No. 342

In the Supreme Court of the United States

OCTOBER TERM, 1966

756

FEDERAL TRADE COMMISSION, PETITIONER

v.

THE PROCTER & GAMBLE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

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CITATIONS

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OPINIONS BELOW

The opinion of the court of appeals (R. 1555–1572)[1] is reported at 358 F. 2d 74. The opinion and final order of the Federal Trade Commission (R. 388a–465a) are reported at CCH Trade Reg. Rep. (FTC

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[1] The record consists of the four-volume joint appendix below, plus the opinion and judgment of the court of appeals and this Court's orders extending the time for filing a petition for a writ of certiorari, and allowing certiorari. These additional documents are printed at the end of volume II as pp. 1555–1577. We cite them as, *e.g.*, R. 1570. Volumes I and II also contain the pleadings, testimony, and Commission orders and opinions. We cite them as, *e.g.*, R. 11a. Volumes III and IV contain the exhibits and *in camera* exhibits, respectively. We cite them by exhibit number and page: *e.g.*, CX (Commission exhibit) 6, R. 4x; CX 342, R. 423x, *in camera*.

Transfer Binder 1963–1965), ¶16,673, but are not yet officially reported. The hearing examiner's opinion (287a–372a) is not reported. The previous opinion of the Commission in this case (R. 249a–255a) is reported at 58 F.T.C. 1203; the previous opinion of the hearing examiner (R. 176a–246a) is not reported.

JURISDICTION

The judgment of the court of appeals (R. 1573) was entered on March 18, 1966. On June 14, 1966, Mr. Justice Stewart extended the time within which to file a petition for a writ of certiorari to July 15, 1966 (R. 1574). The petition was filed on July 13, 1966, and granted on October 17, 1966 (R. 1574; 385 U.S. 897). The jurisdiction of this Court rests on Section 11(c) of the Clayton Act, 15 U.S.C. 21(c), and 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Trade Commission correctly held that the acquisition of the nation's dominant liquid bleach producer by the nation's leading manufacturer of household products closely related to bleach was unlawful under Section 7 of the Clayton Act.

STATUTE INVOLVED

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. 18, provides in pertinent part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the

> whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or tend to create a monopoly.

STATEMENT

On October 7, 1957, the Federal Trade Commission issued a complaint (R. 15a) charging that on or about August 1, 1957, The Procter & Gamble Company ("Procter") had acquired the assets of Clorox Chemical Company ("Clorox") in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18 (R. 20a–21a). Following evidentiary hearings, the hearing examiner, on June 17, 1960, rendered a decision (R. 179a) in which he found the acquisition unlawful and ordered divestiture (R. 242a–246a). On appeal, the Commission, on June 15, 1961, reversed (R. 249a–255a, 58 F.T.C. 1203), holding that the record as then constituted was inadequate, and remanding the case to the examiner for additional evidentiary hearings. These were held, and on February 28, 1962, the examiner rendered his second decision (R. 287a), in which he again held the acquisition unlawful and ordered divestiture (R. 367a–372a). Procter again appealed, and the Commission, in a lengthy opinion (R. 391a–465a), affirmed the examiner and entered a final order of divestiture (R. 388a–391a). The United States Court of Appeals for the Sixth Circuit reversed and directed that the Commission's complaint be dismissed (R. 1555, 358 F. 2d 74).

I

THE FACTS

A. CLOROX—THE ACQUIRED COMPANY

At the time of its acquisition by Procter (1957), Clorox was engaged almost exclusively in the manufacture and sale of liquid bleach for household use (R. 20a, 32a). In the year before the merger, its sales were almost \$40 million and the book value of its assets more than \$12 million (CX 12, R. 15x–16x; CX 27, R. 91x). It had liquid assets of almost \$4 million and an earned surplus of more than \$7 million (CX 12, R. 13x–16x). With thirteen plants located throughout the United States (R. 21a, 33a), Clorox was the only nation-wide seller of the product (R. 520a–521a, 730a). In the six years preceding the acquisition, Clorox's sales had increased 69 percent and its profits 104 percent (R. 301a). By the year of the merger Clorox accounted for almost 50 percent of the nation's total annual sales of household liquid bleach. In some regions, its share was even higher. For example, it had 72 percent of all sales in the Middle Atlantic States. (CX 325, R. 154x.)

B. THE HOUSEHOLD LIQUID BLEACH INDUSTRY

1. The product and its manufacture

Liquid bleach is used in the home principally as a whitener in the cleaning of clothes and fabrics, though also as a germicide and disinfectant. With immaterial exceptions, all brands of household liquid bleach are a chemically identical 5¼ percent sodium hypochlorite solution (R. 520a).[2] It is conceded that household liquid bleach is the relevant line of commerce, or product market, in this case.[3]

Household liquid bleach is easily manufactured, either by adding water to bleach concentrate or by first combining the basic chemicals (chlorine and caustic soda) to make sodium hypochlorite (R. 1171a–1172a). No manufacturer has a patent on the product or its manufacture (R. 1173a). Necessary information relating to manufacturing methods and processes is published by large chemical companies who produce the basic raw materials (R. 1181a) and is available to anyone who is either in the industry or interested in entering it. The machinery and equip-

[2] An officer of respondent testified (R. 1188a) that Clorox bleach is made with great care. The record also contains testimony by competing bleach manufacturers that they likewise take great care in turning out a high-quality product and that their bleaches are equal in quality to Clorox bleaches (R. 727a–728a, 772a, 839a–840a, 920a–921a, 970a, 1012a, 1348a–1349). Procter's president observed that while a household product such as liquid bleach has to be of acceptable quality, it is not simply quality "as you might define it in a laboratory—but it is quality * * * [a]s the public thinks of it." (R. 528a).

[3] Liquid bleach in somewhat stronger solution is used for industrial purposes; it does not compete with household liquid bleach (R. 768a, 773a). Powdered bleaches compete to some extent with household liquid bleach, but are generally limited to fine fabrics, and are more costly than liquid bleaches (CX 323B, R. 148x; R. 1027a–1028a, 1090a). Thus—all agree—household liquid bleach is sufficiently distinct to constitute a separate product market for Section 7 purposes. Throughout, we use "bleach" to refer to household liquid bleach.

ment required for a plant of efficient capacity are available at reasonable cost (R. 396a, 1181a–1182a) and there is no shortage of raw materials; they are readily obtainable in all parts of the country (R. 1179a–1180a).

2. The industry's structure

While technology would thus appear to be consistent with an industry consisting of a large number of bleach manufacturers of comparable size and strength, in fact the sales of the industry are heavily concentrated in a few leading firms. At the time of its acquisition by Procter, Clorox alone, as noted, accounted for approximately 50 percent of all bleach sales in the nation. The two largest firms accounted for about 65 percent, and the six largest for about 80 percent.[4] The remaining sales were scattered among more than 200 other producers, most of them very small (R. 396a; CX 696A–J, R. 282x–289x). Many of

[4] The respective national shares of the six major manufacturers of bleach were as follows (CX 325, R. 154x; RX (respondent's exhibit) 112F, R. 375x; R. 822a, 851a, 1050a, 1492a):

Brand	Manufacturer	Percentage of total U.S. sales
Clorox	Clorox Company	48.8
Purex	Purex Corporation, Ltd	15.7
Roman Cleanser	Roman Cleanser Company	5.9
Fleecy White	John Puhl Products Company	4.0
Hilex	Hilex Company	3.3
Linco	Linco Products Corporation	2.1
All other brands		20.2
		100.0

these are so-called "garage" or "down cellar" bleach producers whose sales are inconsequential (R. 396a, 860a–861a, 968a, 984a, 1269a); the others manufacture house brands for grocery stores and supermarkets (R. 1317a). Only eight liquid bleach manufacturers have assets of more than $1 million; very few have assets of more than $75,000 (CX 696A–J, R. 282x–289x).

Concentration is even greater on a local or regional, than it is on a national, basis. Liquid bleach is quite heavy in relation to its unit price, and therefore relatively expensive to ship; freight averages 10 percent of cost (R. 724a; CX 437, R. 177x). And since it is uniformly sold on a delivered-price basis, the manufacturer always absorbs the cost of transportation (R. 626a, 738a, 874a, 895a, 909a, 922a, 957a, 1028a, 1065a, 1089a). For these reasons, it is generally not economical for a manufacturer to sell beyond a radius of about 300 miles from his plant (R. 397a). Only Clorox has enough plants spread throughout the country to be able to sell nationally, most manufacturers being far more limited in their selling area. Even Purex, the second-ranking seller, and a relatively large and diversified firm (R. 722a–723a), distributed its bleach in only one-half of the nation (R. 725a).

The result is that the sales share of the leading producers (including Clorox) is much larger in particular areas than their national shares might suggest, for in no region do all of them sell. Thus, for example, at the time of the merger Clorox and two other firms had 97.8 percent of all bleach sales in the Metropolitan Chicago area; Clorox and one other firm had 88 percent of the Southwestern region; and Clorox and one other firm had 81.6 percent of the Pacific market (CX 325, R. 154x). As noted (p. 4, *supra*), Clorox alone accounted for almost 72 percent of all sales in the Middle Atlantic States.[5]

3. The marketing of household liquid bleach

Shelf display, and brand advertising and sales promotions,[6] are the twin keys to the successful marketing of bleach (R. 398a). Shelf space is limited and is allocated by the retailer among brands of the same product according to the demand that each manufacturer has succeeded in generating for his brand (R. 733a, 1199a, 1295a, 1302a).[7] Numerous witnesses testified to the critical importance of advertising and

[5] These figures are drawn from the Nielsen Food Index, and their accuracy is stipulated (R. 820a–821a). The dominant position of Clorox in the various regions is confirmed by the testimony of other bleach manufacturers (R. 730a, 825a, 848a, 875a, 881a, 907a, 939a, 961a, 971a, 1065a). No attempt was made by the Commission or by the respondent to delineate or to analyze in detail the local or regional areas in which bleach manufacturers in fact compete. In the circumstances the Commission used aggregate national figures as approximations of conditions obtaining in the several regional markets, suggesting that, due to the limitations imposed by freight costs, and the wide dispersal of Clorox's plants, Clorox's actual market power was greater than the national figures suggested (R. 430a–431a). A summary of the sales shares of the principal bleach manufacturers in each region is contained in an appendix to the court of appeals' opinion (R. 1570), reproduced below at p. 36, n. 31.

