminated" and states if that is what complaint counsel intended, they should have used the same language in subparagraph 36(d). The point was argued at the hearing (Tr. 646–73) and the examiner ruled then and now rules that reading Paragraph 36 together with subparagraph 36(d) placed respondent generally on notice that "the elimination of Sterling as a potential competitor in the household aerosol deodorizer market" was being alleged.

A. Sterling Was Not a Potential Competitor in the Household Aerosol Deodorizer Market

As pointed out in Point II, *supra*, for a company to be viewed as a likely or potential entrant under Section 7, it must be shown to have distinctive capabilities, resources, incentives, and interests to enter the particular market. See *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964).

The Commission has set out the governing law quite clearly in *P&G–Clorox* and *Bendix-Fram*.[31] In *P&G–Clorox*, the Commission found that Procter & Gamble was a potential competitor in liquid bleach, in fact, "virtually the only such prospect" because it was "a progressive and experienced manufacturer of many products in the same product line as liquid bleach," it actually considered independent entry and "by reason of its proximity, size, and probable line of growth," ie was perceived as a likely entrant and it already exerted influence on the market.[32] As the Supreme Court noted, liquid bleach was "a natural avenue of diversification since it is complementary to Procter's products, is sold to the same customers through the same channels, and is advertised and merchandised in the same manner." It also noted that "Procter's management was experienced in producing and marketing goods similar to liquid bleach," "Procter had considered the possibility of independently entering" and there was substantial evidence to support the Commission finding that it was "the most likely entrant" (386 U.S. at 580–81).

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[31] *Procter & Gamble Co.*, 63 F.T.C. 1465 (1963), affirmed 386 U.S. 568 (1967); *Bendix Corp.*, FTC Docket 8739, opinion, June 18, 1970, 3 Trade Reg. Rep. ¶ 19,288 [77 F.T.C. 731].

[32] 63 F.T.C. at 1577–78.

Recently, in *Bendix-Fram*, the Commission found that Bendix was a likely entrant by acquisition (*not* by internal growth) into the relevant market on the basis of "objective evidence" of its major involvement in the automotive parts business, its manufacturing and sale of automotive filters, and its actual examination of the market with a view toward entering. It found that "only one conclusion is possible: the whole logic of Bendix's corporate development, its size, resources, and direct proximity to the passenged car filter aftermarket, and the unambiguous direction of its business growth, all pointed to expansion into the passenger car filter aftermarket." [33]

In contrast, the record in this case shows that Sterling did not have the capabilities and resources to manufacture and sell household deodorizers or household aerosol deodorizers. Its consumer products were drug products which are manufactured, developed, distributed, and marketed in entirely different ways than household products, like Lysol Spray. Sterling's plants were not adaptable to manufacture household products and its warehousing and distribution arrangements were entirely different than those for household products like Lysol Spray. While both products are sold in food stores and drugstores, they are sold to different retail buying personnel and reach the retailers through different channels. There are entirely different requirements for warehousing, distribution and delivery in terms of location, scheduling, handling equipment, etc. Lysol Spray moves through food brokers, while Sterling's drug products do not. There cannot be any way to use common distribution or marketing facilities, common sales force, or common sales promotions as between Sterling's drug products and a household product like Lysol Spray. This point is confirmed by the testimony of an official of Miles Laboratories who described the relationship between Miles Laboratories and its household products operation, the S.O.S. Company. Miles has found, as has Sterling, that a drug firm has no expertise or advantage in attempting to operate a household products business and the two businesses have to be handled entirely differently (Finding 125).[34]

The record shows that Sterling never considered entry into the Lysol Spray market, apart from the present acquisition, and Lehn &Fink never considered it a potential entrant. Lehn & Fink was

[33] Opinion mimeo, p. 12; 3 Trade Reg. Rep. at p. 21,444 [77 F.T.C. at 815].

[34] The Miles officials noted that the only possible relationship between proprietary drugs and household products was in coordination of television advertising (Finding 146(c)). The possibility of any such coordination did not enter into the Sterling-Lehn & Fink merger transaction (Findings 21, 130(c)) and it could not have provided any incentive for Sterling to enter the deodorizer field independently. As pointed out *infra*, television advertising coordination also provided no advantage to Lehn & Fink.

concerned about the possibility of potential entry, but it regarded such entry as likely to come from firms which had competence and expertise applicable to the distribution and sale of household products to supermarkets. The likelihood would be increased if the firm had an aerosol capability and if, like Clorox, it had disinfectant products and reputation. Sterling had none of these capabilities and it was not in any sense a likely or potential competitor (Finding 117).

In the absence of objective evidence of any of the capabilities, resources or interests prescribed by the cases for a finding of likely or potential entry, complaint counsel seek to draw the conclusion that Sterling was a potential entrant into the Lysol field from several statements and factual inferences in the record which respondent explained.

(a) Complaint counsel proposed a finding that Sterling's sales of quaternary ammonium products show that it had "the ability to enter the household aerosol deodorizer market," because those products are the "basic ingredients from which disinfectants and deodorizers are made" (CPF 188, p. 72). However, the uncontradicted evidence is that these quaternary compounds are not adaptable for use in a household product because they are incompatible with soap. Sterling sells the quaternary compounds as intermediates for industrial conversion and they are not household products distributed and sold through consumer channels (Finding 117(a)).

(b) Conceding that Sterling does not have aerosol capacity, complaint counsel state that they could "acquire this capacity" and could contract out the packaging of the aerosol deodorizer (CPF 190, p. 72). The same could be true of any company and it does not show that Sterling was a potential competitor in this market in any sense relevant under the Clayton Act.[35]

(c) Finally, complaint counsel argue that Sterling's products and Lysol Spray were "functionally related," like Procter & Gamble's laundry detergents and Clorox bleach, and that there is "similarity in merchandising and marketing methods between proprietary drugs sold by Sterling and household aerosol deodorizers sold by Lehn & Fink" (CPF, p. 73). The record fails to support these statements

[35] A finding is proposed (CPF 189, p. 72) with regard to a product (Bronkometer) which incorporates an aerosol device for the delivery of a measured dose of medication by inhalation to persons suffering from asthmatic condition. This medical product is made entirely differently from any household aerosol, and complaint counsel concede its irrelevance in their next proposed finding that "Sterling does not have aerosol capacity presently" (CPF 190, p. 72). Although no findings is proposed, in the argument portion of their filing complaint counsel state that Sterling's subsidiary in England was selling an aerosol oven cleaner (CPF, p. 77). This is a product obtained from an aerosol packager and does not show any aerosol capability (Finding 117(d)).

and conclusions. There is no "functional" relationship between drugs and Lysol Spray. Unlike the laundry products of Procter & Gamble and Clorox, drugs and household products are used for entirely unrelated purposes and are merchandised, marketed and distributed in entirely different ways. The only thing in common is that both employ advertising, and television advertising, but the same is true of many unrelated consumer goods.

On the basis of the evidence adduced, the examiner is of the opinion that Sterling was not a potential entrant or likely competitor of Lehn & Fink in the household aerosol deodorizer market.

B. It Has Not Been Shown That The Entrenchment of Lysol Spray Was a Result of The Acquisition by Sterling

Complaint counsel view the acquisition of Lehn & Fink by Sterling as a product extension merger (CPF, p. 74) and find it in violation of Section 7 because:

> Lysol Spray was at the time of the merger the dominant product in the household aerosol deodorizer market. Sterling with its greater resources has enhanced the dominant position occupied by Lysol Spray. Lysol Spray's position in the market has thus been entrenched to the detriment of not only its existent competitors but also to potential enrants (CPF, p. 76).

To support this position, complaint counsel rely principally upon two cases: *FTC* v. *Procter & Gamble*, 386 U.S. 568 (1967) and *General Foods Corporation* v. *FTC*, 386 F.2d 936 (3rd Cir. 1967), *cert. denied* 391 U.S. 919 (1968).

Respondent seeks to distinguish these cases on the facts (RB, pp. 39–40) by arguing that Lehn & Fink did not lack any resources needed to manufacture and sell Lysol Spray prior to the mergers; that Sterling could not, and did not, bring to Lysol Spray any financial resources of significance; and that because of the difference between the businesses of the two companies, Sterling could not, and did not, bring to Lysol Spray anything whatsoever with regard to manufacturing, product development, distribution, sales, and promotional activities (Findings 122–124). Respondent admits (RB, p. 40) that to a limited extent, it was possible to coordinate television advertising and to piggyback commercials; but any minimal benefit from this practice expired in 1968 with the changes in network arrangements for sale of television time (Findings 135(c), (f)). Respondent then cites and relies upon *Matter of Bendix Corp.*, Docket 8739, decided by the Commission June 18, 1970 [77 F.T.C. 731], 3 Trade Reg. Rep. ¶ 19,288 and *Miles-S.O.S.*, decision of the Commission approving the acquisition by Miles of S.O.S. in the divestiture phase of *General Foods-S.O.S.*, July 11, 1968 (RB, p. 44).

In Appendix A to its opinion in *General Foods Corporation* (1965–1967 Transfer Binder at pp. 22,732–736) [69 F.T.C. pp. 429–445], the Commission made an extensive comparison of various significant operative facts in the *General Foods* and *Procter & Gamble* cases. The hearing examiner believes that a brief discussion of some of the significant similarities and differences between these two cases and the present matter would be helpful. At the outset it should be noted that the *General Foods* case involved a household steel wool product called S.O.S., the *Procter & Gamble* case involved a household laundry product called Clorox and the subject matter involves a household aerosol deodorizer and disinfectant product called Lysol Spray.

In all three situations, the acquired company was the manufacturer of the leading product in its field. S.O.S. in 1956 had net sales of $14,468,000; Clorox in 1957 had net sales of slightly under $40 million; and Lysol Spray in 1965 had net sales of $12,230,000. Both General Foods and Procter & Gamble prepared pre-acquisition reports predicting the growth of sales of S.O.S. and Clorox, while no such pre-acquisition study was made by Sterling. For the most part, prior to the acquisition, S.O.S. and Clorox were single product companies, while Lehn & Fink in 1965 had cosmetic sales of over $20 million as well as proprietary drug items accounting for over $4 million in sales (Finding 14).

In contrast to steel wool and liquid bleach that were basically small-firm industries prior to the mergers, the household deodorizer market at the time of the merger included several large multiproduct firms such as: S. C. Johnson, Colgate-Palmolive, and American Home Products (Findings 130(b), 138, 142) and since the merger has included such companies as Dow Chemical, Gillette, American Cyanamid, and Noxell Corp. (Findings 110, 138).

Both the steel wool and liquid bleach industries were dominated by two companies: Steel wool in 1957 by S.O.S. with 51 percent and Brillo with 47.6 percent or combined sales of 98.6 percent with only three companies sharing the remaining 1.4 percent of the market; and liquid bleach in 1957 by Clorox with 48.8 percent and Purex with 15.7 percent or combined sales of 65 percent with four other manufacturers accounting for 15 percent and the remaining 20 percent of the market divided among approximately 223 small producers. At the time of the merger in 1965, the first two companies in the aerosol deodorizer market were Lysol with 28 percent and S. C. Johnson with 20 percent or combined sales of 48 percent, with the next four firms accounting for 34 percent and all others 12 percent (Finding 142). In the steel wool industry only S.O.S. and Brillo had national distribution, while in the liquid bleach industry only Clorox sold on a national scale. In contrast, in the household

aerosol deodorizer market all seven of the leading firms were national competitors.

