

IN THE MATTER OF
GENERAL MILLS, INC.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 3
OF THE CLAYTON ACT

Docket 6926. Complaint, Oct. 31, 1957—Decision, Sept. 19, 1959

Dismissal, for failure of proof, of Count II of complaint charging violation of Sec. 3, Clayton Act, in that respondent had unlawful exclusive-dealing sales contracts with Grand Union supermarket food chain under which the latter agreed not to handle sponges made by duPont.
Count I was settled by consent on Sept. 10, 1959, p. 295, herein.

Before: *Mr. John Lewis*, hearing examiner.

Mr. Donald R. Moore and *Mr. Charles J. Steele* supporting the complaint.

Davis, Polk, Wardwell, Sunderland & Kiendl, by *Mr. James J. Higginson*, of New York, N.Y.; and *Mr. John F. Finn*, of Minneapolis, Minn., for respondents.

INITIAL DECISION AS TO COUNT II OF COMPLAINT

STATEMENT OF PROCEEDINGS

The Federal Trade Commission issued its complaint against the above-named respondent on October 31, 1957, charging it with having violated the provisions of Section 2(d) and Section 3 of the Clayton Act, as amended (15 U.S.C. Sections 13 and 14), in connection with its sale and distribution of sponges in commerce. Copies of said complaint and notice of hearing were duly served upon respondent. Said complaint charges respondent, in Count I thereof, with having made certain discriminatory advertising allowances to certain of its customers, including The Grand Union Company, and in Count II with having entered into preclusive sales contracts with The Grand Union Company, pursuant to which the latter agreed to refrain from handling the products of one or more of respondent's competitors. Following service of the complaint upon it, respondent appeared by counsel and filed answer to such complaint denying, in substance, the violations charged.

Thereafter, and following a series of postponements to enable counsel for the parties to negotiate a stipulation of facts covering a number of the material facts in the proceeding, a hearing was held on July 28, 1958, in New York, New York. At said hearing counsel supporting the complaint requested that leave be granted to limit the presentation of evidence to Count II of the complaint, inasmuch as counsel for the parties were negotiating an agreement with respect to Count I thereof which would dispose of such count without the necessity of holding a hearing. There being no objection, the hearing proceeded with respect to Count II. A stipulation of facts pertaining thereto was spread upon the record, and the testimony of several witnesses and various documentary evidence were offered in support of the complaint. All parties were represented by counsel, participated in the hearing and were afforded full opportunity to be heard and to examine and cross-examine witnesses.

At the close of the evidence offered in support of the complaint further hearings were suspended, pending the filing by respondent of a motion to dismiss the complaint. Thereafter a motion, together with a supporting memorandum, was filed by counsel for respondent

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to dismiss Count II of the complaint on two grounds, viz., that (1) upon the facts and law no right to relief has been shown and (2) the maintenance of this proceeding is no longer in the public interest. A memorandum brief in opposition to respondent's motion to dismiss was subsequently filed by counsel supporting the complaint, and a reply to the memorandum of counsel supporting the complaint was thereafter filed by counsel for respondent.

Subsequent to the holding of the hearing with respect to Count II of the complaint, the parties entered into an agreement purporting to dispose of Count I without hearing. Said agreement has heretofore been submitted to the hearing examiner and is the subject of a separate initial decision. Accordingly, no further reference to such count need be made herein.

After careful consideration of the motion to dismiss Count II of the complaint and the memoranda filed in support of and in opposition thereto, the examiner has concluded that on the facts and the law counsel supporting the complaint have established no right to relief and that the motion to dismiss should, accordingly, be granted. Consequently, upon consideration of the entire record herein and from his observation of the witnesses, the hearing examiner makes the following:

FINDINGS OF FACT

1. General Mills, Inc. (hereinafter called General Mills) is a corporation organized, existing and doing business under the laws of the State of Delaware. Prior to March 1, 1958, its headquarters was located at 400 Second Avenue South, Minneapolis, Minnesota, and since that date has been located at 9200 Wayzata Boulevard in the same city. It is now, and for many years has been, engaged in the production and sale of flour and other grain products, feeds, soybean products, chemicals, sponges and sponge products. Its gross annual sales of all products were \$516,052,804 in the fiscal year ending May 31, 1956, and \$527,701,677 in the fiscal year ending May 31, 1957.

2. General Mills entered the sponge business in 1952 by the purchase of the assets of O-Cel-O, Inc., a New York corporation engaged in the manufacture and sale of cellulose and polyurethane sponges and sponge products. Between 1952 and 1957 the operations of General Mills in connection with the manufacture, distribution and sale of sponges and sponge products were conducted through its O-Cel-O Division, with headquarters in Buffalo, New York. During most of this period, i.e., from July 1, 1954 to September 30, 1957, the sale of sponges and sponge products were made through 70 inde-

pendent food brokers representing the O-Cel-O Division throughout the United States.