[6] By "sales promotions" we mean special offers, contests, and similar marketing devices.

[7] While there are some 200 bleach manufacturers—and even more brands (CX 696A–F, R. 282x–287x; RX 112A–U; R. 370x–390x)—supermarkets generally stock only two to four brands. These will generally be Clorox bleach (the only na-

promotional efforts by the manufacturer in order to create sufficient demand for his brand to entitle it to shelf space (R. 569a, 832a, 847a–848a, 873a–874a, 937a, 961a, 988a–989a, 992a, 1008a, 1025a–1026a, 1066a, 1200a). In summarizing the importance of such efforts, an official of a large retail grocery chain said (R. 1302a): "Today we don't sell groceries any more; they are all bought from us."

Liquid bleach is thus a product heavily "presold" by the manufacturer to the public through advertising and promotions (R. 569a, 832a, 847a–848a, 873a–874a, 937a, 961a, 988a–989a, 992a, 1200a). In its last full year of independent operation, Clorox spent more than $3.7 million—or approximately 10 percent of net sales—for newspaper, magazine, radio, billboard and television advertising and an additional $1,738,000 for other promotional activities (R. 398a–399a; RX 83, R. 453x, *in camera*).[8] The Commission found (R. 398a) that these heavy expenditures go far to explain why Clorox maintained so high a market share despite the fact (1) that its brand, though chemically indistinguishable from rival brands (R. 1423a; see, also, pp. 4–5 and n. 2, *supra*), retailed for a price equal to or, in many instances, higher than its competitors' (R. 731a, 771a, 811a–812a, 816–817a,

tional brand), one or two regional or local brands, and, in some instances, a private (store) brand (R. 734a, 848a, 875a–876a, 905a, 921a, 937a, 967a, 971a, 984a, 986a, 1012a, 1027a, 1265a, 1287–1288a, 1293a, 1345a–1347a, 1510a, 1514a; CX 710A–B, R. 316x–317x).

[8] Its leading competitor, Purex, spent $3 million to advertise its products in 1957 (CX 447, R. 188x). Unlike Clorox, it had other products besides liquid bleach which its advertising budget covered (R. 722a–723a, 725a–726a; CX 438, R. 184x–185x).

859a–860a, 878a–879a, 904a–905a, 938a, 962a, 1009a, 1015a, 1028a–1029a, 1068a–1069a, 1091a, 1109a), and (2) that Clorox apparently enjoyed no substantial advantages in cost of production vis-à-vis other bleach producers (see pp. 5–6, *supra*).[9]

C. PROCTER—THE ACQUIRING COMPANY

1. The company and its products

Procter is a large, diversified manufacturer of low-price, rapid-turnover household products.[10] In 1957 its sales were in excess of $1.1 billion (R. 400a), from which it realized profits of more than $67 million (CX 6, R. 7x). Before acquiring Clorox, Procter had never manufactured or sold household liquid bleach.

Between 1946 and 1962, Procter's net sales increased approximately 400 percent, and its assets even more, reflecting in significant part its rapid diversification into new products closely related to its existing lines. For example, during this period it developed and successfully introduced a new detergent, a new deodorant

[9] The vital role of advertising in the marketing of bleach is illustrated by the experience of the Roman Cleanser Company in selling the same bleach under two different brand names in the same market (R. 1052a): the advertised brand sold at a consistently higher price (R. 1068a–1069a).

[10] Among the more important products sold by Procter at the time of the merger were Ivory Soap, Ivory Flakes, Ivory Snow, Camay, Lava (soaps); Cascade and Duz (detergents); Tide, Cheer, Dreft, Oxydol, Dash, and Joy (detergents); Comet (scouring cleanser); Spic and Span linoleum cleaner, Zest detergent toilet bar, Crisco shortening, Golden Fluffo shortening, Big Top peanut butter and peanuts, Duncan Hines baking mixes, Crest toothpaste, Gleem toothpaste, Drene shampoo, Prell shampoo, Lilt and Pin-it home permanents, and Charmin facial tissue, paper napkins, and paper towels (R. 29a–30a).

toilet soap bar, two new brands of toothpaste, and an abrasive cleanser (R. 23a, 35a; CX 6, R. 11x; CX 14, R. 18x)—all (along with several brands Procter obtained by acquiring their producers) "low priced, rapid turn-over, household items sold primarily through grocery, drug and department stores—the type of goods which [Procter] is accustomed to market." (CX 6, R. 11x; CX 348B, R. 158x; R. 299a).

By 1957 Procter was among the nation's 50 largest manufacturing corporations, and its annual sales of soaps, detergents and cleansers alone (products whose end use is closely related to that of bleach, see p. —, *infra*) were more than $500 million (R. 400a–401a). Procter was the largest seller of these products. For example, it accounted for 54.5 percent of all packaged detergent sales and, together with Colgate-Palmolive and Lever Brothers, for 80 percent of this $760 million market (R. 401a).[11] There were no other firms in the industry of comparable size, fourth place being occupied by the Purex Corporation with total sales of only $50 million—5 percent of Procter's (CX 438, R. 179x).

2. Procter's marketing methods

As noted, Procter's principal products were low-price, high-turnover items marketed chiefly to housewives—products which manufacturers seek to "pre-sell" to the consumer by means of advertising and sales promotion (see pp. 8–9, *supra*). Indeed, in 1957 Procter was the largest advertiser in the United

[11] Procter is larger than either of its principal competitors. In 1957 Colgate-Palmolive's total sales were $291 million and Lever Brothers' $250 million (R. 401a, 598a; CX 529, R. 199x).

States, spending more than $80 million on advertising and an additional $47 million for promotions (R. 401a, 1133a; CX 447, R. 188x; CX 342, R. 423x, *in camera*).[12] The principal aspects of Procter's marketing techniques are the following.

Advertising Discounts. Procter receives substantial discounts from the advertising media. It is in television advertising, apparently, that the greatest discounts are available to the large advertiser, and it is in television that Procter concentrated the bulk of its advertising efforts. On the NBC television network, Procter was entitled to a discount of 30 percent for daytime and 25 percent for nighttime purchases; and on the CBS television network, it was entitled to a discount of 25 percent (R. 778a, 1139a).[13] In contrast, Purex Corporation's network television advertising

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[12] Procter's principal competitors in the sale of such products are also leading advertisers. In 1957 Colgate-Palmolive spent almost $37 million, and Lever Brothers approximately $23.5 million, for advertising (CX 447, R. 188x).

[13] Network rate structures are in fact somewhat more complex than the record of this case indicates. See Blake and Blum, *Network Television Rate Practices: A Case Study in the Failure of Social Control of Price Discrimination*, 74 Yale L.J. 1339, 1347–1362. Professor Blake testified before the Senate Antitrust and Monopoly Subcommittee that discounts to the largest advertisers could run as high as 75 percent. Gerald Arthur, a former advertising executive and owner of radio and television properties, testified that the largest advertisers, such as General Foods, obtain television advertising at a cost of $2.50 per thousand households, whereas a smaller advertiser would have to pay $3.50 to $4—40 to 60 percent more, in other words—for the identical coverage. Federal Trade Commission Report, Technical Study No. 8, National Commission on Food Marketing, June 1966, *The Structure of Food Manufacturing*, p. 70.

expenditures of $1.4 million entitled it to only a 6 percent discount (R. 779a; see, also, R. 780a). Clorox received no discounts of any substance (R. 434a, 699a, 1126a–1127a).

Similar discounts were available to the large purchaser of magazine and newspaper advertising. To qualify for the 17 percent discount offered by *Life* magazine, an advertiser had to make purchases of about $2 million in any 12-month period, and *Ladies Home Journal* and *Better Homes and Gardens* offered a 12 percent discount on purchases of about $1 million (R. 780a–781a, 818a). At the time of the acquisition, Procter spent about $9 million for magazine advertising, and thus could easily qualify for these discounts (CX 447, R. 188x). Clorox and Purex could not (R. 781a,–782a, 1123a, 1130a). Procter's budget for newspaper advertising also qualified it for substantial discounts (R. 691a–692a).

Sales Promotions. Promotions play a significant role, often in conjunction with advertising, in the marketing of Procter's products. Among the promotions regularly employed in the sale of household cleansing agents are contests, reduced price on the second package with purchase of the first package at regular price, and mail offers of premiums, coupons, and free samples (R. 323a–324a, 542a, 544a–545a; CX 18, R. 31x–32x). A contest in 1956 involving Tide, Joy, Camay, Oxydol, and Ivory Snow offered $100,000 in prizes plus $5,000 in bonus prizes, and was tied in with a coupon mailing to the home (CX 111A–I, R. 117x–125x; R. 504a); and a 1957 "Wife Saver" sale and contest involving Oxydol, Camay, Ivory bar soap, Joy, and Spic and Span, offering $60,000 in prizes plus a $2,500 bonus prize, was tied in with a price reduction of 7 cents off on the sponsoring brands, all supported by television and newspaper advertising (CX 279A–O, R. 137x–142x; CX 420, R. 171x).[14] Procter, as noted, spent a total of $47 million on such promotions during the year preceding the acquisition. Procter states in its salesman manual (CX 18, R. 32x): "Advertising creates an acceptance for our products, and promotions increase the incentive [of the consumer] to buy."