While the Commission found that technical know-how was vital and constituted a barrier to entry in the steel wool industry, it found the manufacturing process for Clorox to be relatively simple. The record in this proceeding contains no evidence that the manufacture of a household aerosol deodorizer requires any particular technical know-how not available to all, and the entry of four firms into the market since 1965 confirms this (Finding 138).

Steel wool, liquid bleach, and aerosol deodorizers are all low-price, high-turnover consumer products sold mainly in grocery stores, although 16 percent of Lysol Spray sales are made through drug outlets. All three products depend on the extent to which a manufacturer can pre-sell them; and the advertising and promotion of these products are vital to create familiarity and brand loyalty and to insure adequate allocation of shelf space. S.O.S. expended a total of $2,265,000 or 15.7 percent of net sales for advertising in 1965, and Clorox spent $3,718,000 or almost 10 percent of total sales for advertising in 1957. Lysol spent $2,300,000 for advertising in 1965 (Finding 128), or 19.1 percent of sales (Finding 129). In both the cases of steel wool and liquid bleach, the Commission found that the small competitors lacked the financial resources to engage in any substantial advertising and could not derive the same benefits from advertising that were available to national distributors. No such evidence was adduced with respect to Lysol's competitors.

The Commission also found that due to the nearly universal acceptance of S.O.S. Brillo, and Clorox, all three were sold at higher prices than lesser-known brands. While Lysol Spray sold at a higher price than other advertised room aerosol deodorizers, the record shows this was due to Lysol Spray's dual use—an air deodorizer and a surface disinfectant—that other aerosol deodorizers did not possess. With respect to the four new products that entered the market after the merger, it was shown that all four claimed to be both an air deodorizer and a disinfectant like Lysol Spray and sold at the same price as Lysol Spray (Finding 111).

In both the steel wool and liquid bleach industries, the Commission found that as a result of the inability of the smaller companies to compete with the two dominant brands, the smaller manufacturers were compelled to market their products under private labels and through discount houses and other outlets that specialize in low-price merchandise. No such evidence was presented in the instant proceeding, and at least eleven firms are presently engaged in

marketing name brand products in the household aerosol deodorizer market (Findings 110, 142).

Both General Foods Corporation and Procter & Gamble Company were found by the Commission to be engaged in the sale of a wide variety of low-price, high-turnover "functionally closely related" household items sold to consumers through grocery stores and supermarkets at the time of the merger. General Foods is the largest packaged food manufacturer in the United States with sales of almost $1 billion; and Procter & Gamble is one of the nation's fifty largest manufacturers with total net sales in 1957 of over $1 billion. Sterling, in contrast, sold no household consumer items in 1965 and had total sales in the United States of approximately $200 million and foreign sales of $100 million.

In 1961 and 1965 General Foods ranked number 3 among all manufacturing corporations and number 1 among food processors in total advertising expenditures, and Procter & Gamble in 1965 ranked number 1 among all manufacturing corporations and number 1 among soap and cleaner manufacturers in total advertising (CX 59(a)). In contrast, Sterling was number 36 among all manufacturing corporations and number 5 among drug and cosmetic concerns in total advertising.

The pre-acquisition reports of both General Foods and Procter & Gamble predicted that the acquisitions would result in economies in distribution, warehousing, transportation, and advertising. No such savings or advantages were demonstrated with respect to Sterling, and as a matter of fact, it was shown that the manufacture, distribution, and promotion of Lysol could not be combined with any of Sterling's other products (Findings 120–125).

Finally, the Commission's reliance on large-volume discounts for leading television advertisers and on the inability of smaller firms to buy an entire network television program in the *General Foods* and *Procter & Gamble* cases, has been completely eliminated by the abandonment of volume discounts and the availability since 1968 to firms both large and small of isolated 30-second commercials eliminating even the need for piggybacking (Finding 136).

After the Commission had struck down the General Foods-S.O.S. acquisition, it approved on July 11, 1968, the acquisition of S.O.S. by Miles Laboratories in the divestiture phase of that case.[36] Re-

[36] It is well settled that a decision approving an acquisition in a divestiture context amounts to a holding that the acquisition clearly does not violate Section 7 of the Clayton Act. See *United States* v. *Kennecott Copper Corp.*, 249 F.Supp. 154, 163 (S.D.N.Y. 1965). Indeed, it has been held that a divestiture would be rejected if it had any significant anticompetitive effects, even if not amounting to a violation of Section 7. *United States* v. *Aluminum Company of America (Alcoa-Rome), et al.*, 1967 CCH Trade Cases ¶ 71,973 (N.D.N.Y. 1966).

spondent urges the Miles acquisition of S.O.S. as a binding precedent in this matter, and the examiner is impressed with the many similarities between the Miles-S.O.S. acquisition and the Sterling-Lysol acquisition. Briefly summarized, the controlling facts are:

1. Miles Laboratories and Sterling Drug are both primarily drug manufacturers. For the year ending December 31, 1967, Miles had total sales of $197,401,000 and assets of $135,728,000 (Finding 146 (a)). In 1965 Sterling had total sales in the United States of $196,337,000 and assets in the United States of $149,251,000 (Finding 2).

2. Miles is one of Sterling's most significant competitors in its basic business—the analgesic market. Miles' principal product is Alka-Seltzer and Sterling's is Bayer Aspirin. Both Miles and Sterling are substantial users of media advertising and of television advertising for their proprietary drug products. In 1965 Sterling spent $35 million for all media advertising and was ranked number 36, and Miles spent $33 million, and was number 39 in rank of advertisers in the United States (Finding 7, 146(b)). In 1965 Sterling spent $18 million for network television advertising and ranked number 16 among television advertisers for that year; and more than 90 percent of Miles' advertising expenditures for that year was for television, and it was ranked number 21 among buyers of network television time (Findings 7, 146(b)).

3. The market share in 1965 for Bayer Aspirin was about 16 percent of the analgesic market and for Alka-Seltzer, 15 percent (Finding 146(c)).

4. The advertising to sales ratios of Bayer Aspirin and Alka-Seltzer are relatively the same. In 1967 Sterling spent $16 million on Bayer Aspirin, and Miles spent approximately $18 million. Miles since 1968 has piggybacked some of its commercials for S.O.S. with Alka-Seltzer, but otherwise these two businesses have been operated separately (Finding 146(c)). Similarly, after the merger Lysol Spray was sometimes piggybacked with other Sterling products (Finding 135), but the two businesses were also operated separately (Findings 119–125, 130–135).

5. The S.O.S. acquisition represented Miles' first significant diversification into the household consumer products field, as did Sterling's acquisition of Lehn & Fink.

In its original answer, respondent urged as an affirmative defense that the allegations of the subject complaint are inconsistent with the determinations made by the Commission in approving the Miles-S.O.S. acquisition. In denying respondent's interlocutory appeal to

the examiner's order striking this defense, the Commission in its order dated February 12, 1970 [77 F.T.C. 1617], noted that:

> By striking respondent's "affirmative defenses" as separate issues, the examiner has not eliminated the substance of these alleged defenses from the hearing. Nothing in the examiner's ruling has foreclosed respondent from arguing any point he wishes to raise concerning the Commission's action in approving Miles Laboratories' acquisition of S.O.S.

Respondent now urges upon the examiner that he follow the Miles-S.O.S. precedent in this proceeding rather than the *General Foods-S.O.S.* or *Procter & Gamble-Clorox* cases.

Complaint counsel in support of their "entrenchment" allegation stress certain factual similarities with the *General Foods* and *Procter & Gamble* cases: 1) Lysol Spray was the "dominant" product in the aerosol deodorizer market (CRB, p. 21): 2) Lysol Spray expended substantial sums for television advertising and its total advertising to sales ratio in 1965 was 19.1 percent (CRB, p. 21); 3) the market share of Lysol Spray increased significantly after the merger (CRB, p. 22); and 4) Lysol Spray was a low-price, high-turnover item sold to consumers primarily through grocery stores (RPF, p. 73, CRB, p. 20).

Respondent on the other hand points out many factual differences between this case and the *General Foods* and *Procter & Gamble* cases: 1) the household aerosol deodorizer market was not a small-firm industry at the time of the merger with the two leading firms accounting for almost all of the sales; 2) the firms in the aerosol deodorizer market were not single product firms; 3) all the firms in the aerosol deodorizer market have national distribution; 4) technical know-how is not an important factor in manufacturing an aerosol deodorizer; 5) no economic advantages in manufacturing, distribution, transportation or advertising resulted from the acquisition of Lysol Spray by Sterling; 6) no premium pricing can be attributed to Lysol Spray because of its universal acceptance, but rather because of its dual use as a disinfectant and deodorizer; 7) Sterling's drug business is not "functionally closely related" to the household aerosol deodorizer market since Sterling, prior to the merger, had no household products; 8) four new firms have entered the household aerosol deodorizer-disinfectant market since the acquisition; 9) Sterling's pre-merger sales in the United States were $200 million compared to General Foods and Procter & Gamble's sales of over $1 billion; and 10) Sterling ranked number 36 in advertising expenditures compared to General Foods which ranked number 3, and Procter & Gamble ranked number 1 in total advertising expenditures.

Upon the basis of the foregoing, the present case in many material

respects differs from both the *General Foods* and the *Procter & Gamble* cases. Of major significance, however, is the fact that after finding in the *General Foods* case that the steel wool industry was heavily concentrated, that high advertising expenditures were required, and that the smaller firms were at a serious competitive disadvantage, the Commission approved the acquisition of S.O.S. by Miles in the divestiture phase of the *General Foods* case. As indicated above, Miles and Sterling are strikingly similar in almost every respect of their business activities and Lysol and S.O.S. are also comparable household products in most material respects. Significantly, complaint counsel refrained from any comment on the *Miles-S.O.S.* matter in their original brief and reply brief, although respondent placed great reliance on that matter throughout the case and discussed it fully in its brief (RB, pp. 49–51).

It is the examiner's opinion after an examination of all the facts that Sterling's acquisition of Lysol Spray is distinguishable from both the *General Foods* and *Procter & Gamble* cases and should be controlled by the Commission's precedent in approving the Miles-S.O.S. acquisition. In this connection, the examiner has been unable to find any distinguishing material factors in the Sterling-Lysol Spray acquisition that were not present in the Miles-S.O.S. acquisition. Conversely, the examiner notes that the similarities between the Sterling-Lysol acquisition and the *General Foods* and *Procter & Gamble* cases stressed by complaint counsel were also present in the Miles-S.O.S. acquisition. Accordingly, there is little basis for concluding that Lysol Spray's position as the dominant product in the household aerosol deodorizer market has been, or may be, further entrenched to the detriment of actual and potential competition as a result of the acquisition by Sterling.

CONCLUSIONS OF LAW

1. At all times relevant in this proceeding, respondent Sterling and Lehn & Fink were corporations engaged in "commerce" as defined by Section 7 of the Clayton Act, as amended.

2. As stipulated by the parties, the entire United States is the appropriate geographic market, or "section of the country," within which to consider the alleged competitive effects of the merger of Sterling and Lehn & Fink under Section 7 of the Clayton Act, in the various product markets or lines of commerce.