In September 1957 there was a complete reorganization of the General Mills sponge operation in which the O-Cel-O Division was abolished and full responsibility for the manufacture and sale of sponges was transferred to the Grocery Products Division of General Mills in Minneapolis. The sale of sponges through brokers was discontinued and the key officials who were in charge of the operations and sales of the O-Cel-O Division were separated from the company.

3. General Mills has a plant for the manufacturing of sponges and sponge products at Tonawanda, New York, and an office and processing plant at 1200 Niagara Street, Buffalo, New York. It sells its sponges to customers with places of business located throughout the several states of the United States and in the District of Columbia, for resale to consumers in the United States. Its customers include retail grocery chains, supermarkets and independent retail grocery stores. Among its retail grocery chain accounts are: Acme, Atlantic & Pacific, Bohack, Big Ben, Dilbert, Gristede, Food Fair, Hills, Safeway and Stop 'n Shop. General Mills' sales of sponges and sponge products amounted to \$4,777,000 in the fiscal year May 31, 1956, and \$4,063,000 in the fiscal year ending May 31, 1957.

4. General Mills is now, and for many years has been, engaged in "commerce," as that term is defined in the Clayton Act. It transports or causes to be transported its products from the state of manufacture to customers located in other states of the United States and in the District of Columbia. There is, and has been, a constant stream of trade and commerce in these products among the various states and the District of Columbia.

5. In the course and conduct of its business in commerce, as above found, General Mills is, and since 1952 has been, in competition with other corporations, persons, firms and partnerships in the sale and distribution of sponges and sponge products in commerce. Its principal competitors have been and are E. I. duPont de Nemours & Company of Wilmington, Delaware; Nylonge Corporation of Cleveland, Ohio; Burgess Cellulose Company of Freeport, Illinois; Ivalon Division of Simonize Company of Chicago, Illinois; and American Sponge and Chamois Company of New York, New York. These five companies and General Mills together account for approximately 80 percent of the sales of sponges and sponge products in the Eastern United States.

6. The contract which is the subject of Count II of the complaint was entered into in January 1955, while General Mills' O-Cel-O Division was being represented in the New York metropolitan area

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by the independent brokerage firm of Gash, Ferolie Corporation (hereinafter called Gash), of 162 East 64th Street, New York, New York. Gash was and is a food broker, selling primarily to the grocery trade, and O-Cel-O products were only one type of a wide variety of grocery trade products, produced by many different manufacturers, handled by it.

7. Among the customers of General Mills in the sale of sponges and sponge products is The Grand Union Company (hereinafter referred to as Grand Union), which has its headquarters in East Paterson, New Jersey and operates a chain of retail grocery stores and supermarkets selling a great variety of edible and non-edible household products. There are approximately 340 stores operated by Grand Union in five divisions located in Vermont, Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, and other Atlantic seaboard and eastern states. Grand Union also owns all of the stock of two other grocery chains, one of which operates in Canada and the other in Washington, D.C., Maryland and Virginia. General Mills sponges and sponge products were sold to Grand Union through its broker, Gash, during the period from October 1954 to September 1957.

Grand Union purchased from General Mills for resale, sponges and sponge products which were shipped by General Mills to Grand Union stores or Grand Union warehouses located in states other than that from which General Mills made the shipments. Grand Union maintained warehouses in the State of New Jersey and shipped General Mills sponges and sponge products from such warehouses into the State of New York for ultimate sale in retail stores to consumers.

8. The gross sales volume of Grand Union and subsidiaries for the fiscal year ending March 3, 1956, was \$283,003,166, and for the year ending March 2, 1957, was \$374,155,488. Grand Union's sponge purchases from General Mills were as follows, for the years indicated:

1953	-----	\$14,913.95
1954	-----	19,092.40
1955	-----	45,861.80
1956	-----	60,402.31
1957	-----	28,236.00
1958 (through June 30)	-----	10,870.00

Sales to Grand Union through September 1957 were made by the O-Cel-O Division of General Mills and thereafter were made directly by General Mills.

9. On or about January 5, 1955 a contract was executed between the O-Cel-O Division of General Mills and Douglas Leigh, Inc., an

advertising company of New York, New York, which was the owner and operator of an electric spectacular display sign located in Times Square, New York City. Said sign contained a stylized representation of a Grand Union food market and an electrically animated cartoon panel which communicated the messages of participating advertisers. The agreement related to the advertising of General Mills sponges and sponge products on the spectacular sign. The effective period of the contract and its renewal expired on December 14, 1956.

10. Substantially contemporaneous with the agreement between General Mills and Douglas Leigh, General Mills' broker, Gash, entered into an agreement with Grand Union, which was embodied in a letter dated January 6, 1955, addressed to Grand Union by Gash. The letter agreement referred to the agreement with Douglas Leigh and to certain in-store advertising which was to be coordinated with the spectacular sign. Most of the agreement between O-Cel-O and Grand Union, as reflected in the letter of January 6, 1955, is immaterial to the disposition of Count II of the complaint, except for paragraph 2 of such letter, which provides:

The Grand Union Company agrees to discontinue the sale of DuPont sponges.