Multi-Product Advertising and Promotions. As a producer of many products, Procter derives considerable advantages in advertising and sales promotion that are denied a single-product firm. Thus, it can—and does—feature joint promotions for several of its products, thereby reducing the mailing, printing and other costs of the promotion for each product (CX 111A–J, R. 117x–125x; CX 279A–O, R. 137x–142x). It can—

[14] Procter also maintained a special Appliance Trade Sales Department, the function of which was to secure at both the manufacturing and distributing levels of the appliance industry the endorsement and merchandising support of Procter products used in washing machines and dishwashers (CX 17, R. 21x). There were once contracts between Procter and the washing-machine companies providing for the payment by Procter of one dollar for each home demonstration using a Procter product (R. 574a–577a). In addition, Procter secured the endorsement by the principal washing-machine manufacturers of its detergent, "Tide", and the withdrawal of their endorsement of a competing product, "All", formerly manufactured by Monsanto Chemical, and subsequently purchased by Lever Brothers (R. 576a; see p. 43, n. 36, *infra*). The Federal Trade Commission challenged Procter's exclusive arrangements and a consent order banning them was issued. *Procter & Gamble Co.*, 56 F.T.C. 1623.

and does—purchase network programs on behalf of several products. This enables it to give each product network exposure at a fraction of the cost per product that a firm with only one product to advertise would incur (R. 552a–553a, 1139a; CX 575, 225x). By the same token, Procter can advertise a product on several programs for the same price per product that a single-product firm would have to pay for single-program coverage. In addition, a multi-product network advertiser can run commercials for different products in different sections of the country during a single commercial break, thereby selectively concentrating its advertising where it is most needed (R. 1494a).

Sales Force. Procter's marketing efforts are backed by a well-trained force of approximately 1,800 salesmen (R. 609a; CX 18, R. 27x). Their principal task is to procure and retain "adequate" shelf space for Procter's products in the self-service supermarkets—"adequate" shelf space being defined by Procter as space proportional to Procter's market share (R. 531a–532a, 572a; CX 18, R. 54x–55x, 64x–69x; CX 21A–B, R. 83x–90x). Procter also stressed to its salesmen (CX 18, R. 54x–55x): "What [the housewife] finds in the store with respect to the display of our brands and the shelf space and position they occupy will greatly influence her buying." Toward this end Procter's salesmen were instructed to realign the shelves whenever possible, so as to group Procter's products into departments (*e.g.*, package-soap department, liquid-soap department), and, within each department, to group all sizes of Procter's brands together (CX 21A-B, R. 83x-90x).[15]

3. Procter's marketing philosophy in action

An illustration of the effectiveness of Procter's marketing organization was the introduction in 1957 of its abrasive cleanser, Comet. At the time Procter entered the abrasive cleanser market, Ajax, the abrasive cleanser manufactured by Colgate-Palmolive, accounted for roughly 56 percent of the nation's sales (R. 559a; CX 571A, R. 217x).[16]

Procter launched Comet with a nation-wide campaign of advertising and promotions, featuring extensive coverage by television and newspaper media and widespread distribution of free samples and coupons offering one regular-size Comet free with the purchase of another regular or giant size (R. 560a-561a; CX 153A-G, R. 127x-134x; CX 573E, R. 446x, *in camera*). In the course of a 22-month period, Procter spent $7.2 million for these and similar advertising and promotional activities (CX 573E, R. 446x, *in camera*), and achieved for Comet a 36.5 percent share of the national market.[17]

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[15] Clorox, utilizing a network of 80 independent brokers, sought to secure services similar to those performed by Procter salesmen (R. 524a-525a, 1233a-1236a). After the acquisition, Procter continued Clorox's method of selling through brokers (R. 524a-525a, 608a).

[16] The other leading brands were Bab-O, manufactured by B. T. Babbitt, Inc., which had 24 percent of the market, and Blue Dutch, manufactured by Purex, which had 10 percent (CX 438, R. 182x; CX 534, R. 208x; CX 571A, R. 217x).

[17] Procter stressed Comet's green color, pine odor, and the presence of bleach (CX 153A-G, R. 128x-131x). The presence of bleach was not in fact novel; Blue Dutch (Old Dutch cleans-

D. THE ACQUISITION

Procter in 1957 was in the process of diversifying into product lines related to its basic detergent-soap-cleanser business (pp. 10–11, *supra*). Liquid bleach represented a natural avenue for such diversification. Packaged detergents—Procter's most important product line—and household liquid bleach are used together, not only in the washing of clothes and fabrics, but also in general household cleaning, liquid bleach being a disinfectant as well as a whitener. Thus, from the consumer's point of view, packaged detergents and liquid bleach are closely related items. Household cleansing agents are also related to liquid bleach by the mode of distribution, both being low-price, rapid-turnover consumer lines marketed through self-service stores and presold by the manufacturer by means of mass advertising and sales promotions. In fact, cleansing agents and bleach are often displayed as a group on the same or adjacent shelves (R. 733a, 909a, 970a, 1014a, 1032a, 1093a).[18]

The acquisition of Clorox was the culmination of at least two years of study of the liquid-bleach industry by Procter's promotion department in order to

er) contained bleach (R. 765a; CX 438, R. 182x). The Comet campaign is also described in Klaw, "The Soap Wars: A Strategic Analysis," *Fortune*, June 1963, pp. 122–198, based largely on the record in *United States* v. *Lever Brothers Co.*, 216 F. Supp. 887 (S.D. N.Y.).

[18] The close relationship of Procter's and Clorox's business extends beyond Procter's cleansing agents, since its other products—food, paper, and toilet articles—are also low-price, high-turnover household goods sold through self-service stores and heavily advertised and promoted (R. 28a, 406a, 525a; CX 6, R. 11x).

determine the desirability of its entry into the industry (CX 323A–C, R. 147x–149x; CX 324A–D, R. 150x–153x). In October 1955, a memorandum from Procter's promotion department recommended against entry by Procter on its own on the ground that even a \$20-million investment (exclusive of plant and equipment) might not be enough to obtain a "satisfactory" market share (defined as 32 percent), and that it would take five years for the investment to "pay out" (CX 324A–B, R. 150x–151x).

The memorandum did, however, recommend that Procter consider entering the liquid-bleach market by acquiring Clorox if this could be done at a reasonable price, which the memorandum suggested as \$20 million payable in Procter stock (CX 324A–B, R. 150x–151x; R. 581a). The promotion department stated that liquid bleach accounted for 90 percent of the large and expanding household bleach market and that its ascendancy over powdered bleach would continue in the foreseeable future. It pointed out (CX 324B, R. 151x):

> Taking over the Clorox business could be a way of achieving a dominant position in the liquid bleach market quickly which would pay out reasonably well.

A subsequent report from Procter's promotion department, dated February 1957,[19] recommended that Procter pay if necessary \$30 million for Clorox (CX 323A–C, R. 147x). The report repeated the obser-

[19] In the interim Clorox and Proctor had negotiated unsuccessfully over acquisition, being unable to agree on a price (R. 650a–652a).

vations in the first report concerning the desirability of entry, and also noted (CX 323A–C, R. 149x):

> We are advised that Clorox spent $2,600,000 in the last half of 1956 for advertising, or at the rate of $5,320,000 per year. We believe that P & G advertising philosophies and economies applied to an advertising expenditure of this size can be expected to further advance the Clorox business.

In May 1957, a few months after this report was submitted, Procter entered into a contract for the acquisition of Clorox. The acquisition was consummated in August by the transfer of all of Clorox's assets to a newly organized, wholly owned Procter subsidiary. Shareholders of Clorox received shares of Procter common stock having a market value of approximately $30.3 million (CX 12, R. 15x; CX 27, R. 91x; CX 702, R. 296x). Mr. Morgens, then Procter's executive vice president, stated (CX 413A–B, R. 167x–168x):

> While this is a completely new business for us * * * we are thoroughly at home in the field of manufacturing and marketing low price, rapid turn-over consumer products.

E. POST-ACQUISITION DEVELOPMENTS

Between the merger and the close of the record in 1961, Clorox's market share continued to increase. In 1957, Clorox's market share was 48.4 percent; four years later, it was 51.9 percent (RX 135B, R. 402x). In the New England region, its share rose from 56 to 67.5 percent in this period (R. 314a, 462a).

The operation of Clorox remained, in most respects, substantially unchanged. But there was at least one significant change. Prior to the merger Clorox was not using promotional devices such as premiums, coupons, price-off labels, contests, tie-ins to other products, or free products (R. 663a, 670a–672a, 714a–715a). In the four years following the acquisition, Procter expended $2 million on such devices for the promotion of Clorox (see R. 462a; CX 336, R. 156x; CX 718A–F, R. 447x–453x, *in camera*).