3. The manufacture and sale of "health and beauty aids" products, as defined in the complaint, is not an appropriate product market, or line of commerce, within which to consider the alleged competi-

tive effects of the merger of Sterling and Lehn & Fink under Section 7 of the Clayton Act.

4. The manufacture and sale of "proprietary drugs" and of "personal care products," as defined in the complaint, are not appropriate product markets or lines of commerce within which to consider the alleged competitive effects of this merger under Section 7 of the Clayton Act.

5. If the manufacture and sale of health and beauty aids, proprietary drugs, or personal care products were to be considered as appropriate product markets or lines of commerce under Section 7, there is no likelihood of any significant adverse effect on competition in any such market as a result of this merger. There was no violation of Section 7 in any such line of commerce.

6. There is no likelihood of any significant adverse effect on competition by the elimination of Lehn & Fink as a likely or potential competitor in any of the drug lines in internal medicines in which Sterling was engaged.

7. There is no likelihood of any significant adverse effect on competition by the elimination of Sterling as a likely or potential competitor in the cosmetics line in which Lehn & Fink was engaged.

8. The manufacture and sale of acne aids and of external antiseptics are appropriate markets or lines of commerce within which to consider the alleged effects of this merger upon competition under Section 7 of the Clayton Act.

9. There is no likelihood of any significant adverse effect on competition in either the acne aids or external antiseptics market as a result of this merger; there was no violation of Section 7 in these lines of commerce.

10. There is no likelihood of any significant adverse effect on competition in the alleged household aerosol deodorizer market or in any market in which Lysol Spray competes; there was no violation of Section 7 in any such line of commerce.

11. Counsel supporting the complaint have failed to sustain the burden of establishing, by substantial, reliable and probative evidence, that the effect of the acquisition by respondent Sterling of Lehn & Fink has been, or may be, substantially to lessen competition or to tend to create a monopoly in any line of commerce alleged in violation of Section 7 of the Clayton Act.

ORDER

It is ordered, That the complaint in the above-entitled proceeding be, and the same hereby is, dismissed.

OPINION OF THE COMMISSION

BY DENNISON, *Commissioner:*

This is an appeal by counsel supporting the complaint from a decision of the hearing examiner dismissing the complaint herein.

I Proceedings Below

The complaint in this matter was issued by the Commission on August 7, 1969, charging Sterling Drug Inc. ("Sterling"), with violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, by its acquisition on June 28, 1966 of Lehn & Fink Products Corporation ("Lehn & Fink"). The complaint alleged that the acquisition may have substantially lessened competition in the following lines of commerce: (1) the "health and beauty aid" market, (2) two specific product lines thereof—"acne aids" and "external antiseptics," and (3) the household aerosol deodorizer market.[1]

The complaint charges that by virtue of the acquisition horizontal competition was eliminated in the health and beauty aid market and in the manufacture and sale of acne aids and external antiseptics. As to the household aerosol deodorizer market, the complaint alleges that Lehn & Fink's position as the dominant firm in that market will be entrenched to the detriment of actual and potential competition.

After hearings were held, the examiner filed a lengthy initial decision adopting nearly all of respondent's proposed findings and concluding that no violation of law existed. He held that the evidence failed to sustain the view that the broad range of "health and beauty aid" products comprise a proper market in which to measure any competitive effects of the acquisition; and that even if it be considered a relevant market there was no likelihood of significant adverse effects because of the many companies in the field and the relatively small market shares of the merging companies. Complaint counsel appeal from these findings.

As to the "acne aid" line of commerce, the hearing examiner construed the complaint as limiting this product line to "proprietary" acne aids, *i.e.*, those acne aid products promoted and advertised directly to the consumer by the manufacturer. Since Sterling's "acne

[1] The complaint also alleged that potential competition was adversely affected in two submarkets of the "health and beauty aid" market, *viz.*, "proprietary drugs" and "personal care products." Much of complaint counsel's evidence and arguments on these submarkets during the hearing tended to coalesce with the overall "health and beauty aid" market. In any event, complaint counsel do not appeal from the examiner's adverse findings with respect to these allegations. Consequently, we will not deal with these alleged submarkets as such.

aid" product—pHisoHex—was shown to be an over-the-counter ethical preparation (and, therefore, not a "proprietary" item advertised to the public), any elimination of actual competition between it and Lehn & Fink's proprietary acne aid product—Stri-Dex—was not within the complaint. On the other hand, he held that if the product line alleged in the complaint were more properly broadened to include all competing acne medications, thus putting Sterling's pHisoHex and Lehn & Fink's Stri-Dex into the same line of commerce, there was a complete failure of proof as to size of such market, the shares held by these two companies and any anticompetitive effect.

Similarly, with respect to "external antiseptics," the examiner found that the apropriate line of commerce would be all external antiseptics sold on a nonprescription (over-the-counter) basis, and not just those advertised and promoted by the manufacturer as proprietary products, as alleged in the complaint. Although prior to the merger both Sterling and Lehn & Fink manufactured and sold external antiseptic products, the examiner found lack of probative evidence indicating any adverse effect on competition. Among the reasons given for this finding was that numerous similar generic and other first-aid antiseptic products were omitted from the evidence of market structure put into the record by complaint counsel.

Complaint counsel do not appeal from the hearing examiner's dismissal of the above charges relating to the acne aid and external antiseptic product lines.

Finally, the hearing examiner dismissed the charge that Sterling's acquisition of Lehn & Fink entrenched the latter's Lysol Brand Spray Disinfectant in the household aerosol deodorizer market. He found, among other things, that prior to the acquisition Sterling was not a likely potential entrant into the household aerosol deodorizer market and that after the acquisition Sterling could not contribute any resources to the marketing of Lysol Spray that Lehn & Fink and other competitors in that market did not already possess. Complaint counsel appeal from these findings.

We have carefully considered the parties' arguments in the light of the record and accepted legal precedents, and have concluded for the reasons stated below that the examiner's findings, except to the extent inconsistent with this opinion, should be adopted.

II The Facts Surrounding the Acquisition

A. Sterling

Respondent Sterling is a corporation which in 1965, the year preceding the merger, was the 228th largest industrial corporation in

the United States in terms of sales. In 1965 domestic sales totaled $196,387,000 and consolidated foreign sales amounted to $106,963,000. As of December 31, 1965, Sterling had total assets of $221,175,000, which included foreign assets amounting to nearly $72 million. Its principal business is the manufacture and sale of proprietary drugs, although it makes and distributes other preparations including prescription drugs. Sterling's sales of proprietary drugs alone in the United States in 1965 were $81 million; sales of other medicinal products amounted to $71,735,000.

Sterling makes and sells several nationally known proprietary drug items through its Glenbrook Laboratories Division, particularly analgesics and antacid laxatives. Its principal analgesic product is Bayer aspirin, total sales of which were $41,672,000 in 1965. It also sells Phillips milk of magnesia, an antacid/laxative which had sales amounting to $18,456,000 that year. Other Sterling brands include Campho-Phenique, an external antiseptic; pHisoHex, an antibacterial skin cleaner; Cope and Vanquish pain relievers; Dr. Lyons tooth powder; and Z-B-T baby powder. Sterling makes and sells prescription drugs and over-the-counter ethical drugs through its Winthrop Laboratories Division and has diversified into a number of lines including chemicals and sewage disposal processes.

Sterling has maintained considerable brand allegiance toward most of its consumer products. In 1965, it was the 36th largest advertiser in the United States, spending $35 million for all media advertising, $18 million of which was for network TV commercials.

B. Lehn & Fink

Prior to its acquisition by Sterling in 1966, Lehn & Fink had sales of $66,702,978 for the fiscal year ending June 30, 1965. As of June 30, 1965, Lehn & Fink's total domestic assets amounted to $22,568,072. In addition, it had foreign assets of $5,723,450. Its Consumer Products Group, which constituted 62 percent of its sales that year, included "Dorothy Gray" (a so-called "franchised" line) and "Tussy" cosmetics and "Ogilvie" and "Noreen" hair preparations. Domestic sales of its Cosmetic Division for that fiscal year amounted to $20,094,400. In addition, Lehn & Fink sold the following products in the amounts indicated (for fiscal year 1965): Lysol Brand Spray Disinfectant ($12,230,000); Lysol Liquid Disinfectant ($5,822,000); Medi-Quik antiseptic, a first-aid product ($2,036,000); Stri-Dex, a medicated pad sold for the treatment of acne ($2,125,000). The latter two products constituted all of its sales activity in the drug or medicinal line.

For the 10 years preceding the acquisition Lehn & Fink enjoyed continuing prosperity and consistent growth. Its sales more than

doubled, its profits after taxes more than tripled, its total assets and working capital doubled, and its long-term debt had been reduced to practically nothing. At the time of the merger, Lehn & Fink was creating and maintaining brand allegiance toward most of its consumer products through extensive advertising. For fiscal year ending in June 1969, it spent $12 million for media advertising with an advertising-to-sales ratio of 22 percent.

C. The Acquisition

On or about June 28, 1966, Lehn & Fink was merged into Sterling by means of an exchange of stock. Subsequent to the merger, Sterling has operated Lehn & Fink as a separate division with separate management personnel, marketing and research staffs, and separate advertising agencies. The only significant blending in operations which has taken place has been overseas and in Canada. Sterling's vice-president and treasurer testified that the acquisition was made in part for financial reasons and in part because Lehn & Fink's foreign operations in cosmetics, toiletries, and non-food household consumer products "fitted in nicely" with Sterling's overseas selling operations. According to this witness, the marketing conditions in many overseas countries are such as to facilitate a more centralized method of distribution for diverse consumer products than is true in this country. He testified that Sterling had not contemplated combining domestic operations of Lehn & Fink with its own and that there was no analysis or consideration given to forming particularly close relationships between the two companies' domestic operations; he stated further that, due to differences in manufacturing and distributing the companies' respective products, no advantages would accrue to integrating operations in this country.[2]

The examiner found from evidence submitted by respondent that Sterling had not considered entering the cosmetics business by internal growth. However, it had considered entering the cosmetics business by acquisition and had viewed Shulton, Jergens and Max Factor cosmetic firms as possible candidates for acquisition. He found that no prior consideration had been given by Sterling to entering the household aerosol deodorizer market either by internal diversification or by merger.

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[2] Sterling's 1966 Annual Report characterized the merger as follows:

"The merger of Lehn & Fink with Sterling brings into the Company strong domestic marketing and research organizations. At the same time, it promises to augment our own foreign sales through the addition of product lines new to Sterling, such as Lysol, Dorothy Gray and Tussey cosmetics, Medi-Quik, Beacon Wax, and a wide variety of industrial products. These lines have substantially broadened and diversified our own product base and opened new opportunities for sales expansion for our experienced marketing organizations throughout the world."