The agreement pursuant to which Grand Union was to discontinue its purchase of duPont sponges was preceded by a period of negotiation between Grand Union and Gash, in which Gash sought to induce Grand Union to discontinue Nylonge sponges as well as duPont sponges, as the quid pro quo for General Mills agreeing to participate in the Broadway sign and make further advertising expenditures in connection with the sale of its sponges in Grand Union stores. Grand Union refused to accede to this request. It did agree, in the letter agreement of January 6, to give "serious and sympathetic consideration to the stocking of O-Cel-O's wet pack sponges" when this new item became available in several months, but it did not agree to discontinue the comparable Nylonge sponge at that time.

11. During 1954 Grand Union's total purchases of sponges amounted to approximately \$75,500. Its purchases of sponges, other than O-Cel-O sponges, were approximately as follows:¹

duPont	\$39,500
Ivalon	10,000
Nylonge	12,500

¹ The figures cited are apparently rough approximations since the exhibit in the record from which such figures are taken gives the purchases of O-Cel-O sponges as \$13,500, whereas the stipulation entered into by the parties cites the 1954 O-Cel-O purchases as being \$19,092.40.

Following the agreement between General Mills' broker and Grand Union in January 1955, Grand Union ceased the purchase of duPont sponges, although it continued to sell the duPont sponges which it then had on hand in its warehouse for some undisclosed period until the existing supply was exhausted.² The purchase of duPont sponges was not resumed until February 1957, after General Mills participation in the Broadway spectacular sign had ceased. During the intervening period Grand Union continued to purchase Ivalon and Nylonge sponges, although the amount thereof is not revealed by the record except for the year 1954. It also appears that sometime in 1955 Grand Union began to purchase Amsco sponges manufactured by American Sponge and Chamois Company, but the amount thereof does not appear from the record.

12. The only indication in the record of General Mills' position in the New York metropolitan market with respect to its sponge business is the statement in a letter from its broker Gash to Grand Union, dated November 23, 1954, when he was seeking to obtain a larger share of the Grand Union business, that—

* * * the O-Cel-O Company enjoys practically 100 percent distribution in the market. In fact, the only chain that doesn't stock it is Safeway.

The only reference in the record indicative of duPont's position in the same market is a statement appearing in an interoffice memorandum by a Grand Union official, who was considering the proposal to stop buying duPont and Nylonge sponges, that duPont sponges were carried only by Grand Union and Safeway "of the major chains in this area." The same source also refers to Nylonge sponges as being carried only by Grand Union and American Stores "of the major chains."

CONTENTIONS AND CONCLUSIONS

Section 3 of the Clayton Act makes it unlawful for any person engaged in commerce, in the course of such commerce, to sell goods on the condition, agreement or understanding that the purchaser will not use or deal in the goods of a competitor or competitors of the seller, where the effect of such arrangement "may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

There is no serious dispute as to most of the basic facts. It is conceded that General Mills is engaged in commerce and that its sales to Grand Union were made in the course of such commerce.

² While the agreement provides that General Mills would "discontinue the sale of duPont sponges," it was understood and interpreted by the parties as permitting the disposition of duPont sponges which were then in stock.

For purposes of this proceeding it is conceded that the broker for General Mills' O-Cel-O Division was authorized to enter into the agreement or arrangement pursuant to which Grand Union agreed that it would cease the further purchase of duPont sponges. There is some uncertainty in the record as to the geographic or market area in which the agreement was to operate and as to its duration. General Mills' broker was under the impression that the agreement not to purchase duPont sponges only applied to the Grand Union stores in the New York metropolitan area where he represented General Mills, whereas Grand Union's understanding of the arrangement was that it was to cease purchasing such sponges for all of its 340 stores in the Eastern United States. For purposes of this decision the hearing examiner will assume that the agreement applied to all Grand Union stores in the Eastern United States.

The agreement is silent with respect to the period of its duration. However, the testimony of General Mills' broker and that of a representative of Grand Union indicates that they understood the arrangement as being coterminous with the separate arrangement between General Mills and Douglas Leigh pertaining to the former's participation in the Broadway spectacular sign, on which Grand Union was featured. The original agreement to participate in the sign was for a period of one year and was renewed on April 20, 1956, which renewal expired on December 14, 1956.

The basic question at issue is whether there is sufficient evidence in the record to warrant a finding that the arrangement between General Mills and Grand Union, pursuant to which the latter agreed to cease its purchase of duPont sponges, "may tend to substantially lessen competition or tend to create a monopoly in any line of commerce." For purposes of deciding this question, the examiner must, of course, view the evidence and all inferences therefrom in the light most favorable to counsel supporting the complaint, as counsel for respondent concede. *Vulcanized Rubber and Plastics Co.*, 52 FTC 533.