The following example illustrates the effectiveness of such promotions. In October 1957, Purex selected Erie, Pennsylvania—where it had not sold previously—as an area in which to test the salability, under competitive conditions, of a new bottle and an allegedly "improved" liquid bleach (R. 741a, 753a; CX 454A–C, R. 191x–193x). The two leading brands in Erie at the time of this test were Clorox, with 52 percent, and the "101" brand sold by the Gardiner Manufacturing Company, with 29 percent of the market (CX 450, R. 189x; R. 1002a). To attain broad distribution in a short period of time, Purex launched an intensive newspaper and television advertising campaign and mailed coupons to all homes in the area, offering introductory price reductions (R. 744a; CX 450, R. 189x). In five months Purex captured 33 percent of the Erie market; Clorox's share dropped to 35 percent and 101's to 17 percent (CX 450, R. 189x).

Clorox responded by offering its bleach at reduced prices printed on the label of the bottle (CX 336, R. 156x; CX 450, R. 189x; R. 595a–596a, 1238a). Subsequently, Clorox added an offer of a $1-value ironing board cover for 50 cents with each purchase of Clorox at the reduced price (CX 429A–B, R. 175x–176x; CX 450, R. 189x). It also supplemented its regular newspaper and magazine advertising with a substantial number of TV spots (CX 429A–B, R. 175x–176x; CX 450, R. 189x; CX 538B, R. 215x). The result of these activities was to restore Clorox's lost market share and, indeed, to increase it slightly (CX 450, R. 189x). Purex's share fell to 7 percent.[20] Purex's president testified that the effect of Clorox's vigorous response was to cancel out Purex's test and make impossible any evaluation of its new container and (allegedly) improved product (R. 785a).[21]

Since the merger Purex has acquired the fourth largest producer of bleach, John Puhl Products Company, which owned and marketed the "Fleecy White" brand in geographic markets which Purex was anxious to enter. One of the reasons for this acquisition, according to Purex's president, was that (R. 1492a–1493a):

> Purex had been unsuccessful in expanding its market position geographically on Purex liquid

[20] The 101 brand, whose manufacturer did not counter the promotional or advertising measures of Clorox or Purex, lost sales to both (CX 450, R. 189x). It apparently lacked the financial resources to engage in this kind of activity (R. 1008a, 1020a).

[21] Activities similar to those engaged in here are characterized in the trade as "muddying the test waters". Klaw, "The Soap Wars: A Strategic Analysis," *Fortune*, June 1963, pp. 122, 186. A number of other bleach producers testified to their concern that they would be harmed by the powerful promotional and advertising programs that Procter was capable of conducting (R. 355a–361a, 787a, 832a, 912a, 946a, 961a, 973a, 992a, 1016a, 1036–1037a, 1094a).

> bleach. The economics of the bleach business, and the strong competitive factors as illustrated by our experience in Erie, Pennsylvania, make it impossible, in our judgment, for us to expand our market on liquid bleach. * * *

II. THE PROCEEDINGS

A. THE DECISION OF THE FEDERAL TRADE COMMISSION [22]

The Commission found that the acquisition of Clorox by Procter might substantially lessen competition, or tend to create a monopoly, in the household liquid bleach industry, and ordered divestiture (R. 388a–465a). Observing that the threat of new entry frequently acts as an important and salutary restraint upon the exercise of market power by oligopolists, and that the liquid-bleach industry was highly oligopolistic at the time of the merger, the Commission found that the merger substantially impaired the effectiveness of this restraint. It pointed out that although advertising had apparently been an important factor in the rise of Clorox to a position of dominance in the industry, and in the maintenance of its dominant position, prior to the merger Clorox had been a relatively small, single-product firm, incapable of massive advertising and consumer promotions, and ineligible for the substantial discounts that the mass media make available only to very large national advertisers, like Procter (R. 434a–435a). The merger gave Clorox access to the considerable advertising and

[22] We refer to the Commission's final decision of November 1963. It had previously rendered an interlocutory opinion remanding the case to the hearing examiner (see p. 3, *supra*).

promotional advantages that large, multi-product firms like Procter possess—for example, advantages of price, programming flexibility, and sponsorship in national television advertising, and virtually limitless financial resources to support large advertising budgets and to enable costly, but highly effective, consumer promotion campaigns using coupons, premiums, and similar devices (R. 400a, 433a–438a). Since advertising and marketing are crucial to the successful marketing of bleach, the Commission concluded that Procter would have substantially greater competitive power in the liquid-bleach market than Clorox had had, and that—whether or not Procter exercised its power—firms contemplating entry into the bleach industry would be deterred (R. 441a–442a). Hence the salutary check that potential competition provides in a highly concentrated and oligopolistic industry like bleach would be weakened (R. 440a–441a, 450a). In addition, what actual competition remained in the industry would likely be chilled by Clorox's enhanced market power (R. 439a–440a, 451a).

The Commission also found that the merger would seriously harm potential competition by eliminating Procter as a prospective entrant into the bleach industry (R. 454a–455a). Prior to the merger, Procter, the Commission found, was the most likely prospective entrant, not only because of its proven capacity for successfully introducing new brands in industries closely related to bleach,[23] but also because

[23] Comet, like liquid bleach, was advertised as a whitener and disinfectant, and contained bleach (CX 153A–G, R. 128x–134x; *supra*, p. 16 and n. 17).

it had in fact carefully considered entering the liquid-bleach industry on its own (R. 402a–403a). Had it not purchased Clorox, it would have remained a restraining influence on Clorox's exercise of market power because it had the incentive and ability to enter the bleach industry. In time, moreover, it might actually have entered, thereby eroding Clorox's dominant position and perhaps reducing the concentration of the industry.

B. THE DECISION OF THE COURT OF APPEALS

The Court of Appeals for the Sixth Circuit ruled that the Commission's finding of illegality had been based on treacherous conjecture, mere possibility, and suspicion (R. 1565, 1568) and set aside the Commission's order (R. 1569). The court found nothing unhealthy about the liquid-bleach industry simply because one producer controlled 50 percent and six producers 80 percent of the national market, and held that the advertising and marketing advantages which might accrue to Clorox as a result of the merger were economies and "the fact that a merger may result in some economies is no reason to condemn it" (R. 1563). It rejected the Commission's finding that the merger eliminated the important potential competition of Procter with the observation that "[t]here was no reasonable probability that Procter would have entered the household liquid bleach market but for the merger." (R. 1568.)

Before the court of appeals, Procter also challenged the Commission's decision on procedural grounds—alleged reliance by the Commission on matters *dehors* the record, and the Commission's allegedly improper failure to adhere in its second decision to the principles of its earlier interlocutory decision. On these issues, the court upheld the Commission (R. 1557–1558).

SUMMARY OF ARGUMENT

The Federal Trade Commission found in this case that the acquisition of the Clorox Company, the nation's largest producer of household liquid bleach, by the Procter & Gamble Company, a large manufacturer of many household items—such as soap and detergent—that are closely related to liquid bleach, might substantially lessen competition or tend to create a monopoly in the bleach industry; and that the acquisition was therefore unlawful under Section 7 of the Clayton Act. The Commission's reasoning and conclusion, we believe, are soundly based on the teachings of this Court, and we submit that the court of appeals' action in setting aside the Commission's order reflects a basic misapprehension of those teachings.

At the heart of this case is the proposition that in an industry already highly concentrated and oligopolistic in structure—one where a few firms control most of the business—potential competition provides an important, and indeed indispensable, restraint upon the exploitation by the dominant firms of their freedom from significant actual competition. It deters them from increasing their prices and profits to a level at which entry by new competitors would be feasible and attractive; and the result is at least some approach toward the market conditions that actual competition would determine. A merger which appreciably reduces the efficacy of potential competition in noncompetitively structured markets is, accordingly, cause for grave concern under the antitrust laws.

The Commission found that the acquisition of Clorox by Procter was likely to have this effect. The bleach industry was highly concentrated, with two firms accounting for 65 percent of the nation's sales and six for 80 percent. Clorox alone had 50 percent, and much more in some areas of the country. In this oligopolistic setting, the importance of preserving effective potential competition could hardly be overemphasized. The merger undermined its efficacy in two cardinal respects.

First, it increased the difficulty of new entry by conferring on Clorox substantial new competitive advantages in the area that matters most in the bleach industry—"preselling" the consumer, by heavy advertising and sales promotions, on the real or supposed virtues of the manufacturer's particular brand. Before the merger, Clorox, being a relatively small, single-product firm, did not have access to important advertising and promotional advantages that only large, multi-product firms like Procter enjoy—for example, large volume discounts for network television advertising—and Clorox's advertising budget was quite limited compared to that of a firm like Procter. Union with Procter promises that Clorox can presell its brand still more effectively than heretofore and increase still more the already settled consumer preference for the brand. This will make it even more difficult for a newcomer to gain a foothold—and should he, despite the obstacles, attempt entry, he would find that Clorox's power to repel a new competitor has greatly increased. Recognizing this, prospective entrants will be more reluctant than ever to essay entry. The threat of entry—and the salutary restraint on the expoitation of market power that it provides—has thus been substantially reduced.

The Commission also found the efficacy of potential competition impaired by the elimination of Procter as a prospective entrant into the bleach industry. Procter was one of the few firms with sufficient resources and marketing experience to enable a successful challenge to Clorox, and it had actually pondered entry. It must surely have figured as a palpable restraint on Clorox's conduct. No longer need Clorox curb its power to obtain higher-than-competitive profits out of concern for Procter's response.