III The Alleged Health and Beauty Aid Market

A. "Supply Space" Arguments of Complaint Counsel

The complaint alleges a "health and beauty aid" line of commerce which is defined as all those chemical products falling within the Bureau of Census Standard Industrial Classification ("SIC") 2834 ("Pharmaceutical Preparations") or 2844 ("Perfumes, Cosmetics, and Other Toilet Preparations") and which are promoted directly to the consumer.[3]

The complaint goes on to characterize this market as follows:

> Health and beauty aid products are generally pre-sold to the consumer through extensive advertising and promotion and are then purchased by the consumer primarily in retail food, drug, department, and mass-merchandising outlets. In comparison with the ttoal range of products purchased by the typical household, these products are relatively low in price and relatively high in rate of turnover.
>
> The health and beauty aid market is rapidly expanding. During the period 1947 through 1966 the dollar value of total shipments increased from approximately $710 million to approximately $3.5 billion * * *.
>
> The health and beauty aid market is characterized by an extraordinarily high degree of product differentiation, and the necessity of creating and maintaining consumer brand preference through advertising is a substantial barrier to entry into the market. A second major barrier to entry is the necessity of obtaining and maintaining widespread distribution through large numbers of retail outlets.
>
> In order to successfully manufacture and sell a broad range of health and beauty aid products, a firm must possess the following competitive resources, among others:
>
> (a) A chemically-oriented research and product development department capable of continually introducing new brands and maintaining consumer preference for existing brands;
>
> (b) A financial base large enough to support continuous, substantial advertising expenditures; and
>
> (c) An experienced national sales force capable of obtaining and servicing thousands of food, drug, department, and mass-merchandising outlets.

It is complaint counsel's position that Sterling and Lehn & Fink were competitors in such a health and beauty aid market and that the acquisition in question eliminated Lehn & Fink as a significant independent factor in that market. Complaint counsel acknowledge that their approach to the definition of a relevant market in this case is somewhat unusual in that it seeks to bring within one "market" a large number of diverse products and their sellers. Indeed, the hearing examiner concluded that assuming health and

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[3] The parties have stipulated that the United States as a whole is the relevant geographic market in this case.

beauty aids constituted a proper and relevant product market the large number of sellers in such a market and the relatively small shares held by Sterling and Lehn & Fink compelled a conclusion that the merger between them would not significantly lessen competition.

In attempting to establish the health and beauty aid line of commerce before the hearing examiner, complaint counsel relied heavily upon the testimony and exhibits prepared by Dr. John Narver, an associate professor at the University of Washington Graduate School of Business Administration.

Dr. Narver explained at the outset of his testimony his "supply space" theory of market analysis.[4] Briefly summarized, it is Dr. Narver's thesis that too much attention has been paid in merger cases to demand side analysis of markets and not enough to supply side; that inquiries into questions of "reasonable interchangeability" and cross-elasticity of demand between products has led to "analytic myopia" causing economists and antitrust authorities to take a short-run view of firms and markets. The proper approach, Dr. Narver contends, would be to view a firm as essentially a pool of resources which can supply a far greater variety of products than engage it at any particular point in time. He believes that managers of firms are not emotionally wedded to any particular product or group of products but, endeavoring to maximize profits, are willing to re-address the firm's resources to new areas and to respond to a wide variety of new demands if the profit potential is greater elsewhere.

Dr. Narver defines supply space as being "the range of demands to which a pool of resources [*i.e.*, the firm] can respond." The range is not infinite but, depending upon the time or planning horizon chosen, is related in varying degrees to the existing specialization of the firm. He makes a distinction between immediate or near-term ability to channel resources in a given direction and future ability to do so. Dr. Narver would consider only immediate or near-term

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[4] Dr. Narver's views are also set forth in an article in a special issue of a law review devoted to "Conglomerate Mergers and Acquisitions: Opinion & Analysis." See Narver, *Supply Space and Horizontality in Firms and Mergers*, 44 St. John's L.Rev. 316 (Spring 1970, spec. ed.). Dr. Narver acknowledged the writings of others who have emphasized the dynamics of the firm. See, *e.g.*, Penrose, *The Theory of the Growth of the Firm* (1959); Levitt, *Managerial Economics* (1951). For views similar to Narver's in the context of merger law, see Berry, *Economic Policy and the Conglomerate Merger*, 44 St. John's L.Rev. 266 (1970); Edwards, *The Changing Dimension of Business Power*, 44 St. John's L.Rev. 416 (1970); Schlade, *Proposed Objective Product Market Criteria*, 35 Un. of Cinn. L.Rev. 376 (1966).

ability relevant for defining a supply space.[5] Firms not able to respond immediately or in the near-term to a product line, but having apparent capacity to do so in the future, would be considered potential competitors in that line.

As for measuring supply space for a given demand or group of firms, Dr. Narver suggests certain objective criteria. We will discuss these later in connection with complaint counsel's attempt to apply the supply space concept to this case. However, of primary importance for this case is his view that firms occupying a common supply space are in a common product market and mergers between them should be viewed strictly as "horizontal." [6]

It should be noted at this point that antitrust law has not completely ignored supply side analysis, although it cannot be denied that demand side analysis has usually been given heavier emphasis. See Blake & Pitofsky, *Cases and Materials on Antitrust Law*, 191–192 (1967). In *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 n. 42 (1962), although the majority opinion settled on a demand side analysis in determining that men's, women's, and children's shoes were each separate lines of commerce, at the same time it noted "The cross-elasticity of production facilities may also be an important factor in defining a product market * * *." However, the Court felt prevented from pursuing that line of analysis because the trial court made but limited findings concerning the feasibility of interchanging equipment in the manufacture of non-rubber footwear. Mr. Justice Harlan, however, in his separate opinion, remarks that "Such an analysis, taking into account the interchangeability of

[5] In his article, *supra*, Dr. Narver states (pp. 323–24):

"The supply space implications of a pool of resources are twofold: (1) the ability of the resources to supply a variety of products in the present period; and (2) the ability of the resources to supply a variety of products in future periods. The ability to supply in the near-term we shall call the *technological capability* of the resources. For us, the technological capability is the most important, for it can be determined strictly on objective grounds. The ability to supply in future periods we shall call the *logic of supply*—which is the secular direction of growth in the industry. Although replete with supply implications, it is necessarily more speculative, and hence of less value for antitrust analysis and policy."

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"The technological capability of a firm is the qualitative and quantitative aspects of its human and physical resources in terms of technical know-how, production capacity, raw material supply, financial strength (including financial assets and access to the capital market), marketing know-how and distribution channels, and so on."

[6] Thus to use an illustration of Dr. Narver's, assume Firm A can respond to product demands 1 and 2 and Firm B can respond to demands 1 and 2. Assume further that Firm A is currently only marketing to demand 1, and Firm B is currently marketing only to demand 2. A merger between A and B should be viewed as "horizontal" because both firms can supply to demands 1 and 2. Products 1 and 2 constitute a "supply space" product market for those firms.

production, would seem a more realistic gauge of the possible anti-competitive effects in the shoe manufacturing industry of a merger between a shoe manufacturer and a retailer than the District Court's compartmentalization in terms of the buying public," *id.* at 367.

Emphasis on the long-run view of firms and their probable response to changes in demand was given in *United States* v. *Continental Can Co.*, 378 U.S. 441 (1964). There the Court found a violation of Section 7 in a merger between leading firms in the glass container and metal container industries. Holding that a relative product market can exist across several "industries," the Court stated "[E]ven though certain [product] lines are today regarded as safely within the domain of one or the other of these industries, this pattern may be altered, as it has been in the past. From the point of view not only of the static competitive situation but also the dynamic long-run potential, we think that the Government has discharged its burden of proving prima facie anticompetitive effect * * *" (*id.* at 466). The Court held that glass and metal containers together constitute a single line of commerce, even though there are some end uses for which glass and metal do not compete.[7] Although in reaching its result the Court relied essentially on substitution in end uses of products, rather than interchangeability on the supply side, still the case is instructive since it shows that relevant lines of commerce can be viewed in dynamic terms and not on the basis of a particular point in time.

Also, as Dr. Narver acknowledged, the Commission's "product extension" merger decisions reviewed in *Federal Trade Commission* v. *Procter & Gamble*, 386 U.S. 568 (1967), and *General Foods* v. *Federal Trade Commission*, 386 F.2d 936 (3d Cir. 1967), emphasized the ability of those firms to extend their particular marketing skills to new product area.[8] Merger law has also recognized the role played by potential competition in oligopolistic markets and the need to preserve such potential competition from removal by acquisition. See *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964);

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[7] The Court stated: "We would not be true to the purpose of the Clayton Act's line of commerce concept as a framework within which to measure the effect of mergers on competition were we to hold that the existence of non-competitive segments within a proposed market area precludes its being treated as a line of commerce." 378 U.S. at 457.

[8] See also *The Papercraft Corp.*, 3 CCH Trade Reg. Rep. ¶ 19,725 (FTC 1971) at p. 21,775 [78 F.T.C. at 1403], in which the Commission found injury to competition by the merger of two firms, even as noncompeting products within the gift wrapping market, since it was clear "the manufacturer of the one can and does shift readily to the production of the other in response to price and profit opportunities." See also *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 510–11 (1948).

Federal Trade Commission v. *Procter & Gamble Co.*, *supra; Beatrice Foods Co.* [1965–1967 Transfer Binder] Trade Reg. Rep. ¶ 17,244 (FTC 1965) [68 F.T.C. 286]; *National Tea Co.* [1965–1967 Transfer Binder] Trade Reg. Rep. ¶ 17,463 (FTC 1965) [Modified by order dated March 23, 1972, see page 424 herein.]; *Foremost Dairies, Inc.*, 60 F.T.C. 944 (1962); *Kennecott Copper Corp.*, 3 CCH Trade Reg. Rep. ¶ 19,619 (FTC 1971) [78 F.T.C. 744]; *The Stanley Works*, 3 CCH Trade Reg. Rep. ¶ 19,646 (FTC 1971) [78 F.T.C. 1023]; cf. *Bendix Corp.* v. *Federal Trade Commission*, 1971 Trade Cases ¶ 73,724 (6th Cir. 1971). These decisions were based, at least in part, on recognition of the ability of modern corporations to transfer their management, manufacturing, and marketing skills to related but unidentical product markets where profit opportunities beckon.

It might be asked whether the supply space concept as urged upon us in this case is significantly different from the "potential competition" doctrine insofar as measuring the competitive impact of what might otherwise be labeled a "conglomerate acquisition."[9] Respondent suggests that it is not, or that the result should not be different under either approach. It called as its chief expert witness, economist Dr. Almarin Phillips, who noted under both the "supply space" theory and the potential competition doctrine there are two sets of firms: those already in a product market, *i.e.*, producing and selling close substitutes, and those "on the wings" ready to enter. Although Dr. Phillips agreed that in the past some economists have paid "too little attention to the supply side," he did not believe using the "supply space" approach to be particularly useful in analyzing the impact of mergers. He explained that as an economist he would always look first at the particular product markets to see whether competitive conditions existed. Only if concentration appeared to be too high would he then try to ascertain the number and identity of potential entrants and whether the acquisition eliminated an important potential competitor.

Be that as it may, we see no reason to foreclose the issue by refusing to consider evidence proferred by complaint counsel in support of its broad market definition. More important than the particular label attached to a theory, or whether precedent for it

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[9] One distinction would seem to be that under existing decisions removal of a potential competitor by acquisition is deemed unlawful generally only where certain oligopolistic conditions exist and where the number of potential entrants is not large. However, apparently under complaint counsel's and Dr. Narver's approach, any two "large" firms occupying a common supply space would be barred from merging. See Narver, *op. cit.*, *supra*, n. 4, at pp. 335–36, 339 (but cf. Narver, Tr. 1189).