It is the position of counsel for respondent that there is no record basis for any finding of probable lessening of competition or tendency to monopoly since the record fails to establish that General Mills is a dominant factor in the sponge market in the United States or in the eastern portion thereof, or that competition has been foreclosed in a substantial share of the sponge market. In the latter connection, respondent urges that there can be no substantial foreclosure of competition where a competitor is excluded from the outlets of only a single customer. Counsel supporting the complaint argue that it is unnecessary to establish that General Mills dom-

inated the sponge market, and that from the facts with respect to its total sales of sponges, the number of Grand Union stores involved, and the quantity of duPont products foreclosed by the arrangement, the probability of a substantial lessening of competition may be inferred.

Counsel for both sides are in agreement that, on the one hand, it is not necessary to show that there has been any actual injury to competition in order to meet the statutory requirement of a probable substantial lessening of competition, and that, on the other hand, Section 3 is not a per se statute, so that there must be an affirmative showing of facts, beyond the mere preclusive agreement, sufficient to give rise to an inference that the arrangement will have a probable substantial adverse competitive impact. The main disagreement between counsel is as to the operative facts which will support such an inference. The position of counsel for respondent appears to be that there must be a general sales policy of an exclusive nature by a dominant producer, tying up a substantial proportion of the outlets in the line of commerce affected, before it can be found that such agreement will have the statutory effect. The argument of counsel supporting the complaint, on the other hand, appears to suggest that if the quantum of commerce tied up by the arrangement is more than "insignificant or insubstantial," the statutory test is met, without any proof as to the seller's relative position in the market or as to the relative proportion of the share of commerce affected.

While the hearing examiner is not in agreement with some aspects of the argument of counsel for respondent, particularly with respect to the requirement for showing dominance by the seller, the position of counsel supporting the complaint is even less tenable. Much of the confusion in the argument springs from the attempt to apply the holdings of the "tying" cases to the instant situation. From the supposed holding of such cases that the producer must have a monopolistic or dominant position with respect to the tying product, respondent seeks support for its contention that a failure in the evidence to show such a position on the part of General Mills is a fatal weakness in the case of counsel supporting the complaint. From the holding of such cases that a seller possessing such power violates the law if the amount of commerce in the tied product is more than inconsequential, counsel supporting the complaint seek support for their position that the requisite showing of potential injury has been made. The trouble with both arguments is that this is not a "tying" case.

A tying arrangement involves—

* * * an agreement by a party to sell one product on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. *Northern Pacific Railway Co. v. U.S.*, 356 U.S. 1, 5.

Since "tying arrangements serve hardly any purpose beyond the suppression of competition" (*Standard Oil Co. of California v. U.S.*, 337 U.S. 293, 305-306), they are considered "unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected. *International Salt Co. v. U.S.* 332 U.S. 392." *Northern Pacific Railway Co. v. U.S.*, *supra*, at 6.

In the tying cases, proof of a monopolistic or dominant position in the market for the tying product has been deemed sufficient to establish the probability of competitive injury, within the meaning of Section 3 of the Clayton Act, with very little evidence, if any, with respect to the amount of commerce involved in the tied product. In one of the earliest tying cases, *United Shoe Machinery Corp. v. U.S.*, 258 U.S. 451 (1922), a seller occupying a "dominant position" in the shoe machinery industry was deemed to have violated Section 3 of the Clayton Act by contracts tying the purchase of other types of machinery and supplies to the lease of the machine in which it enjoyed dominance, without any showing as to the volume of commerce involved with respect to the tied products.³ In *International Salt Co. v. U.S.*, 332 U.S. 392, 396, the lessor of a patented machine for dispensing salt, which was leased on condition that the lessees purchase salt sold by lessor, was held to have violated both Section 3 of the Clayton Act and Section 1 of the Sherman Act upon a showing that the lessor enjoyed monopolistic control over the patented machine and that the amount of commerce in salt which was tied up by the arrangement was "not insignificant or insubstantial."

However, while proof of a monopolistic or dominant position over the tying product, with little more, is deemed sufficient to establish a Section 3 Clayton Act violation, it does not follow that proof of dominance is a *sine qua non* to the establishment of such a violation. This was made abundantly clear by the Supreme Court in *Times-Picayune Publishing Co. v. U.S.*, 345 U.S. 594, 608, when it stated:

³ See *Times-Picayune Publishing Co. v. U.S.* 345 U.S. 594, 606, interpreting the *United Shoe* case as involving a situation where the necessary proof of competitive effect was based on the seller's dominant position with respect to the tying product, "without more."

From the "tying" cases a perceptible pattern of illegality emerges: When the seller enjoys a monopolistic position in the market for the "tying" product, or if a substantial volume of commerce in the "tied" product is restrained, a tying arrangement violates the narrower standards expressed in § 3 of the Clayton Act because from either factor the requisite potential lessening of competition is inferred.