The court of appeals brushed aside, as based merely on conjecture and suspicion, the Commission's analysis of the importance of maintaining effective potential competition in the bleach industry and its delineation of the serious adverse impact of the merger on that competition. The court found nothing untoward in the competitive structure of the bleach industry at the time of the merger—thus ignoring this Court's emphasis upon undue concentration as an index to competitive health. The court discounted the enhanced power that Clorox derived from the merger on the grounds (1) that, since the merger, Clorox has not generally availed itself of the advertising and promotional advantages that its union with Procter enables, and (2) that, in any event, "economies" in the cost of advertising and promotion are never a proper basis for striking down a merger. The court failed to consider, however, that it is the power of Clorox, backed by Procter, to respond devastatingly to any attempt of new entry, not the use of that power, that deters prospective entrants; only if entry were attempted would Clorox have occasion to utilize to the maximum its new competitive advantages.

That these advantages may represent in part the ability to purchase advertising at a lower cost than before the merger cannot, in the circumstances, save the merger from condemnation. These cost advantages are not "economies" that antitrust law seeks to encourage. They are not likely to be passed on to the consumer, or, indeed, to be used for any purpose save to enable additional advertising to be purchased in an industry already saturated by advertising—an industry where additional advertising by the dominant firm could have no purpose of informing the consumer, but could serve only to make entry by new competitors more difficult and thus to discourage, not promote, the efficient conditions that vigorous competition would create.

Finally, the court below held that the elimination of Procter as a potential competitor had no significance in the absence of evidence that Procter in fact intended to enter the bleach industry. But Procter's actual intentions are quite irrelevant. So long as Procter remained at the edge of the market, well able to enter should conditions ripen, Clorox had an incentive not to engage in the kind of conduct that would have made entry attractive to Procter—such as maintaining prices too far above the competitive level.

The court of appeals dismissed two additional points that, in our view, persuasively support the Commission's findings: first, that, in enhancing Clorox's competitive power, the merger not only diminished the restraining effect of the threat of new entry into the bleach industry but also tended to chill what actual and potential competition existing bleach producers might supply; secondly, that the merger, by weakening potential competition, retarded the prospects for eventual erosion of the high concentration of the bleach industry through new entry.

ARGUMENT

The merger at issue in this case joined the nation's leading manufacturer of household liquid bleach, Clorox Company, with the nation's leading manufacturer of household cleaning products generally, Procter & Gamble. The Federal Trade Commission held the merger unlawful under Section 7 of the Clayton Act on the ground that its effect might be substantially to lessen competition, or tend to create a monopoly, in the manufacture and sale of household liquid bleach. Since Procter was neither an actual competitor of Clorox (it did not make or sell a liquid bleach or any close substitute therefor) nor a supplier to or customer of any bleach manufacturer, the merger does not fit into the conventional horizontal or vertical categories. But Section 7 is not limited to those categories;[24] it also covers so-called "conglomerate" mergers,[25] such as that here involved, and we shall demonstrate that the theory of illegality upon which the Commission's decision is based represents a logical and sound development of principles well established in the Section 7 decisions of this Court. We shall also show that the Commission correctly applied its theory to the circumstances of the present case. More pertinently, perhaps, we shall show that the court of appeals, in overturning the Commission's finding of illegality, quarreled not so much with the substantiality of the supporting evidence as with the Commission's underlying theory. In rejecting that theory, the court radically, and we think erroneously, curtailed the scope of Section 7 as applied to the important and rapidly growing conglomerate merger movement.[26]

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[24] See *Federal Trade Commission* v. *Consolidated Foods Corp.*, 380 U.S. 592; *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 317; H. Rep. No. 1191, 81st Cong, 1st Sess., p. 11.

[25] The *Consolidated Foods* case, *supra* n. 24, is the only previous conglomerate merger case to have reached this Court. The Court held there that a merger which creates a probability of substantial reciprocal buying violates Section 7. Reciprocal buying is not involved in the present case, although we believe that the *Consolidated Foods* decision affords support by analogy to the Commission's position here (see pp. 47–48, n. 39, *infra*.).

[26] See, *e.g.*, Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 89th Cong., 1st Sess., pursuant to S. Res. 40, Pt. 2, p. 516.

I

A CONGLOMERATE MERGER THAT SUBSTANTIALLY IMPAIRS THE EFFICACY OF POTENTIAL COMPETITION AS A RESTRAINT UPON ANTICOMPETITIVE CONDUCT IN HIGHLY CONCENTRATED MARKETS IS UNLAWFUL UNDER SECTION 7 OF THE CLAYTON ACT

In a market of many sellers of roughly comparable size and strength, one can ordinarily rely on competition among them to keep prices down, to promote efficiency, and to spur innovation. But a similar assumption cannot be safely indulged where the market is highly concentrated—where a few sellers account for most of the sales. In such a market, as this Court has observed (*e.g., United States* v. *Philadelphia National Bank,* 374 U.S. 321, 363), there is great danger that the major sellers will find their interests best served by tacitly renouncing vigorous price competition—by adopting a policy of "live and let live"—and that the remaining sellers, being much smaller, will dare not challenge this policy. In these circumstances, actual competition ceases to be a vital force; by mutual consent, it is abandoned in favor of parallel behavior and the "easy life." *United States* v. *Aluminum Co. of America,* 377 U.S. 271, 280.

Yet the sellers in the market may still be subject to a significant form of competitive restraint—that of potential competition.

An oligopolist may be confident that, if he raises his price, his competitors will follow suit. Even so, before initiating a price rise, he must consider the possibility that a higher price level might induce sellers from outside the market to attempt entry. To be sure, existing sellers normally can assume that new entrants will encounter initial cost disadvantages that impose a barrier to such entry; but that advantage may cease to be crucial once the prevailing price in the market rises to a point at which the newcomer, despite higher initial cost, can make a substantial profit selling at the market price. Since the entry of new competitors is bound to erode the market share of the existing sellers, those sellers have a palpable interest in keeping the market price low enough to make entry unattractive. Thus, the threat of entry—potential competition—restrains oligopolists from exploiting fully their market power; it is some substitute for the actual competition which oligopolistic markets tend to lack.

It is, to be sure, an imperfect substitute. To the extent that there are barriers to entry—and there rarely are none—sellers in the market may be free within a considerable range to raise prices without thereby inviting entry. Nevertheless, potential competition has an important and salutary role to play in concentrated markets. This is well recognized in the economic literature,[27] in the opinions of the Federal Trade Commission,[28] and in the opinions of this Court.[29] That a

[27] See Bain, *Barriers to New Competition* (1956), *passim;* Wilcox, *Competition and Monopoly in American Industry*, T.N.E.C. Monograph No. 21 (1940), pp. 7–8; Clark, *Competition as a Dynamic Process* (1961), p. 372; Weston, *The Role of Mergers in the Growth of Large Firms* (1953), p. 109.

[28] Besides the instant case, see *Foremost Dairies, Inc.*, 60 F.T.C. 944; *Ekco Products Co.*, Trade Reg. Rep. (1963–1965 FTC Transfer Binder), ¶ 16, 879, affirmed, 347 F. 2d 745 (C.A. 7); *Beatrice Foods Co.*, 3 Trade Reg. Rep., ¶ 17, 244. In *Beatrice*, the Commission pointed out that in about one-third of the nation's largest (billion-dollar) industries, the four largest firms had at least 50

merger which eliminates or weakens potential competition may—depending, of course, on the circumstances—thereby violate Section 7 is, by now, settled law.

A merger might produce such an effect in one of two ways. First, it might increase the difficulty of entering the market by conferring upon one of the market leaders a competitive advantage not already enjoyed by the other sellers in the market; any such increase in the height of the barriers to entry would

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percent of total sales, and that in view of the prevalence of high concentration in American industry "the importance of potential competition in the administration of a statute concerned with the long-range competitive prospects of the American economy is manifest." 3 Trade Reg. Rep. at pp. 22, 333.

[29] In *United States* v. *Continental Can Co.*, 378 U.S. 441, 465–466, the Court pointed out that the mere "possibility" of new competition "over the long run acts as a deterrent against attempts by the dominant members of either industry to reap the possible benefits of their position by raising prices above the competitive level." And in *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, the Court observed that, even if a firm is not likely to enter the market immediately, the fact that it appears to await only an opportune moment to do so is highly significant. A violation of Section 7 may therefore be predicated upon the elimination of "the potential competition of the corporation that might have remained at the edge of the market, continually threatening to enter" (378 U.S. at 173). Cf. *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 659, where the Court noted that "the mere efforts of Pacific Northwest to get into the California market, *though unsuccessful*, had a powerful influence on El Paso's business attitudes within the State" (emphasis added). The foregoing are Section 7 cases. But even under the more rigorous standards of the Sherman Act, restraints upon potential competition have often been held illegal. See *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 150–153; *United States* v. *Griffith*, 334 U.S. 100, 107; *United States* v. *Reading Co.*, 226 U.S. 324, 351, 369–371; *United States* v. *United Shoe Machinery Corp.*, 247 U.S. 32, 53.

enlarge the range within which the existing sellers were free from competitive restraint. Secondly, if one of the parties to the merger was a prospective entrant into the market of the other, the merger would weaken potential competition by thinning the ranks of the potential competitors. This second dimension has received explicit recognition in the decisions of this Court (see p. 33, n. 29, *supra*). The first has not. But, if a merger may be illegal by reason of eliminating a potential competitor, it also is reasonable that it may be illegal by making the entry of *any* new competitors substantially more difficult and thereby weakening potential competition generally.

To find that a merger has one or even both of these effects is not necessarily conclusive on the question of its illegality. Eliminating one of many equally able and willing potential entrants would not substantially impair the efficacy of potential competition; nor would raising barriers to entry imperceptibly. And some competitive advantages that raise entry barriers seem a dubious predicate of antitrust illegality, since they reflect the kind of efficiencies—in production, distribution, and the like—that a pro-competitive policy is intended to promote. In addition, impairment of potential competition is likely to be harmless wherever the market is sufficiently unconcentrated that existing competition can be relied upon as a market regulator.