Another distinction would appear to be that in potential competition cases where evidence of subjective intent to enter a market exists, a firm might be recognized as a likely future entrant, but might not be classified as being in a supply space encompassing that product. See *supra* n. 5.

exists, is our obligation first to examine the evidence—not only from a short-range view but also from a long-range perspective—and to recognize "meaningful competition where it is found to exist." *United States* v. *Continental Can Co.*, *supra*, 378 U.S. at 449. Whether and to what extent, once the outermost boundaries of a market are determined, the standards for adjudging the legality of a "horizontal merger" in that market should be tempered because the competition eliminated might be potential in form rather than actual, we need not determine at this point.

B. The Problem of Proof

Complaint counsel's attempts during the hearing to establish all health and beauty aid products as a relevant market were based for the most part upon certain exhibits prepared by Dr. Narver. The hearing examiner in his initial decision found that (1) these exhibits failed to establish a market composed of health and beauty aid products, and (2) even if there were a health and beauty aid market the evidence did not show that the merger was anticompetitive. Complaint counsel appeal from these holdings, although in asserting the existence of a health and beauty aid market they no longer place primary reliance on the Narver exhibits. However, in order to put complaint counsel's arguments on appeal in proper perspective, it is necessary to review briefly the theory upon which the Narver exhibits were introduced.

In his testimony Dr. Narver expressed the view that a determination of supply space would entail some sort of empirical study of the marketplace. He agreed that this could include evidence of factors such as technical know-how, production capacity, raw material supply, financial strength, marketing know-how and distribution channels. Dr. Narver, however, did not testify as an "expert witness" on these factors. Rather, his testimony was based upon certain statistical exhibits prepared by him from Census Bureau data and other public sources such as the *Fortune Plant and Product Directory*. These exhibits purported to show a significant tendency over a 5-year period (1961–1966) on the part of firms doing business in one portion of the hypothetical "health and beauty aids" supply space to diversify into other portions.

Dr. Narver made it clear that he considered this type of evidence to be the most significant in determining a supply market. As he put it, "the marketplace must instruct us" as to the existence of a supply space between product demands A and B. He testified: "Opinions are important to a point, but more important is the actual movement of firms from A to B, the concept being that if a substantial number of firms have moved from A to B or from B to A,

something must be going on, something must be related between A and B." [10] He further explained that if the diversification from A to B was through mergers rather than internal expansion, a statistical examination should be made to determine whether the merger trend was significantly unique for firms producing product A, as compared to a random pattern of acquisition by all firms in the economy. If so, this would indicate to him that the mergers were technologically based rather than pecuniary mergers" taken for investment purposes only.[11]

The exhibits prepared by Dr. Narver purported to show that between 1961 and 1966 there was an increase from 9 to 24 in the number of firms listed in the *Fortune Plant and Product Directory* that reported activities in *both* SIC 2834 (pharmaceuticals) and SIC 2844 (perfumes, cosmetics, and other toilet preparations). However, as indicated, the hearing examiner disagreed that the exhibits had statistical value, finding instead that the exhibits had serious shortcomings and did not constitute probative evidence of a common supply space between the two census categories.

The primary deficiency found was that the main exhibit (CX 61) was based on an assumption that the data universe was the same for both years. After the hearing it was discovered apparently for the first time that the data source, the *Fortune Plant and Product Directory*, covered the 1,000 largest firms in 1966 but only the 500 largest firms in 1961. Most of the increase in firms reporting in the two SIC divisions (11 out of the 15 new firms listed) can be attributed to the doubling of coverage of the Fortune Directory. To the extent there was an increase among a common universe of firms, *i.e.*, the top 500 firms, between 1961 and 1966, there was no breakdown showing whether the diversification was by merger or by internal diversification. Therefore, no attempt was made to determine whether, for example, diversification by merger was in excess of random diversification during those years. According to Dr. Narver's own views, such a breakdown should be shown and diversi-

[10] See also the "President's Task Force Report on Productivity and Competition," 5 CCH Trade Reg. Rep. ¶ 50,250 (1969) at 55,521 (speaking in the context of the potential competition doctrine):

"* * * The identity of potential entrants should not be established by introspection. If the producer of X is truly a likely entrant into the manufacture of Y, the likelihood will have been revealed and confirmed by entrance into Y of other producers of X (here or abroad), or by the entrance of the firm into markets very similar to Y in enumerable respects."

[11] In addition, see Narver, *op. cit., supra*, n. 4, at 328–334: Penrose, *The Theory of the Growth of the Firm*, at 127–131 (1959). For measurements taken of diversification trends across industry lines, see Gort, *Diversification and Integration in American Industry* (1962); Berry, *Corporate Bigness and Diversification in Manufacturing*, 29 Ohio St. L.J. 402 (1967); and "Industrial Concentration and Product Diversification in the 1,000 Largest Manufacturing Companies: 1950)" (FTC 1957).

fication-by-merger would have to be significantly in excess (he estimated 300 percent) of random diversification into such census groups from other sectors of the economy. Complaint counsel submitted no probative evidence on such a breakdown or the extent to which diversification exceeded random diversification, and they do not now rely upon histories of actual corporate diversification between drugs and cosmetics.[12]

Complaint counsel content, however, that other evidence in the record establishes the proper existence of a health and beauty aid market in accordance with the supply space concept. At this point a question might be raised as to whether counsel can with consistency continue to argue the existence of such a supply space. Their own expert witness and "author" of the supply space theory testified that we should let actual diversification movements in the marketplace "instruct us" and that this type of evidence is the best means of testing a hypothetical supply space.

However, we believe that further examination should not necessarily stop at this point. It is possible that resource adaptability exists in fact for firms in the asserted supply space although that fact has not yet been indicated by way of a significant trend or for other reasons such evidence was not available.[13] Consequently, we will review the "additional evidence" relied upon by complaint counsel.

Complaint counsel rely first of all on the fact that the hearing examiner found that health and beauty aids do have the following common characteristics:

1. They are used in, on or near the human body for purposes of treating minor ills or for purposes of personal care and hygiene or beautification.

2. They have a relatively high rate of turnover, small size, low price, and self-service type presentation to the consumer.

3. They are displayed together for sale to the consumer primarily in drug and variety stores or in health and beauty aid racks in grocery stores and supermarkets, although there are some stores

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[12] We emphasize the more limited evidentiary basis upon which the appeal rests, since it is known there have been a number of mergers in recent years between "drug" and "cosmetic" houses. However, the exhibits introduced by complaint counsel showing many such mergers (CX 62a–d) failed to tie these mergers to the particular 4-digit census groups alleged in the complaint. And, as indicated with respect to CX 61, no attempt was made by complaint counsel to compare this "trend" with acquisition patterns by other firms such as chemical companies or food companies (Finding 55). Complaint counsel do not appeal from the examiner's conclusion that further information is needed before these exhibits could be used as probative evidence of a supply space.

[13] This point is also made in Backman, *Conglomerate Mergers and Competition*, 44 St. John's L.Rev. 90, 106 (1969). Backman was addressing himself to the Task Force Report recommendation quoted *supra*, n. 10, which dealt with the problem of identifying potential competitors to a given product market.

which specialize in carrying primarily or exclusively health and beauty aid products.

4. They are consumed in use and are repurchased by the consumer with a degree of regularity.

5. Many require a high degree of preselling as well as a high degree of initial and continual advertising and promotional support.

To show common characteristics of marketing skills and resources, complaint counsel rely on testimony of an expert witness who has studied the effects of advertising and who identified health and cosmetic products as particularly susceptible to intensive advertising. This is said to be by reason of the consumer's "ego defensive" involvement with use of such products, *i.e.*, that they are associated with personal well being, physical adornment, etc. Such advertising, according to this and other testimony, puts great stress on hidden product qualities and is used to create, or at least respond to, consumer demands to an extent that is unique among most products. As compared to all other industries, advertisers of health and beauty aids have the highest advertising-to-sales ratio.[14] Most of this advertising expenditure goes to network television.

The record further shows that manufacturers of health aids and beauty aids continually test and examine consumer attitudes and behavior in a quest for new product ideas. A representative of one company gave as an example of marketers' perception of unrealized needs, the development of deodorants that a generation ago many people did not perceive were needed. The number of both health and beauty products have expanded rapidly over the past 10 to 20 years. One retail representative stated there has been such a multiplicity of items that "even a computer can't keep up." Witnesses testified that the talents needed to develop new proprietary drugs and to sell them are similar for cosmetics.[15]

Notwithstanding the above evidence and his own findings of elements of commonality set forth above, the hearing examiner stressed the fact that the term "health and beauty aids" was developed simply as a catch-all term principally in the grocery trade

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[14] Even the exhibit showing the advertising-to-sales ratio, a tabulation from *Advertising Age*, lists as a separate category "drug and cosmetic" advertisers.

[15] One exception to the high degree of commonality in marketing techniques among health and beauty aid products may exist in what is referred to in the trade as "franchised cosmetic" lines. These are promoted as "prestige" items and sold through a more limited number of outlets. Found at counters separate from the usual self-service health and beauty aid sections, their sale normally requires the assistance of a sales clerk. Rather than depend solely on "pull" created by national media advertising, manufacturers of these lines also depend on in-store "push" activity such as special displays and demonstrators, and they often pay "push money" to sales clerks to recommend their products. This one possible exception does not substantially detract, however, from the over-all thrust of the evidence showing common marketing techniques, retail customers, and distribution channels among most health and beauty products.

by rack jobbers and that there is no commonly accepted definition of the "health and beauty aid" market as given in the complaint leaves out a number of items, such as non-chemical items (cotton swabs, bandages, etc.), which are generally put into the "health and beauty aid" grouping by retailers.[16] He also noted that the complaint definition includes "franchised" cosmetics, which are not usually displayed in health and beauty aid sections of stores (but see n.15, *supra*). Finally, the examiner stressed that the term "health and beauty aids" covers a range of products which are not substitutes for one another and that competition for shelf space exists principally within individual use categories, *e.g.*, analgesics vs. analgesics, shaving cream v. shaving cream.

Although for other reasons we find that the "health and beauty aid" line of commerce in the complaint has not been adequately substantiated, we do not concur with the weight given by the examiner either to possible differences between the complaint definition and the trade usage of the term "health and beauty aids" or to the lack of substitutability between individual products. It is apparent that in these findings the hearing examiner simply avoided the main thrust of the issue raised by complaint counsel; namely, whether upon examining *supply* resources a significantly large manufacturer of any of these products has the production, distribution, and marketing techniques to be able to respond readily to product demands throughout the asserted market as profit opportunities appear.

As indicated, we think the record discloses that common advertising and market research methods exist for developing and promoting health and beauty aid products. The record also shows that these products reach retail outlets through common channels of distribution. The same group of "rack jobbers" distribute them to grocery stores and supermarkets (food items, on the other hand, are distributed through food brokers). If a health item, such as a proprietary drug, is distributed to a drug store, department store, or specialty outlet, a line of beauty aid products offered by that manufacturer would also be handled by the same group of manufacturers'

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[16] Early in the hearing complaint counsel made it clear that the health and beauty aids market as defined in the complaint was limited to chemically based products. In addition to a number of non-chemical items, the examiner found that "over-the-counter" ethical drugs and private label items, although not within the complaint's definition of line of commerce (because they are not promoted to the public by the manufacturer) nevertheless are sold in health and beauty aid sections of stores. Complaint counsel concede on appeal that over-the-counter ethicals and private label items compete with proprietary drug products and should be included in the "health and beauty aid" line of commerce.