The Court in the *Times-Picayune* case went on to hold that for purposes of establishing a Section 1 Sherman Act violation, proof of both elements was necessary. However, this holding, insofar as it appeared to require proof of dominance in a Sherman Act case was later modified in *Northern Pacific Railway Co. v. U.S.*, *supra* at 6, where it was held to be sufficient to show that the party charged had "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product * * *."

Since tying contracts are deemed to "serve hardly any purpose beyond the suppression of competition," the courts have required a minimal showing with respect to the amount of commerce involved in the tied product whenever it appears that the seller or lessor enjoys a monopolistic or dominant position in the tying product, or has sufficient economic power therein to use it as leverage against users of the tied product. The vice of such arrangements does not lie in the minor amount of commerce involved in the tied product but, as expressed by the court in an early case (upon which counsel supporting the complaint place considerable reliance), in the fact that the seller "seeks by contract to extend * * * the monopoly of the patent to supplies not covered by the patent." *Oxford Varnish Corp. v. Ault*, 83 F. 2d 764, 766 (CA 6, 1936). In other words, it is the effort to extend a monopolistic or dominant position to another field with which the law is concerned in most tying cases, rather than with the amount of commerce involved in the tied product. Consequently counsel supporting the complaint can receive little comfort from the fact that a very minor amount of commerce in the tied product was involved in many of such cases, since the holding of probable effect was based primarily on the seller's strong position in the tying product. On the other hand, it is also clear from the tying cases that a Section 3 Clayton Act violation may be found to exist, even without proof of dominance or the equivalent, where the substantiality of the commerce tied up is of such proportions as to support an inference of probable lessening of competition.

The instant case does not involve a tying arrangement, i.e., an effort to use economic power in one field as leverage for acquiring power in another. Consequently the concept of dominance, as devel-

oped in the tying cases, is not apposite. Conversely, the holding of such cases with respect to the minor amount of commerce in the field of the tied product which is required to be shown, where a seller is dominant in the field of the tying product, has limited application.

The arrangement here involved falls within the general category of what is known as requirements contracts, in which the restrictive element of the arrangement has no connection with another field of commerce. Typically, such contracts require the buyer to purchase all of his requirements of a given product from the seller, or conversely, not to purchase such products from anyone else. The arrangement in this case involves a less extreme version of such contracts, in that the buyer is not required to buy all of his requirements of the product in question from the seller or to cease buying them from all other competitors, but only to refrain from buying them from one of the seller's competitors.

It has been recognized that, unlike tying agreements which "serve hardly any purpose beyond the suppression of competition" requirements contracts "may well be of economic advantage to buyers as well as sellers." *Standard Oil Co. of California v. U.S.*, *supra*, at 306. Consequently, while the statute makes no distinction between tying and requirements-type cases, the courts have tended to require a stronger showing in the latter cases to support an inference of probable adverse competitive effect. The inquiry in such cases has not centered, as in the tying cases, primarily on the seller's important position in the field of the tying product and only incidentally on his position in the line of commerce of the tied product, but rather on the substantiality of the foreclosure in the line of commerce tied up or limited by the preclusive agreement.

As stated in the *Standard Stations* case (*Standard Oil Co. of California v. U.S.*, *supra* at 314), the test applied in requirements cases is whether "competition has been foreclosed in a substantial share of the line of commerce affected." While counsel supporting the complaint nominally accept the test in the *Standard Stations* case as controlling, they interpret the affirmative requirement of that case that the share of commerce foreclosed must be "substantial," as tantamount to the negative test applied in the tying cases to dominant sellers, viz., that the amount of commerce involved in the tied product be *not* "insignificant or insubstantial." However, as already pointed out, the basis of the prediction of probable adverse competitive effect in the tying cases is based on the dominance or near dominance of the seller in the field of the tying product and the effort

to extend that position to another field, rather than the minor amount of commerce in the tied product.

Aside from this tendency to interpret "substantial" as equivalent to the "not insignificant" test used in the tying cases, counsel supporting the complaint attempt, incorrectly, to treat substantiality as a single-dimensional concept. Their position appears to be that substantiality can be determined solely from the number of outlets and amount of commerce tied up by the agreement, without any comparison with the total number of outlets or total amount of commerce in the line of commerce involved. However, in the opinion of the examiner, such a determination can very rarely be made on such a single-dimensional basis. Counsel supporting the complaint rely, in this respect, on the District Court's decision in the *Standard Stations* case (78 F. Supp. 850, 875), where it was found that the exclusive contracts covered "a substantial number of outlets and a substantial amount of commerce, whether considered comparatively or not." It is not entirely clear what the court meant by the phrase "whether considered comparatively or not." However, from the evidence in the record of a comparative nature, the examiner interprets this reference, as did the Supreme Court, to be to statistical evidence "on the comparative status of Standard and its competitors before and after the adoption of that [exclusive] system." While that type of comparative evidence may be unnecessary, since it relates to actual injury, this does not mean that comparative evidence may not be required to furnish the basis for an informed judgment as to the substantiality of the number of outlets and amount of commerce involved.