These qualifications require that the Commission and the courts proceed with care in judging a merger which affects only potential competition. But—as next we show—we believe that the Commission here proceeded with the requisite caution and that the court of appeals set aside the Commission's order basically because it rejected the underlying theory of the Commission sketched above—and, implicitly, the teachings of this Court which sustain that theory.

II

THE MERGER OF CLOROX AND PROCTER VIOLATED SECTION 7 BECAUSE IT SUBSTANTIALLY WEAKENED POTENTIAL COMPETITION IN THE HIGHLY CONCENTRATED HOUSEHOLD LIQUID BLEACH INDUSTRY

A. AT THE TIME OF THE MERGER, THE INDUSTRY WAS HIGHLY CONCENTRATED

We indicated in the preceding point that preserving potential competition is chiefly important in concentrated markets. Those are the markets where actual competition is likely to be weak. In atomistic markets, where actual competition is generally strong, the lesser restraint imposed by the threat of new entry ordinarily has little practical significance. The bleach industry, however, was highly concentrated at the time of the merger, and actual competition almost certainly quite feeble. Two firms accounted for 65 percent of the nation's sales, and six for 80 percent, the balance of the market being divided among a fringe of small producers. By all standards, the level of concentration was plainly very high.[30]

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[30] Professor Bain regards concentration as "high" where the 8 largest sellers account for 80 percent of the market's sales; here the 6 largest accounted for that amount. Bain, *Industrial Organization* (1959), p. 32. He suggests that oligopolistic interdependence in such industries is in general "very strong" (*id.*, p. 128; see, also, pp. 126–127). The bleach industry is approxi-

Moreover, the national figures tend to understate the degree to which the industry was actually afflicted with oligopoly conditions. Due to its high shipping cost, bleach cannot be transported great distances from plant; and only one firm—Clorox—had enough plants, strategically sited, to be able to sell anywhere in the nation. In some areas, Clorox faced no competition from other substantial bleach producers and its market share approached monopoly proportions; in others, it and one or two other leading producers together accounted for more than 80 percent of the market.[31]

Clearly, there is very great need to preserve effective potential competition in an industry as highly concentrated and oligopolistic as the bleach industry, where a single firm—Clorox—so patently dominated its competitors. Yet, the opinion of the court of appeals shows no recognition that potential competition was an interest worth preserving. Doubtless this re-

mately as concentrated as the metal can industry, which the Court in *United States* v. *Continental Can Co.*, 378 U.S. 441, 459, described as "highly concentrated". See, also, *United States* v. *Aluminum Co. of America*, 377 U.S. 271.

[31] Market shares of liquid bleach brands as shown by the Nielsen Food Index for nine territories were as follows (CX 325, R. 154x):

Section of the country	Clorox	Purex	Fleecy White	Hilex	Linco	Roman Cleanser	All others
New England	56.0	------	------	------	------	------	44.0
Metropolitan New York	64.3	------	------	------	------	------	35.7
Middle Atlantic	71.6	------	------	------	------	------	28.4
East Central	42.4	5.0	5.2	0.9	0.7	27.2	18.6
Metropolitan Chicago	28.6	0.1	18.9	0.1	50.3	------	2.0
West Central	34.5	20.6	9.0	25.8	2.1	------	8.0
Southeast	52.6	16.0	5.7	------	------	5.3	20.4
Southwest	48.1	39.6	3.9	------	------	------	8.1
Pacific	39.2	42.4	------	------	------	------	18.4

flects the court's belief that the industry was, in fact, vigorously competitive. Wholly ignoring this Court's teachings on the anti-competitive consequences of high concentration, the court found no indication of "anything unhealthy about the market conditions" (R. 1562). It justified this finding by reference to two facts. The first was the existence of a fringe of 200 small producers accounting for 20 percent of the nation's bleach sales. Plainly, however, such a fringe affords no assurance of effective competition with the market leaders, especially since the Commission found—on evidence not seriously disputed—that these were in the main very small, weak companies.

Secondly, the court noted that, after the merger, producers other than Clorox "were selling more bleach for more money than ever before" (R. 1562–1566). But Clorox in this period increased its market share from 48 to 52 percent, thus demonstrating its ability to expand more rapidly than its competitors, and indicating that the bleach industry is becoming more, not less, oligopolistic. The importance of preserving potential competition as a restraint upon the pricing and other business behavior of the existing bleach manufacturers, notably Clorox, is, therefore, greater, not less, than it was before the merger.

It remains only to show that the merger impaired the efficacy of potential competition substantially. We demonstrate this in two stages, considering first how the merger increased the difficulty of new entry, and secondly how it eliminated a vitally important prospective entrant.

B. THE MERGER SUBSTANTIALLY INCREASED THE DIFFICULTY OF ENTRY BY GREATLY ENHANCING CLOROX'S MARKET POWER

1. Any firm pondering entry into the bleach industry on any but the smallest scale would have to consider carefully its prospects for wresting substantial sales from the entrenched sellers, particularly Clorox, which has so large a sales share in all parts of the country. An obvious prerequisite to success would be to induce the grocer to give the new brand prominent shelf display, and the grocer would not do this unless the manufacturer had already "presold" his brand to the consuming public. Effective preselling of a new brand of bleach would require a campaign of advertising and promotion; and doubtless a costly and elaborate one would be required to overcome the established consumer preference for heavily advertised, long-familiar brands such as Clorox.

The difficulties of entry under such conditions should not be underrated.[32] But undoubtedly large firms experienced in the marketing of similar household products could—before the merger—have surmounted the difficulties. For, despite its powerful hold on the bleach industry, Clorox was a single-product firm of modest size in comparison to the major producers of low-price, rapid-turnover household

[32] The leading student of barriers to entry, Professor Bain, has described "product differentiation"—that is, the ability of a manufacturer to create a preference for his particular brand over other brands of the same product—as the most important barrier. *Barriers to New Competition* (1956), p. 216. Clorox's ability to charge a premium price for a bleach chemically identical to competing brands (see Statement, *supra*, pp. 4–5) would appear a prime example of successful product differentiation.

items—companies like Colgate-Palmolive, Lever Brothers, General Foods and, of course, Procter & Gamble. Clorox's advertising budget was less than $4 million annually, and its ability to respond to any firm willing and able to expend very large sums promoting a new brand of liquid bleach consequently quite limited. Procter, by spending more than $7 million in 22 months to advertise and promote a new brand of abrasive cleanser (Comet), was able to obtain a 36.5 percent share of the market in the face of competition from well-established brands like Ajax and Bab-O (Statement, *supra,* p. 16). The same could have happened in the bleach industry. The danger was real enough to have deterred Clorox and the other major sellers from raising the price of bleach to a level at which entry would have become attractive to one or more large companies in related product lines.

It does not matter whether in fact those companies pondered entry into the bleach industry—though Procter undeniably did (Statement, *supra,* pp. 17–18). Their capacity and incentive to enter, if entry became feasible and attractive because Clorox and its competitors were maintaining high prices and reaping abnormal profits, could not have been lost upon the members of the bleach industry. It could not have failed to induce them to exercise self-restraint in pricing their brands above a competitive level and in extracting profits greater than free competition would have determined. The merger removed much of the inducement by greatly strengthening Clorox's competitive position vis-à-vis any would-be entrant (as presently we show), as well as by taking out the likeliest challenger, Procter (as we show in the following subpart).

2. Clearly, the major competitive weapon in the successful marketing of bleach is advertising (including sales promotions). Clorox before the merger was limited in this area by the size of its advertising budget, by its inability to qualify for large discounts offered by the advertising media, and by its inability—as a single-product firm—to obtain the advantages of joint multi-product advertising and promotions. All of these limitations were removed by union with Procter, the nation's largest advertiser.

(*a*) As noted, Clorox's advertising budget before the merger was less than $4 million annually. Since this was 10 percent of its sales revenues, a substantial expansion of advertising expenditures would hardly have been feasible. Proctor's budget for advertising and sales promotions the same year was $127 million—more than 30 times larger than Clorox's. Procter, of course, sells many products, not one, and it would never expend in advertising and promoting the Clorox brand the sums that, theoretically, it could. But, equally obviously, Procter could readily expand Clorox's advertising budget to meet the short-term competitive threat posed by an attempt of a firm to enter the bleach industry with a new brand; it could (and doubtless would) respond to a massive advertising campaign on behalf of the new brand as Clorox, alone, could never have.[33]

[33] This Court has recognized the role of heavy advertising expenditures in the repulsion of new entry. In *American*

(*b*) Clorox spent more than $1 million on television advertising in the year before the merger, and while this may seem a large sum, it was not large enough to entitle Clorox to any network volume discounts. Nor did Clorox qualify for the sizeable volume discounts offered by leading magazines to large advertisers. The merger changed this. As part of the Procter family, Clorox is now entitled to the maximum discounts—25 to 30 percent—offered by the major networks, and to the magazine discounts as well. Thus, for the same sum of money, Clorox can today obtain substantially more advertising in the principal media than it could before the merger—or than any other bleach manufacturer could or can obtain. This has a twofold significance. On the one hand, it means that unless Procter actually curtails the Clorox advertising budget (an unlikely supposition—see p. 48 and n. 40, *infra*), the Clorox brand will probably be more heavily advertised than before the merger and hence

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Tobacco Co. v. *United States*, 328 U.S. 781, 797, it observed: "The record is full of evidence of the close relationship between * * * large expenditures for national advertising of cigarettes and resulting volumes of sales. * * * Such tremendous advertising * * * is * * * a widely published warning that these companies possess and know how to use a powerful offensive and defensive weapon against new competition. New competition dare not enter such a field, unless it be well supported by comparable national advertising." We do not suggest—nor did the Commission—that Section 7 would bar the acquisition of Clorox by *any* large advertiser. It may well be doubted that a firm without experience in the marketing of low-price, rapid-turnover goods would be likely to expend heavy sums to advertise the Clorox brand. And we stress that Procter's advertising budget is but one of a number of factors that—as will appear—the Commission considered in appraising the effects of the merger.

even more impervious to the inroads of a new brand that must struggle to win consumer acceptance.[34] On the other hand, it means that in the event of attempted entry Clorox can expand its advertising efforts with less financial difficulty than it could have before the merger. Both factors add significantly to the deterrence of new entry into the liquid bleach industry.