It also appears to us that toilet soap and related bath items should probably have been included if toiletries in 2844 are included. These are classified in SIC 2841, outside the two 4-digit categories alleged in the complaint, yet apparently are often promoted and sold along with toiletry items classified in 2844.

salesmen or representatives. Also, the buying personnel of stores is usually the same for all health and beauty aid products.

Furthermore, in our view the important consideration insofar as commonality of distribution is concerned is whether the products defined in the complaint are sold through the same retail outlets—not where they are shelved within the store. If suppliers have common retail customers, development of new brands or products within the same general category would not entail the expense of setting up an entirely new sales organization and familiarizing new retail customers with the firm's reputation and ability to pre-sell products through national advertising. Health and beauty items are carried by the same group of retail stores—primarily supermarkets and drug stores. The fact that after these products are distributed, some may not end up in precisely the same section of the store or may not compete with all health and beauty aids for shelf space, is of little moment. This seems particularly true where, as here, the manufacturers of these items generally seek to pre-sell their products through intensive national advertising, so that when the consumer enters the store he or she will have already been persuaded to search out and select the advertiser's particular brand.

However, we think the evidence as presented in this record in support of the asserted health and beauty aid market is deficient in one major respect. Although it would appear that proprietary products falling within census groups 2834 and 2844 have a considerable degree of commonality in advertising and distribution, there is very little evidence in the record bearing on the issue of commonality in *production* techniques and resources. Complaint counsel, apparently relying during the hearing on statistical evidence of manufacturing diversification trends, produced little evidence on this important factor of supply.[17]

[17] Cf. Penrose, *The Theory of the Growth of the Firm* (1959) at pp. 82, 87:

"It is obvious that the relevant demand for any particular firm is not defined by the entire range of goods and services being bought and sold in the economy, or even in the relevant geographical markets. Each firm is concerned only with a limited range of products and focuses its attention on particular product-markets selected from the total market. The selection of the relevant product-markets is necessarily determined by the 'inherited' resources of the firm—the productive services it already has."

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"Whether we want to answer the question what external opportunities for expansion are relevant for a given firm, or the question what firm will respond to a given external opportunity, we must examine the productive services available within firms. For in a very significant sense unused productive services are a selective force in determining the direction of expansion."

It may be that in some cases a common nexus in distribution and marketing facilities would alone be sufficient to place firms in a single market. This might occur, for instance, where manufacture of the products in question is relatively simple and would not require expensive or unique equipment, or where a supply of finished products could be readily contracted for from an outside source. The record, however, does show such facts to be generally true with respect to most health and beauty aid products.

There is some indication in the record from which it could be inferred that a pharmaceutical firm would have the technical research and production know-how to produce cosmetics. Obviously, drugs and cosmetics have a certain degree of similarity in that both are chemically based items. It appears that such diversification by a pharmaceutical manufacturer would represent a relatively easy step *down* to a less complex level of technology and quality control. On the other hand, there is no probative evidence upon which to base a finding that a cosmetic or other beauty-aid manufacturer has the know-how and other skills required to step *up* to the level of pharmaceutical research and production—which the record indicates involves more specialized, sophisticated, and expensive research and production facilities.

Also, there is little concrete evidence in the record that firms specializing in some areas of proprietary drugs included in SIC 2834 have the technological capability to diversify readily into other areas included in SIC 2834. The record indicates, for instance, that there may be significant differences in the technology between production of external and internal proprietary medicines, the latter requiring less in the way of medical research, testing facilities, and techniques for quality control.

Although complaint counsel are able to point to some evidence in the record showing specific diversification across "industry" lines, *e.g.*, some cosmetic firms such as Lehn & Fink and the Noxell Corporation have added medication to a facial cream to make an "acne aid" product, these examples are too few in number and the degree of diversification too limited to establish by themselves the existence of capability for such firms to span substantially the broad range of products represented by SIC 2834 and SIC 2844.

There is undoubtedly no easy litmus paper test to determine whether a group of products should be held to constitute a relevant market because of technological similarity of production resources—or whether at most they should be considered as in related but separate markets. The one shades into the other. But here we are faced with a virtually blank record on this important issue.

We do not necessarily hold that in every case using supply side analysis, technological adaptability must be shown to exist in the same degree throughout the alleged supply space, or even that all the firms in the alleged market must have the capability to meet each and every product demand encompassed within the market definition.[18] Cf. *United States* v. *Continental Can Co.*, 378 U.S. 441

[18] That is, "cross-elasticity" of production facilities probably need not be symmetrical. Cf. Bain, *Price Theory* 26 n. 6 (1967).

(1964). Thus it might be argued that as long as pharmaceutical firms have the capability of branching out into cosmetics, this would be enough to constitute a supply space composed of firms in SIC 2834 and SIC 2844 insofar as *cosmetic* product demands are concerned. However, the instant case was tried on the theory that cosmetic firms also have the present capacity of diversifying into proprietary drug manufacturing. Thus the complaint alleges that Lehn & Fink has been eliminated as an independent competitive factor in the manufacture and sale of "health" as well as "beauty" aids. (Complaint, Par. 36(a)) It is clear, therefore, that in the absence of statistically significant data of diversification trends, production adaptability must be affirmatively shown to support complaint counsel's theory. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 n. 42 (1962). The search for a proper line of commerce in which to measure the effects of a merger is too important to be left to speculation.[19]

C. Unlikelihood of Substantial Anticompetitive Effects

However, we do not rest our dismissal of the health and beauty aid part of the case solely on the insufficiency of the evidence of the existence of such a market. If that were the only defect it might be remedied by a remand of the case.[20] Also, as noted, the possibility exists that a somewhat less "symmetrical" supply market might be posited. We have examined the evidence submitted by complaint counsel in support of their contention that the merger had anticompetitive effects in the alleged "health and beauty aid" market in an effort to evaluate whether in the event such a market could be established on remand, there is a likelihood of finding a violation of Section 7.

In showing the structure of the alleged health and beauty aids market, complaint counsel rely primarily on a table (CX 64(j) &

[19] Complaint counsel cite cases where "non-homogeneous products" have been held to constitute a line of commerce, *e.g., A. G. Spalding & Bros., Inc.* v. *F.T.C.*, 301 F.2d 585, 603–04 (3d Cir. 1962) ("athletic goods industry"); *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 356 (1963) (commercial banking consisting of a cluster of services and products); *The Papercraft Corp.*, 3 CCH Trade Reg. Rep. ¶ 19,725 (FTC 1971) [78 F.T.C. 1352] (gift wrap paper, tying materials, accessories such as tags, and related items such as kraft paper, etc.). However, in those cases it was established or undisputed that resource flexibility existed or that the product groupings were sold as a full line by most firms. Cf. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 327 (1962).

[20] It was not until the hearings were over that respondent, in an appendix to its proposed findings, brought to the attention of the examiner the fact that subsequent to the hearing respondent's counsel in examining past copies of the *Fortune Plant and Product Directories* discovered that the Directory used a substantially smaller universe in 1961 than in 1966. It appears that complaint counsel were not previously aware of this fact (Tr. 811). As noted, this resulted in the examiner rejecting in his initial decision the principal exhibits relied upon by complaint counsel in support of the existence of a health and beauty aid market.

(k)) using data for companies reporting activity in SIC 2834 and SIC 2844 in 1944. The table consists of those firms among the 1,000 largest in the Fortune Directory that were shown to have activity in either census category, down to and including the smallest company participating in *both* categories. The reason for this firm being the "cut off" firm was Dr. Narver's view that, for "supply space" analysis, any firms larger than this cut-off firm having activity in *either* census category could properly be considered as having capability across the entire health and beauty aid market. The list, after making certain necessary additions, includes 65 firms, ranked in terms of assets with (as it happened) Lehn & Fink being the 65th firm—and Sterling the 21st.

Overlooking the troublesome fact that the table is based on *total* assets, rather than some indicium of resource capability related to 2834 and 2844, the shares of Sterling and Lehn & Fink are about 1.7 percent and 0.16 percent, respectively. The table shows a 4-firm asset concentration ratio of 31 percent, an 8-firm ratio of 48 percent, and a 20-firm ratio of 75 percent in 1966. Complaint counsel, recognizing that this is only a moderate degree of concentration and that the merging firms have relatively small shares of the market, argue that the table understates the degree of concentration since some companies listed may only be peripherally engaged in the health and beauty area. However, no explanation is given as to why complaint counsel did not obtain from such companies sales figures in terms of SIC 2834 and SIC 2844 activity so as to make such a determination. Indeed, complaint counsel's argument can be turned against them, since removal of a particular firm could also have the effect of lowering the concentration ratio figures. That is, companies at the top of the list, *e.g.*, Dow Chemical, could have less resources in drugs or cosmetics than smaller firms shown. Therefore, concentration ratios calculated from total assets may be inflated. Furthermore, some firms not listed in Fortune's 1,000 largest firms appear to have greater sales and resources in SIC 2834 or SIC 2844 than Lehn & Fink whose *total* sales were large enough to place it in the Fortune Directory. Similar problems exist with respect to other listings of firms by assets showing those companies having their primary activity in either SIC 2834 or SIC 2844. See initial decision, Finding 60(c).

Other evidence in the record consists of sales data for the proprietary part of SIC 2834 and cosmetic and toilet preparations (SIC 2844). Here the data is not entirely reliable since, among other things, it uses universe figures for 1966 but 1965 figures for sales

by Sterling and Lehn & Fink. However, it does tend to show market shares of around 2.2 percent and 0.7 percent for Sterling and Lehn & Fink, respectively.[21] No effort was made by complaint counsel to obtain sales figures from other firms reporting in the proprietary drugs portion of SIC 2834 and in SIC 2844, so we have no way to calculate market rankings.

Although these shares are slightly greater than the foregoing measurements based on assets, the evidence shows no recent trend toward concentration in the industries involved. The 4-firm concentration (based on value of shipments) in all pharmaceuticals (SIC 2834) for 1966 was 24 percent, a *decline* from the 1958 figure of 27 percent. Similar decline occurred between 1958 and 1966 in the 8-firm concentration ratio (a decline of 45 percent to 41 percent). As for cosmetic and toilet preparations (SIC 2844), the 4-firm ratio increased somewhat between 1958 to 1963 but held steady at 38 percent between 1963 and 1967. Similarly, the 8-firm ratio in SIC 2844 remained at 52 percent between 1963 and 1967, and the 20-firm ratio was 75 percent in 1963 and 74 percent in 1967.

As in the case of the asset data, there is no evidence that the Sterling-Lehn & Fink merger increased the shares held by the top 4 or 8 firms, or that it even noticeably increased the percentage held by the top 20 firms.[22]

Even where there are substantial barrier to new entry, as appears clearly to be the case here,[23] it cannot be said, as complaint counsel argue, that horizontal mergers are *per se* or presumptively unlawful regardless of the smallness of the market shares. In *United States* v.

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[21] Cf. *Tampa Electric Co.* v. *Nashville Co.*, 365 U.S. 320 (1961), where the Court deemed a 0.77 percent market foreclosure in an exclusive-dealing contract as "unsubstantial," even though this amounted to about $128,000,000 over the life of the contract.

[22] We stress that in the foregoing discussion of concentration ratios and trends, we are speaking only of the as-of-yet unproven health and beauty aids market using concentration ratios in SIC 2834 and SIC 2844 as "proxies" for such a broad market. It is widely recognized that SIC 2834 considerably understates the degree of concentration in various pharmaceutical *product* lines. See Scherer, *Industrial Market Structure and Economic Performance*, 54 (1970); Shepherd, *Market Power & Economic Welfare*, 106, 265, 276 (1970).