In any event, whatever may have been the opinion of the District Court in the *Standard Stations* case, it is clear that the Supreme Court's affirmance of its conclusions was based on the existence of significant evidence in the record of a relative or comparative nature. The Court noted the fact that the gross business of \$58,000,000 tied by the defendant's requirements contracts involved 6.7 percent of the gasoline business in the western area, and that the 5,937 stations constituted 16 percent of the retail outlets in the area. The Court noted that while Standard Oil did not "by itself dominate the market," it was "the largest seller of gasoline in the area" and was a "major competitor." Also considered by the Court was the fact that its six leading competitors also used exclusive contracts and between them controlled 42.5 percent of the gasoline sold in the area. With this factual background the Court concluded:

* * * it is clear that the affected proportion of retail sales of petroleum products is substantial. In view of the widespread adoption of such contracts by Stand-

ard's competitors and the availability of alternative ways of obtaining an assured market, evidence that competitive activity has not actually declined is inconclusive. Standard's use of the contracts creates just such a potential clog on competition as it was the purpose of § 3 to remove wherever, were it to become actual, it would impede a substantial amount of competitive activity.

In all the other cases following the *Standard Stations* case, there has been evidence over and above the mere quantitative amount of commerce foreclosed, from which it could be found that such amount constituted a "substantial share" of the line of commerce involved. In *Anchor Serum Co. v. FTC*, 217 F. 2d 867 (CA 7, 1954), cited by counsel supporting the complaint, not only did it appear that respondent was "the largest producer" in its field, and had entered into exclusive dealing contracts with 16 of its distributors some of whose purchases exceeded \$500,000, but that two of the distributors were the largest distributors in the two states which were the largest market for the product in the United States. In *Dictograph Products, Inc.*, 217 F. 2d 821 (CA 2, 1954), not only did it appear that the amount of business covered by the contracts was of the order of magnitude of \$2,000,000, but that such contracts "foreclosed competitors from dealing with more than 22% of the nation's choicest retail outlets * * *." Also noted by the court was the fact that respondent was "one of the top three in the business, and at least two other leading manufacturers maintain effective control of a substantial number of established distributors by means of similar restrictive, exclusive-dealing agreements."

Other recent decisions of the Commission, which have not reached the court of appeals, contain similar evidence indicating the relative amount of the commerce foreclosed or other facts from which the substantiality thereof and the probability of a substantial lessening of competition could be inferred. In the *Revlon* case, 51 FTC 260, not only did it appear that respondent was "the leader and is dominant" in its field, but that the jobbers whom it had tied up constituted 17 percent of the jobbers who were "recognized by competitors as being the very best jobbers in the field." Respondent's sales to these jobbers amounted to approximately one and a half million dollars. In the *Harley-Davidson Motor Co.* case, 50 FTC 1047, the respondent was found to be the "largest manufacturer of motorcycles in the United States" with sales of over \$15,000,000, was the "dominant domestic factor" in an industry in which few domestic producers remained, and had tied up by exclusive contracts approximately 800 dealers who constituted "the largest and best dealer organization

in the field." In the *Outboard, Marine & Manufacturing Co.* case, 52 FTC 1553, respondent's percentage of the market was found to be between 32 percent to 50 percent during the postwar period, and it was found to be a dominant or at least a substantial factor in the market. It had tied up by exclusive agreements dealers who accounted for at least one-third of the outlets in the industry.

The most recent case to come before the Commission, *Insto-Gas Corp.*, Docket 5851, December 19, 1957, would appear to dispose of counsel supporting the complaint's position that a finding of substantiality can be based on a single-dimensional showing regarding the quantity of commerce involved in an exclusive arrangement. In that case respondent had entered into tying agreements with dealers to which it leased gas cylinders requiring that only gas sold by respondent would be used in refilling such cylinders. The record disclosed that respondent's sales of propane gas were approximately \$300,000, of which "the great majority" involved gas used in the cylinders in question. In that case it was held, contrary to the position urged by counsel supporting the complaint, that it could not be determined whether the amount of commerce foreclosed by such agreements was substantial merely on the basis of these figures and "without any comparison with sales by competitors or any information as to respondent's comparative standing in the industry."

Counsel supporting the complaint seek to distinguish the instant case from the *Insto-Gas* case on the ground that it involved a tying arrangement, whereas the present proceeding does not. This, however, is a distinction without a significant difference. As already noted, in most tying cases the finding of probable injury is based on the seller's dominance in the field of the tying product. Such evidence was lacking in the *Insto-Gas* case. However, as indicated in *Times-Picayune*, an alternative basis for a finding of probable injury is the showing that "a substantial volume in the 'tied' product is restrained." This alternative basis is equivalent to the "substantial share of the line of commerce affected" in the requirements cases. It is clear from the holding in the *Insto-Gas* case that a finding of substantiality cannot be made based merely on a single-dimensional showing that the amount of commerce restrained was in excess of \$150,000.