(*c*) A producer of many related items can frequently advertise and promote his products more effectively than a single-product firm. For example, television commercials are generally believed to be more effective when delivered during a program than when delivered between programs. The advertising message is reinforced in the viewer's mind if it is associated with a favorite program. Moreover, between programs the viewer is apt to be at his least attentive. As a single-product firm of modest size, Clorox before the merger did not, and doubtless could ill afford to, buy entire network programs. Now (as a unit of Procter) it can, and—quite apart from discounts—at a fraction of the cost. Not only is Procter a major purchaser of network programs; it typically advertises more than one product on each program, thereby giving several products network exposure at no higher cost than would be incurred in advertising a single product on a network program. And this is but one of several advertising advantages a multi-product firm like Procter enjoys in the television medium (see Statement, *supra*, p. 15).

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[34] In fact, since the merger, Clorox has received some advertising discounts not theretofore available to it (R. 711a, 1123a, 1130a).

Similar savings are possible through joint sales promotions. Procter has long combined several products in one contest, premium offer, store display, or other promotion, thereby reducing the cost per product of mailing, printing or otherwise disseminating the promotion. Promotions are thus relatively far more expensive for a single-product than for a multi-product firm, and, at the time of the merger, Clorox was not using any. Since the merger the Clorox brand has been featured in sales promotions in combination with other Procter products.[35]

To the extent that Clorox actually exploits these advantages, the result doubtless will be more effective preselling of the Clorox brand.[36] This will increase

[35] We point out, too, the marketing advantage Procter derives from having a direct sales force whose principal function is to assure that Procter products receive shelf space commensurate with their market share. A single-product firm like Clorox before the merger could not afford its own direct sales force; it used independent brokers. They carry products of other manufacturers and cannot concentrate on promoting Clorox. Procter's salesmen, on the other hand, can concentrate their efforts selectively on any Procter product that faces particularly strong competition. Procter has retained the brokers for now, but, should a need for aggressive merchandising of Clorox in competition with a new entrant arise, Procter could readily deploy its force on behalf of Clorox.

[36] A striking example of the advantages of multi-product firms—and of Procter & Gamble in particular—in marketing products of this kind is provided by *United States* v. *Lever Brothers Co.*, 216 F. Supp. 887 (S.D.N.Y.), which the Commission cited in its opinion (R. 398a). Monsanto—a large chemical company—was the first to develop a low-sudsing detergent, All, for automatic washing machines. This was the only low-price rapid-turnover consumer product that Monsanto sold. In 1954, Procter began selling a similar product, followed about six

the difficulty of a new competitor, who must, to succeed, persuade a substantial number of consumers to switch to his brand. To the extent that Clorox does not immediately exploit all of the advantages of a multi-product firm, they remain a latent threat that a prospective entrant must still consider, for actual entry is bound to evoke them.

3. The court of appeals brushed aside all of this evidence on the grounds, first, that, despite the merger, Clorox had not in subsequent years manifested any increased power and, secondly, that a merger should not be forbidden on the basis of "economies" that it makes possible. In the circumstances, neither ground is tenable.

(*a*) It may be true that since the merger [37] Clorox has been operated generally as before. It is hardly

months later by Colgate-Palmolive. Although Monsanto made substantial advertising expenditures on behalf of All, its market share declined from 100 percent in 1953 to 55.3 percent in 1956. In 1955, Monsanto lost $416,000 on All, and in March of the following year decided that it must either sell the All trademark or acquire other consumer products to advertise and distribute with All. Efforts to develop companion products failed, and it was decided to sell the All trademark. Several prospective customers were approached, but the sale was finally made to Lever Bros. (Purex was rejected as a possible purchaser because it lacked the capital required to "effectively * * * advertise and promote 'all'." 216 F. Supp. at 896.) The district court held the acquisition lawful on the ground of Monsanto's inability to market All in competition with the big "soapers," and its findings provide strong support for the proposition that even a large single-product firm has grave disadvantages in competing successfully against a large seller of many low-cost, rapid-turnover consumer products.

[37] The merger was in 1957. The record contains evidence through 1961.

to be wondered at that Procter has been reluctant to make sweeping changes that (1) might provide the Commission with additional evidence of illegality and (2) might represent a wasted investment should the merger ultimately have to be undone as a result of this proceeding. In addition, there has been no occasion for Clorox to flex its added competitive muscle; there have been no efforts at entry.

The court of appeals failed to appreciate that it is the ability of Procter to assist Clorox to repel new competition that is the essence of the deterrent which a Procter-Clorox combination poses to prospective entrants. Actual implementation of the latent advantages that the merger creates for Clorox remains secondary until entry is actually essayed. Nor can one rely on Clorox's being deterred from utilizing these advantages to repel attempted entry by fear that its conduct might be challenged as unfair or monopolistic, in violation of Section 5 of the Federal Trade Commission Act or Section 2 of the Sherman Act. To prove predatory use of advertising and promotions in the context of an ostensibly "defensive" response to new competition would present obvious difficulties—a consideration that underscores the appropriateness of prophylactic relief under Section 7.

Finally, the post-acquisition history—which the Commission did not ignore [38]—actually confirms the

[38] The Commission expressed the view that only in the rare case should post-acquisition evidence be given much weight. We believe this is consistent with the view of the Court in *Federal Trade Commission* v. *Consolidated Foods Corp.*, 380 U.S. 592, 598, that while post-acquisition evidence may be considered in a Section 7 case, it should not be "given conclusive

inference that the merger, by enhancing Clorox's competitive capabilities in precisely the area that is crucial to success in the sale of bleach—preselling the product to the consumer through advertising and sales promotions—has reduced the likelihood of new entry and thereby enlarged the area within which Clorox

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weight or allowed to override all probabilities," since "the force of § 7 is still in probabilities, not in what later transpired. That must necessarily be the case, for once the two companies are united no one knows what the fate of the acquired company and its competitors would have been but for the merger." At all events, the Commission carefully considered the post-acquisition evidence in this case, finding that it confirmed the inference of probable anti-competitive effect that it had drawn from the other evidence, noting particularly the continued growth of Clorox's market share (see Statement, *supra*, p. 19). Three other points might be mentioned. (1) In August 1956 Babbitt, Inc. entered the bleach business through acquisition of Vano Liquid Bleach. Early in 1958, that is, shortly after the Procter-Clorox merger, Babbitt decided to discontinue the manufacture of bleach. Its board chairman testified that since 1953 it had tried not to compete unnecessarily with the "soapers" (the large soap-detergent companies), and added: "* * * I feel that one of the contributing factors to our decision to discontinue [the sale of liquid bleach] was the acquisition of Clorox by Procter & Gamble, since it was obvious that we would not, under these conditions, entertain any thought of establishing a satisfactory franchise on Vano Liquid Bleach" (R. 361a). (2) After the merger, Clorox—using sales promotions that it had not been using at the time of the merger—broke up Purex's attempt to test-market a new bleach container in Erie, Pennsylvania. Shortly after, and at least partly because of, the Erie incident, Purex purchased the fourth largest bleach producer, John Puhl Products Company, in order to expand its geographical selling area (R. 1492a–1493a). Thus, it may well be that the Procter-Clorox merger has accelerated the trend toward concentration in the bleach industry. (3) Clorox has availed itself of some advantages of its union with Procter (see p. 43, *supra*, and p. 42, n. 34, *supra*). Entry is probably more difficult as a result (see pp. 41–42, 43–44, *supra*).

is free to increase price and profit without concern that new competitors will be attracted.

(*b*) We would agree with the court of appeals that, in general, advantages afforded by a merger which reflect simply greater efficiency ought not be a basis for holding the merger illegal; efficiency is, after all, a prime goal of antitrust. But that principle is inapplicable, we believe, to the circumstances of this case.

The most conspicuous cost advantage that Clorox is able to obtain by virtue of its union with Procter involves the volume discounts that the media afford very large advertisers like Procter. These discounts are available only to giant firms. Neither Clorox nor Purex qualified for them, though both are heavy advertisers and Purex is a diversified producer of consumer products with total annual sales of $50 million. These are not small advertisers; yet they must pay much more than Procter for the same television coverage. The inference seems inescapable that the network's discounts are unjustified concessions to their larger customers and would—but for the jurisdictional limitations of the Robinson-Patman Act—constitute price discriminations forbidden by that Act.[39]

[39] Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13, applies only to sales of "commodities", not services like advertising. It is probable, though, that discriminatory advertising discounts could be reached under Section 1 of the Sherman Act, 15 U.S.C. 1, or Section 5 of the Federal Trade Commission Act (unfair methods of competition), 15 U.S.C. 45. Cf. *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392, 395; *Grand Union Co.* v. *Federal Trade Commission*, 300

Even if the merger enabled actual cost savings in the advertising and promotion of Clorox bleach, it is doubtful that the consumer would benefit, either directly through lower prices or indirectly by freeing resources at present tied up in advertising for productive use elsewhere. It seems more likely that any such "savings" would simply be used to obtain greater advertising of the Clorox brand than Clorox could afford before the merger,[40] and thereby to enhance Clorox's ability to charge a premium price for a product physically indistinguishable from its competitors'. It would appear that there is hardly a lack of advertising in this industry and that Clorox has not suffered from underexposure of its brand to the consumer. The court of appeals itself suggested that advertising of liquid bleach may have reached the saturation point.