[23] The hearing examiner in Finding 70 held that there was no evidence as to the relevance of advertising to the market and whether advertising constitutes a barrier to entry into the hypothetical health and beauty aid market. This is contradictory to Findings 63–69 which detail the evidence showing large-scale advertising and distribution "as an important structural element" in this market (Finding 63). In any event, we think the evidence shows that there are substantial barriers to entry. Whether national advertising and distribution programs are viewed simply as a condition of entry based on economies of scale in marketing, see Ferguson, *Anticompetitive Effects of the FTC's Attack on Product-Extension Mergers*, 44 St. John's L.Rev. 292 (1970), or as a means of creating substantial product differentiation, or a combination of the two, see Bain, *Industrial Organization*, 239–242 (1959), it is clear that these barriers are substantial.

Philadelphia National Bank, 374 U.S. 321, 363 (1963), where high entry barriers were found, the Court first formulated the "presumption of illegality" test. It held:

> A merger which produces a firm controlling an *undue percentage share* of the relevant market and results in a *significant increase* in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects. (Emphasis added).

In the case before it the merger created a bank having at least 30 percent of the market, and the acquisition increased the top 2-firm concentration ratio by 33 percent.

It is true that in later cases even lower market share figures were involved where violations of the Clayton Act were found, but there were always additional factors present, such as a clear trend toward concentration. Thus, the Court in *United States* v. *Von's Grocery Co.*, 384 U.S. 270 (1966), stressed that the grocery market in the Los Angeles-Orange County area had been shown to have a steady tendency toward concentration through merger for over a decade, and the merger of two of the top six grocery chains, although resulting in a combined share of only 7.5 percent, created the second largest chain in the area. In *United States* v. *Pabst Brewing Co.*, 384 U.S. 546 (1966), a merger of the 10th largest brewer with the 18th on the national level was held *prima facie* illegel even though their combined share was only 4.49 percent of that market. But again the Court noted a trend toward increasing concentration, that there had been a decrease from 206 brewers to 162 in five years, and that the top 10 producers had increased their share of the market from 45.06 percent to 52.6 percent. Concentration was found to be even higher in regional markets where the merging firms were among the very top firms. See also *United States* v. *Aluminum Co. of America*, 377 U.S. 271 (1964), and *United States* v. *Continental Can Co.*, 378 U.S. 441 (1964), where the acquisitions noticeably increased the market share possessed by either the first or second top firms, each of which already controlled more than 20 percent of the market.

Clearly, in the absence of market shares approaching those in *Philadelphia National Bank*, something more than mere "horizontality" of a merger must be shown. Although there is no single test, an important consideration as seen from the above cases is whether there is a recent trend that threatens to transform an unconcentrated market into a concentrated market or whether the merger significantly adds to or threatens to entrench existing concentration.

Here, if we are to use the data submitted and relied upon by complaint counsel, the shares held by the acquired and acquiring companies in the alleged "health and beauty aid" market are obviously quite small and there is no evidence of a recent movement toward further concentration. Furthermore, as indicated previously, there is no evidence that the merger increased the shares held by the top 4, 8, or even 20 firms. Finally, we cannot say that this acquisition significantly added to existing entry barriers or threatened to entrench existing concentration. Compare *The Stanley Works*, 3 Trade Reg. Rep. ¶ 19,646 (FTC 1971) [78 F.T.C. 1023].[24]

Even if, because of the large size of the companies in the asserted market coupled with the existence of substantial entry barriers, we were to adopt a lesser standard of what is needed in the way of increase in concentration and market shares to establish a presumptive violation, we are satisfied that at most this would be only a borderline case on the basis of the market share data submitted here.

We conclude, therefore, that there is insufficient public interest to be served in prolonging this proceeding by remanding the matter for more hearings on the issue of the existence of a health and beauty aid market. Accordingly, for these combined reasons, we concur with the hearing examiner's dismissal of this part of the complaint. However, we wish to emphasize that unlike the hearing examiner, we do not find that the evidence clearly refutes the existence of a health and beauty aid market—only that the record is inconclusive on that particular issue.

V Alleged Anticompetitive Effects in the Household Aerosol Deodorizer Market

The second main part of complaint counsel's appeal is from the hearing examiner's dismissal of the allegation in the complaint that as a result of the acquisition Lehn & Fink's position as the "dominant firm" in the household aerosol deodorizer market "has been or may be, further entrenched to the detriment of actual and potential competition."

[24] Complaint counsel argue that additional evidence of anticompetitive consequences in the health and beauty aid market arises from the elimination of actual and future potential competition in submarkets and the two product lines, acne aids and external antiseptics, where Sterling and Lehn & Fink did compete to some extent. However, the allegations in the complaint concerning lessening of competition in these submarkets and products were dismissed by the examiner for insufficiency of evidence and complaint counsel have not appealer from those dismissals. Aside from the inconsistency of evaluating competitive effects from a demand-oriented point of view where the only relevant market definition now asserted is in terms of interchangeable supply factors (Narver, Tr. 1188), we fail to see how unproven or *de minimis* effects in narrower markets can be aggregated to show substantial anticompetitive effects in a broader market.

It should be noted at the outset that complaint counsel's approach to this part of the case is not based on the view that household aerosol deodorizers are part of the asserted health and beauty aid market —indeed, aerosol deodorizer products are reported in a SIC category different from SIC 2833 or SIC 2844—nor is any other "supply space" approach taken with respect to the relevant market here. Although there was some disagreement during the trial as to what precisely the product market should be under this part of the complaint, the hearing examiner found the relevant market to consist of "all products used for deodorizing purposes by spraying the air," and neither party now contests this definition. We will therefore accept this as the proper line of commerce.[25]

A. Respondent's "Lysol Brand Spray Disinfectant"

Lysol Brand Spray Disinfectant (hereinafter referred to as "Lysol Spray") was introduced by Lehn & Fink in 1962 as the aerosol form of a well-known and established Lysol liquid disinfectant which is sold mainly as a disinfectant around the home. Lysol Spray, however, is sold and promoted both as a household disinfectant and as a household deodorizer, and the examiner found that other household spray deodorizers compete with it even though many do not possess or claim any disinfectant qualities. Such competing products, at the time of the merger, included Glade Deodorizer (S. C. Johnson Company, "Johnson Wax"); Florient (Colgate-Palmolive Company); Wizard (American Home Products); Renuzit (Renuzit Company, now owned by Bristol-Myers); and Air-Wick (distributed at the time by Lever Brothers).

Lysol Spray after its introduction soon took the lead as the largest selling aerosol deodorizer. This has been the case even though it was priced higher than other spray deodorizers when it came on the market. However, as the examiner found, this ability to maintain a high level of sales despite a substantially higher price was probably due not just to the fact of intensive national advertising but also because of the added disinfectant properties of the product. Lysol Spray was apparently the first aerosol deodorizer to make that claim. (Since the acquisition a number of new competing products have appeared on the market that also claim dual disinfectant-deodorizer properties, and these products have been priced at the same level of Lysol Spray.)

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[25] We have no occasion to consider whether a more narrow product line, *e.g.*, one limited to "deodorizer-disinfectant" sprays, might have been successfully posited as a line of commerce.

In 1965, the year prior to the merger, Lysol Spray had 28 percent of the market, compared to 26 percent held by S. C. Johnson's Glade, 14 percent by Colgate-Palmolive's Florient, and 12 percent by American Home Product's Wizard. By 1966, the year of the acquisition, Lysol Spray's share had climbed to 34 percent, while Glade dropped to 22 percent, Florient to 12 percent, and Wizard to 9 percent. The rest of the market in those two years was shared by various other brands, each having less than 10 percent of the market. However, total industry sales increased from $62 million to $77 million during those two years—a rise of 24 percent. It is clear that although the market *shares* of all other producers declined during this period, many of them have enjoyed increased sales. Nevertheless, it is also clear that Lysol Spray has managed to maintain the lion's share of increase in sales and, as the complaint alleges, has dominated sales in a highly concentrated market.

B. Alleged Elimination of Sterling as a Potential Competitor in the Household Aerosol Deodorizer Market

During the hearing, complaint counsel endeavored to establish that Sterling was a likely entrant into the aerosol deodorizer market and that its entry by acquisition of the leading firm rather than by internal expansion or a toe-hold acquisition has had the effect of eliminating substantial potential competition. The examiner found, however, that Sterling had never contemplated or considered entry into the household deodorizer market prior to its merger with Lehn & Fink; and that it did not have the facilities to produce and distribute a product like Lysol Spray, such that it should be presumed to be a potential competitor. Consequently, he held that the acquisition did not have the effect of eliminating potential competition.

Complaint counsel do not deny that there is lack of evidence of subjective intent on the part of Sterling's management to enter that market either by growth or acquisition prior to the merger with Lehn & Fink. There was evidence that when it acquired Lehn & Fink, Sterling had been seeking entry into cosmetics by acquisition of a firm having a profitable line of cosmetic formulations, as it had under consideration at that time alternative acquisitions of several other cosmetic firms.[26] Nevertheless, they contend that viewed

[26] It should be noted that the hearing examiner considered the acquisition from the point of view of elimination of Sterling as a potential entrant into "cosmetics" as a relevant market, but found that Lehn & Fink had no more than 1.4 percent of total sales of 16 cosmetic firms (Lehn & Fink ranking 14th), and that the acquisition was a permissible "toe-hold" acquisition under criteria of recent Commission decisions. Complaint counsel did not appeal from this finding.

"objectively" Sterling was a likely entrant into the household aerosol deodorizer market.[27] They argue, "the fact remains that, *specific distribution and manufacturing facilities aside*, Sterling was inevitably headed toward growth in the household products field" including household aerosol deodorants (appeal brief p. 66, emphasis added).

Yet it is precisely the "distribution and manufacturing facilities" that are important in determining whether a company is a significant, likely, potential entrant. For example, in *Procter & Gamble Co.*, 63 F.T.C. 1465, 1577–78 (1963), *aff'd* 386 U.S. 568, 580–81 (1967), Procter was found to be a potential entrant into liquid bleach "* * * a natural avenue of diversification since it is "complementary' to Procter's [laundry and cleansing] products, is sold to the same customers through the same channels, and is advertised and merchandised in the same manner." Procter was perceived by the industry as a likely entrant and had already exerted influence in the market. Similar evidence of functional similarity between products or markets existed in the other potential competition cases relied upon by complaint counsel.[28]

In contrast here the examiner found, and complaint counsel do not dispute, that the manufacture of aerosol deodorizers requires expensive high-speed automated equipment which Sterling did not possess; that Sterling's distribution of drugs to supermarkets (where household aerosol deodorants are mostly sold) are limited to ar-

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[27] In previous "potential competition" cases there was usually evidence of consideration by management of the acquiring firm of entering the market in some manner prior to the acquisition in question. However, it is by no means settled that the potential competition doctrine is limited to instances where subjective evidence exists. For arguments that objective criteria alone should alternatively be utilized, see Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Harv. L.Rev. 1313, 1384 (1965); Brodley, *Oligopoly Power under the Sherman and Clayton Acts—From Economic Theory to Legal Policy*, 19 Stan. L.Rev. 285, 332, 357–359 (1967); and *Report of the Presidential Task Force on Productivity and Competition*, 5 CCH Trade Reg. Rep. ¶ 50,250 at p. 55,521 (1969). But cf. *United States* v. *Falstaff Brewing Corp*, 1971 Trade Cases ¶ 73,733 (D.R.I. 1971), *prob. juris. noted*, February 28, 1971 (No. 873). We do not have to decide in this case whether likely potential competition can be established on objective evidence alone since, for the reasons set forth in our opinion, we find the objective evidence here to be unpersuasive.