While seeking to distinguish the *Insto-Gas* case on the ground that it was a tying case, counsel supporting the complaint themselves rely on a number of tying cases to support their position as to the minimal showing which need be made with respect to the amount of commerce restrained by a preclusive agreement. They cite the *International Salt* case, 332 U.S. 392, in which the company's sales

in the tied product amounting to \$500,000 was found to be "not insignificant or insubstantial." Also cited is *Oxford Varnish Corp. v. Ault*, 83 F. 2d 764, in which the fact that the seller's business in the tied product was only one-half of one percent of the national business did not prevent a finding of a violation of Section 3. Counsel overlook the fact that in the *International Salt* case the company had a monopoly in the machine to which it was seeking to tie its sales of salt, and that it was this, rather than the "more than insignificant" volume of business in salt, that was the primary basis for the Court's holding. As previously noted, in the earlier *United Shoe Machinery* case, Section 3 was held to be violated without any showing at all as to the volume of commerce in the tied product, since it appeared that the seller was dominant in the tying product. In the *Oxford Varnish* case the basis of the court's holding was not the negligible share of commerce in the tied product, but the fact that the seller had a monopoly in the tying product and was seeking "to extend the monopoly of the patent to supplies not covered by the patent."

The evidence which counsel supporting the complaint contend establishes a prima facie case of potential substantial lessening of competition falls into two main categories, (a) that relating to respondents alleged position as a leading producer and (b) that relating to the alleged substantiality of the commerce foreclosed. The evidence with respect to each is discussed below.

(a) *Position of General Mills.* Counsel supporting the complaint argue that because respondent is "a large national seller of grocery and related products" and because its sponge sales are "substantial" that this constitutes it "a leading or major * * * seller." The short answer to this argument is that respondent's other sales in its diverse line, including flour and other grain products, feeds, soybean products and chemicals, have nothing to do with its status in the line of commerce here involved. The figures for this miscellany of products cannot be married to its sponge sales to constitute it a leading producer. This is not a case of using economic power in one field as leverage in another.

Nor does the fact that respondent's sponge sales exceed \$4,000,000 annually, or the fact that it is one of six companies which, together, account for 80 percent of the sponge sale in the Eastern United States, mean anything. Since there is no evidence as to the total sponge sales in the industry, there is nothing to which to relate the \$4,000,000 figure. Likewise, there is nothing to indicate what proportion of the 80 percent figure is accounted for by respondent's sales. For aught that appears from the record, it may be the smallest

of the six producers and may have only one percent, or even less, of the 80 percent figure attributed to all six companies.

Counsel supporting the complaint also cite the "practically 100% distribution" of respondent's sponges among chain stores in the market, as being indicative of its leading position in the market. Assuming the accuracy of the puffing statement made by respondent's broker in seeking to enlarge its sponge business with Grand Union, it has little meaning by itself. There is nothing to indicate that it is a major seller in such chain stores or as to the proportion of sponges sold in chain stores, as compared with the rest of the sponge market in the Eastern United States.

(b) *Substantiality of Market Foreclosed.* The evidence concerning foreclosure is on a par with that relating to respondent's position in the market. While, as previously noted, dominance or leadership in the market is not an indispensable element in a Section 3 case, its presence has a bearing on the substantiality of the commerce foreclosed, and the probability of injury. Where the evidence fails to establish market leadership, a stronger showing with respect to the share of the market foreclosed would appear to be required to support an inference of probable lessening of competition. In any event, the evidence here involved fails to establish substantial foreclosure under any standard of measurement.

The facts on which counsel supporting the complaint rely are, (1) that duPont sponges were foreclosed from approximately 300 Grand Union stores, (2) that duPont was one of respondent's "principal competitors," (3) that duPont sponge sales prior to the preclusive agreement was \$39,500 and accounted for approximately half of Grand Union's sponge purchases, and (4) that respondent's sponge sales increased from \$19,092 to \$45,861 during the first year of the agreement and to \$60,402 in the second year.

These facts, separately or in combination, fail to establish substantial foreclosure. Since there is no evidence as to the proportion of sponge sales in the Eastern United States or in the New York metropolitan area which is made through Grand Union stores, there is no basis for determining whether the amount of commerce which duPont lost or which respondent gained is substantial. There is nothing in the order of magnitude of the figures cited to warrant an inference of substantial foreclosure. The fact that respondent increased its sales to Grand Union by approximately \$26,000 in 1955 and by \$40,000 in 1956, or that duPont's sales in the preceding year were \$39,500, has no more significance than the fact that respondent in the *Insto-Gas* case tied up over \$150,000 in gas sales. These are

single-dimensional figures which have little significance in the absence of other evidence to which to relate them.