In short, reductions in the cost of advertising the Clorox brand, by enabling the industry's dominant firm to increase still further the intensity of its preselling efforts, *only* strengthen barriers to entry; for the adverse competitive effect that results from these cost advantages cannot be justified as necessary to give consumers needed additional information about the Clorox brand.

F. 2d 92 (C.A. 2). Assuming the advertising discounts in this case are unjustified, the case is much like *Federal Trade Commission* v. *Consolidated Foods Corp.*, 380 U.S. 592, where the Court held a merger illegal because it fostered the unfair and anti-competitive practice of reciprocal buying.

[40] Procter's promotion department, in recommending the purchase of Clorox assumed that Procter would not reduce Clorox's advertising budget, but, rather, obtain more effective advertising for the same expenditure (see Statement, *supra*, p. 19).

C. THE MERGER REMOVED AN IMPORTANT CHECK ON CLOROX'S EXPLOITATION OF ITS MARKET POWER—THE THREAT OF ENTRY POSED BY PROCTER

We have pointed out that Clorox's power over price was limited by the prospect that, should it raise its price too high above a competitive level, firms in related product lines—and particularly the big "soapers," Lever Brothers, Colgate-Palmolive, and Procter—would find entry into the bleach business both feasible and attractive. The likeliest of these prospective entrants was, surely, Procter. (1) It had recently, and very successfully, launched a new brand in an industry—abrasive cleaners—quite like bleach, wresting market leadership within two years from a brand that had enjoyed even a larger market share than Clorox in its industry (see Statement, *supra*, p. 16). (2) In the form of competition that is crucial in the bleach industry—advertising and promotions—Procter had, as we have seen, substantial advantages, as a large multi-product firm, vis-à-vis the much smaller, single-product, Clorox operation. (3) Procter was constantly on the lookout for new fields, closely related to its basic products, into which to diversify; [41] and bleach was a natural, being a product that is used by the housewife complementarily with soaps and detergents—Procter's major lines. (4) Procter had actually pondered the possibility of entering the bleach industry on its own.

[41] Procter's president testified that approximately 70 percent of Procter's household-product volume comes from products not in existence in 1946 (R. 298a). Between 1952–1957 Procter's net sales rose from $818 million to $1.15 billion (CX 6, R. 7x; CX 14, R. 18x)—an increase of 41 percent—and a substantial part

It is true that the promotion department at that time recommended against entry other than by acquiring Clorox. This—plus the fact that Procter had never attempted to enter the bleach industry on its own—persuaded the court of appeals to reject this branch of the Commission's analysis. In so doing, the court in our view again missed the significance of potential competition as a restraint upon oligopolisic conduct. The Commission itself declined "to speculate on * * * whether or not Procter, had its acquisition of Clorox been blocked, would in fact have entered the bleach industry on its own" (R. 455a). For, it pointed out, the value of potential competition as a salutary restraint upon abuses of power by monopolists and oligopolists (like Clorox) lies not only, or principally, in the likelihood that the potential competitor will soon become an actual one; the threat of future entry itself is a restraint, even if the threat does not soon materialize. This is because an oligopolist faced by such a threat will, as a matter of common business sense, avoid conduct calculated to attract the potential competitor into the market—like raising prices too far above the competitive level. It was thus quite appropriate for the Commission to conclude that Clorox's dominance was limited by the indisputable fact that Procter was ready, willing and able to produce liquid bleach itself in competition with Clorox if entry became attractive.

Absence of any internally manifested intent to enter the market is thus unimportant. Indeed, if Procter

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of this growth reflected the introduction of new brands, such as Comet cleaner, Zest toilet bar, and Crest and Gleem dentifrices, in industries where Procter had not previously sold (R. 553a–555a, 557a–558a; CX 6, R. 11x; CX 632A–D, R. 271x–277x).

had intended immediately to enter on its own, the implication would be that the threat of its entry had failed to deter Clorox from risking new entry by maintaining high prices. Furthermore, from the standpoint of deterring Clorox from exploiting the weakness of present competition, what matters is not what Procter's officials in fact thought of entering the liquid bleach industry other than by acquiring Clorox, but the objective appearances—all that Clorox had to go on. To Clorox, Proctor was, surely a continuing threat to enter. Indeed, a more likely entrant on a large scale into that industry is hard to conceive.

The present case may indeed be a classic instance of the efficacy of potential competition. Procter was clearly interested in entering the bleach industry, but Clorox apparently refrained from making conditions in the industry attractive enough to induce Procter to take the step; evidently, Clorox's price was low enough to discourage entry by a firm, like Procter, which undoubtedly has a high target rate of return.[42] This important restraint has been removed by the merger. Other prospective entrants doubtless remain; but, surely, not many that would be likely to challenge a firm as well entrenched as Clorox; and none so likely as Procter. Moreover, other large multi-product manufacturers, who might well have entered if the principal competitor was Clorox, probably have much less enthusiasm for the industry now that they must pit their competitive efforts against a firm with Procter's market power and advantages.

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[42] See CX 324, R. 150x–151x.

D. THE MERGER NOT ONLY REMOVED A RESTRAINT ON OLIGOPOLISTIC CONDUCT PROVIDED BY FIRMS OUTSIDE THE BLEACH INDUSTRY; IT ALSO TENDED TO CHILL SUCH COMPETITION—ACTUAL AND POTENTIAL—AS REMAINED IN THE BLEACH INDUSTRY AND TO DIMINISH THE PROSPECTS FOR THE INDUSTRY'S EVENTUAL DE-CONCENTRATION

Our emphasis thus far has been on the importance of preserving the potential competition of prospective entrants into the bleach industry as a check on the behavior of the existing producers, notably Clorox. But it is also important to note that the factors that make Clorox since the merger better able to repel entry by a complete newcomer to the industry also enhance its ability to repel competitive forays by existing bleach producers. Expansion by regional or local producers into areas they have not theretofore sold in, no less than entry by outsiders, is more likely to be deterred by a firm of Procter's capabilities than by the more modest, if still formidable, capabilities of Clorox before the merger.[43]

Moreover, the merger reduces the likelihood that eventually enough firms will enter the bleach industry to erode Clorox's undue market share and thereby produce a healthier, less concentrated, market structure. This Court has emphasized that it is an important goal of Section 7 to preserve the possibility of eventual deconcentration of highly concentrated industries and markets[44]—of which the bleach industry,

[43] The Erie incident may be a case in point here (see p. 46, n. 38, *supra*). And the record is replete with testimony that Procter is a far more feared competitor in the liquid bleach industry than Clorox was (R. 355a–361a, 787a, 912a, 946a, 972a–973a, 992a, 1016a, 1037a, 1094a).

[44] See *United States v. Philadelphia National Bank*, 374 U.S. 321, 365, n. 42; *United States* v. *Aluminum Co. of America*,

as we have seen, is a prime example (pp. 35–36, *supra*). It is difficult to foresee this development in the bleach industry unless there is extensive entry; there are at present no bleach producers capable of challenging Clorox. Hence it is essential that the likelihood of new entry not be reduced by mergers which, like the one challenged here, make entry substantially more difficult, and at the same time remove a leading prospect for entry.

These points, too, were summarily dismissed by the court of appeals, doubtless because of its erroneous view that competitive conditions in the industry were satisfactory. Yet, combined with the palpable effect of the merger on the effectiveness of potential competition as a restraint upon oligopolistic behavior in the bleach industry, they provide, we believe, ample support for the Commission's finding of illegality.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded with instructions to affirm and enforce the Commission's order.

Respectfully submitted.

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DECEMBER 1966.

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377 U.S. 271, 278; *United States* v. *Continental Can Co.*, 378 U.S. 441, 461.

APPENDIX

The exhibits cited in this brief were admitted in evidence at the following places in the record:

Ex. No.	*Admitted in evidence*
CX 6	R. 498a
CX 12	R. 500a
CX 14	R. 501a
CX 17	R. 501a
CX 18	R. 502a
CX 21A-B	R. 502a
CX 27	R. 503a
CX 111A-I	R. 504a
CX 153A-G	R. 506a
CX 279A-O	R. 507a
CX 323A-C	R. 582a
CX 324A-D	R. 582a
CX 325	R. 588a-589a
CX 336	R. 589a
CX 342	R. 611a
CX 348B	R. 612a
CX 413A-B	R. 674a
CX 420	R. 707a
CX 429A-B	R. 712a
CX 437	R. 720a
CX 438	R. 747a-748a
CX 447	R. 788a
CX 450	R. 796a
CX 454A-C	R. 754a
CX 529	R. 1083a
CX 534	R. 1088a
CX 538B	R. 1098a
CX 571A	R. 1154a
CX 573E	R. 1151a
CX 575	Tr. 3660
CX 632A-D	R. 1159a
CX 696A-J	R. 1503a
CX 702	R. 1504a
CX 710A-B	R. 42a-43a
CX 718A-F	R. 1529a-1530a
RX 83	R. 1306a
RX 112A-U	R. 1442a
RX 135B	R. 1544a

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