[28] In *The Stanley Works*, 3 Trade Reg. Rep. ¶ 19,646 (FTC 1971) [78 F.T.C. 1023], Stanley was found to be a substantial factor in residential cabinet hardware where it was shown to have already been a substantial factor in architectural cabinet hardware and a minor factor in the residential market. The Commission found an overlap in the resource requirements for architectural and residential hardware. In *Kennecott Copper*, 3 Trade Reg. Rep. ¶ 19, 619 (FTC 1971) [78 F.T.C. 744], the finding that Kennecott was a likely potential entrant was based upon its investigation of entry into the coal industry, including actual steps taken to enter by acquisition of reserves and by other means. Documents reflected its desire to expand from meeting its own coal needs to become a third or fourth largest producer and Kennecott was perceived as a potential and actual competitor by Peabody, the leading coal company and the company that Kennecott acquired.

rangements with health and beauty aid rack jobbers rather than food brokers who handle Lysol Spray and similar products; that the products are sold to different retail buying personnel, and that there are "entirely different requirements for warehousing, distribution and delivery in terms of locations, scheduling, handling equipment" for aerosol deodorants as compared with the drug products which Sterling marketed.

The examiner further found, and again it is not disputed by complaint counsel, that Lehn & Fink had never considered Sterling as a potential entrant into the household aerosol field. On the other hand, there is evidence that Lehn & Fink did consider as potential entrants other firms which had existing grocery capability and aerosol technology (some of which did subsequently come in the market with competing aerosol disinfectants).

Complaint counsel rely instead on: (1) evidence that in addition to pharmaceuticals Sterling was already selling non-food "household products" in overseas markets, including distribution of a Lysol Spray type product in Australia; (2) that Sterling had demonstrated its intention to diversify into household products in this country by acquiring the Aerosol Corporation of America in 1967 and that company's line of household products; and (3) a subsidiary of Sterling was already selling by 1966 some household products, *viz.*, rodenticides, products for use by homeowners for proper functioning of septic tanks, and cleaning fluids and lighter fuels.

It should be noted that these arguments are presented here for the first time as they were not made before the hearing examiner. But, in any event, we fail to see how they show probable diversification into aerosol deodorizers. For one thing, there is testimony that marketing channels in many overseas countries facilitate combined distribution of drugs and diverse household products to an extent that is not true in this country. Therefore it does not necessarily follow that product lines carried abroad presage what direction Sterling's operations would take in this country. As for the acquisition of the Aerosol Corporation, which was a relatively small company, that took place *after* the acquisition of Lehn & Fink, and Sterling's annual report for that year indicates that the acquisition was made to supplement the Lehn & Fink division. Hence, this does not indicate Sterling's prospects for acquiring aerosol equipment apart from the merger.

Finally, the fact that a subsidiary of Sterling was manufacturing a limited line of household products (it is not shown how they were

distributed, however) does not itself establish any proclivity to diversify into a technologically unrelated product line such as aerosol deodorizers. A stroll through any supermarket or drug store will show that there are scores, if not hundreds, of diverse "household products" in which Sterling—or any other established supplier of consumer items—might with equal logic be deemed a "potential entrant." Such a test, however, would nullify any meaningful distinction between likely potential competitors and all other firms. Elimination of one among such a multitude of firms could not be said to eliminate substantial potential competition.

For the above reasons, we concur with the hearing examiner that no showing has been made that the acquisition eliminated Sterling as a potential competitor in the household aerosol deodorizer market.

C. Alleged Entrenchment of Lehn & Fink in the Household Aerosol Deodorizer Market

Finally, complaint counsel contend that even in the absence of a showing of elimination of potential competition, the acquisition has the probability of entrenching Lehn & Fink in the household aerosol deodorizer market to the detriment of competition in general. They rely on *Procter & Gamble*, *supra*, and *General Foods Corp.* [1965–1967 Transfer Binder] Trade Reg. Rep. ¶ 17,465 (FTC 1966) [69 F.T.C. 380], *aff'd* 386 F.2d 936 (3d Cir. 1967), in support of this proposition.[29]

But here again, complaint counsel's arguments are long on theory but short on facts. In contrast to the evidence of competitive advantage that was before the Commission in those two cases, no such evidence was submitted by complaint counsel here. What evidence there is was submitted by respondent, and based on this evidence, the hearing examiner found that at the time of acquisition Sterling did not and could not contribute anything to Lysol Spray production, distribution, and marketing capabilities or resources that Lehn & Fink did not already have. There were no common sources of raw materials, and Sterling's products, most pharmaceuticals, require different production, research, and quality control facilities than Lysol Spray. Lysol Spray was sold to different buying personnel of retail stores and was distributed through different channels. Since the acquisition, Lysol Spray has continued to be manufactured and

[29] Although *Procter & Gamble* rested in part on the elimination of Procter as a potential competitor, the Court also upheld the Commission's findings that substitution of Procter for Clorox threatened to change the structure of the industry and would have the effect of dissuading the smaller firms from competing aggressively. Similar effects were found in *General Foods* where the reviewing court held that it did not read the Supreme Court's decision in *Procter & Gamble* as dependent on the elimination of Procter as a potential entrant, 386 F.2d at 945.

sold by the Lehn & Fink division the same way that it was prior to the merger, and no blending of domestic operations with Sterling's product lines has taken place. Furthermore, the head of Miles Laboratories Consumer Products Group testified that the system of marketing used by Miles for proprietary drugs is not used for non-drug "household products" sold by Miles, such as S.O.S. soap pads. This would seem to support respondent's claim that the continuing separation of functions between Sterling and Lehn & Fink should not be attributed to the pendency of this proceeding.

Although subsequent to the merger Lysol Spray has been advertised more heavily and sales have substantially increased, there is no reason to believe that the increase can be attributed to the acquisition. Prior to 1966, Lehn & Fink had been increasing advertising expenditures each year as sales increased. At the same time, however, the advertising-to-sales ratio has dropped, from 45.2 percent in 1963; 32.4 percent in 1964; and 19.1 percent in 1965, to 16 percent by 1970. Thus, had Lehn & Fink remained independent, it appears that it could have continued to finance advertising expenditures out of the increasing revenue of Lysol sales just as it had done prior to the acquisition in 1966. Compare *Ekco Products Co.* v. *Federal Trade Commission*, 347 F.2d 745, 751 (7th Cir. 1965); *Reynolds Metals Co.*, 56 F.T.C. 743, 775 (1960), *aff'd* 309 F.2d 223 (D.C. Cir. 1962).

Nor is there here the situation that existed in *Procter & Gamble* and *General Foods* where the large acquiring companies were able to take advantage of sizeable volume discounts in TV advertising. Since those cases were decided, the networks have abandoned volume discounts and the possible advantages that a multi-product company might have through "piggy-backing" commercials (*i.e.*, splitting a one-minute spot to advertise two products) virtually disappeared in 1968 when it became generally possible to utilize 30-second commercials by sharing 60-second time spots with commercials of other companies. And since December 1970, 30-second spots have been offered by the networks as a basic unit of sale, thus further eliminating advantages from piggy-backing or use of "shared 30's."

In light of these findings of the hearing examiner, which are undisputed on appeal, we cannot find that the acquisition conferred any advantages on Lehn & Fink or raised entry barriers so significant as substantially to lessen competition in the household aerosol deodorizer market.

Nor do we see how it can be demonstrated that ownership of Lehn & Fink by Sterling threatens a transformation of the nature or

structure of the industry and discourages competition in the manner that was found in *Procter & Gamble* and *General Foods*. In contrast to the liquid bleach and steel wool industries in those cases, which were basically small-firm industries prior to the acquisitions, the household deodorizer market at the time of this merger included several large multi-product firms such as S. C. Johnson, Colgate-Palmolive, American Home Products, and American Cyanamid. At the time of the merger, and today, these companies were Lysol Spray's closest competitors, yet each of these companies, with the possible exception of S. C. Johnson, is larger than Sterling and Lehn & Fink *combined*. Subsequent to the acquisition, additional companies have entered the market, undoubtedly attracted by rising consumer demand for aerosol deodorizer and disinfectant products. Firms now competing include such well-endowed companies as Dow Chemical, Gillette, Bristol-Myers, and Noxell. And we are aware of an even newer major entry subsequent to the closing of the record that has engaged in extensive national advertising. All of the above companies obviously have the resources to compete on fair terms with Sterling. Although the necessity to engage in national advertising may constitute a considerable barrier to entry for smaller firms, this fact existed prior to 1966 and no significant increase has been traced to this acquisition.

Finally, in the absence of evidence that the acquiring company might have entered the market internally or by another acquisition, we cannot agree with complaint counsel that Section 7 of the Clayton Act prohibits *per se* the acquisition of a leading firm in a concentrated market. As indicated in the preceding section, no probative evidence was submitted that Sterling was a likely entrant into household aerosol deodorizers. Its primary interest appears to have been in acquiring a profitable company and one with an established line of cosmetics. Acquisition of Lehn & Fink gave it that opportunity. In terms of market position in cosmetics, Lehn & Fink was not a leading firm and the acquisition appears to have been a toe-hold acquisition in that market.[30]

We therefore agree with the hearing examiner that no violation in the household aerosol deodorizer market has been shown. Accordingly, the complaint must be dismissed.

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[30] Although Lehn & Fink sold a number of household products, cosmetics was its largest line. In the last fiscal year preceding the merger, Lehn & Fink's cosmetic sales exceeded sales of Lysol Spray by 64 percent. Nevertheless, Lehn & Fink's cosmetics sales amounted to less than 1.4 percent of total sales in the billion-dollar cosmetics industry in 1965. See n. 26, *supra*, and initial decision, Finding 84.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of counsel supporting the complaint from the hearing examiner's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission, for the reasons stated in the accompanying opinion, having denied the appeal and having modified the initial decision to conform with the views expressed in said opinion:

It is ordered, That the hearing examiner's initial decision as modified be, and it hereby is, adopted as the decision of the Commission.

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

IN THE MATTER OF

WORLD ART GROUP, INC., ET AL.

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

Docket C-2188. Complaint, Apr. 11, 1972—Decision, Apr. 11, 1972.

Consent order requiring two corporations selling paintings, watches, maps, plates, books and other articles with headquarters in New York City and East Norwalk, Conn., and their advertising agency to cease failing to ship merchandise within 21 days, failing to make refunds in their money-back guarantees, misrepresenting the savings to purchasers of their merchandise, misrepresenting the karat fineness of their gold watches and the efficacy of their insect controls.

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 World Art Group, Inc., a corporation; Standard American Suppliers, Inc., a corporation; Curtis Advertising Company, Inc., a corporation; and Lawrence R. Curtis, individually and as an officer of said corporations 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 World Art Group, Inc., is a corporation organized, existing and doing business under and by virtue of