The fact that duPont was foreclosed from approximately 300 outlets likewise proves nothing, in the absence of evidence as to the proportion of sponge sales in the market which move through these outlets. Such evidence as there is would indicate that there are many thousands of retail stores selling sponges. There is nothing to indicate that the Grand Union outlets constitute some of the choicest outlets in the market, as was the case in *Anchor Serum, supra*, where two of the distributors were the largest outlets in the two states which constituted the largest market for respondent's product. There is no more reason why the Grand Union outlets should be considered as constituting a substantial share of the market, than were the 150 to 200 distributors and 200 bulk filling stations involved in the *Insto-Gas* case.

The fact that duPont is one of respondent's "principal competitors" likewise establishes nothing, in the absence of evidence as to the relative standing of each in the market, and as to the relative share of commerce foreclosed. While duPont, with respondent and four other companies have 80 percent of the sponge business in the Eastern United States, there is nothing to indicate duPont's standing among the six companies. Furthermore, even if it be assumed that duPont is a major factor in the market, it does not follow that the General Mills is a major factor or that the commerce it has foreclosed is substantial. General Motors is a principal competitor of Studebaker, but this does not make Studebaker a major factor in the automobile business or mean that there has been a substantial foreclosure of competition because Studebaker has taken over a General Motors distributor.

There is nothing in any of the facts and figures in the record from which it can be inferred that the arrangement here involved may substantially lessen competition. Respondent's total sales to Grand Union in the peak year 1956 constituted less than 1½ percent of its total sponge sales (\$60,402 out of \$4,770,000). Only part of its increase over 1954 can be assumed to be due to the preclusive arrangement. Its sales in 1954 were more than \$4,000 above those for 1953, even without any agreement with Grand Union. While duPont sales in 1954 were \$39,500, only part of this business was acquired by General Mills in 1955 since its sales in that year increased by only \$26,700. Since the figures of other sponge companies' sales are not in the record, it is not possible to determine whether there was a general increase in sponge purchases by Grand Union. However, it does appear that in 1955 it took on the additional Amsco

line, despite the agreement with respondent. In any event, the exclusion of a single competitor from approximately \$27,000 to \$40,000 worth of sponge business through a single distribution outlet, albeit one having over 300 stores, is hardly a state of facts from which it can be inferred, without more, that there is a reasonable probability of a substantial impairment of competition.

In so holding the examiner does not intend to indicate any concurrence with the position of respondent that there can be no substantial foreclosure unless there is a "general sales policy of exclusion." While the difficulty of establishing substantial foreclosure obviously increases in a case where the preclusive policy is a limited one, this does not mean that there may not be cases where a preclusive arrangement involving only a single distribution outlet or affecting a single competitor will violate the law. The statute, by its very terms, applies to contracts not to "use or deal in the goods * * * of a competitor or competitors." In the *Revlon* case, *supra* at 281, the Commission specifically recognized that Section 3 "is not limited to exclusive dealing agreements but applies equally to agreements not to deal with a competitor or class of competitors." In *Tampa Electric Co. v. Nashville Coal Co.*, 168 F. Supp. 456 (M.D. Tenn., 1958), an agreement by a single customer to buy its entire requirements of coal from one company was held to violate Section 3 where it appeared that the quantity of coal involved, one million tons, was more coal than was then being consumed in the entire state. While there were 16 distributors involved in the *Anchor Serum* case, the finding of potential injury rested largely on the position of two distributors, each of whom was the largest distributor in the two states which were, respectively, the largest users of the product in question.

Apparently mindful of the almost de minimis nature of the showing here, counsel supporting the complaint fall back on the cases which hold that the Commission has the power to stop monopolistic practices in their incipency. Such cases do not, however, excuse the introduction of substantial evidence to support an inference that the arrangement in question is reasonably calculated to have the proscribed statutory impact. Counsel argue that while the arrangement in question involved only one customer, it is necessary "to bear in mind the potentiality of an extension of such restrictive sales" in the light of respondent's overall size. However, there is not the slightest record basis for anticipating the extension of such arrangement.

On the contrary, as counsel supporting the complaint themselves have argued in a separate proceeding against Grand Union for

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knowingly inducing respondent and others to participate in the Broadway spectacular sign, the arrangement was part of a specially "tailored" deal. The agreement by Grand Union to discontinue handling duPont sponges was part of the *quid pro quo* for respondent's agreeing to participate in the sign. When its participation in the sign came to an end, the preclusive arrangement came to an end soon thereafter. There is no reason to anticipate from these facts that respondent is likely to enter into similar arrangements with other customers. There is not the slightest indication that the arrangement in question was the opening gun in a campaign which is likely to lead to the adoption of other such arrangements.

Respondent has urged, conversely, that the whole proceeding is now moot in view of the fact that the preclusive arrangement came to an end following the termination of respondent's participation in the Broadway sign, and in view of the lack of likelihood of its being renewed inasmuch as the services of the broker and officials responsible for the arrangement have been terminated and the O-Cel-O Division has been integrated into respondent's general operations. While respondent's argument in this respect is not without appeal, the examiner finds it unnecessary to pass upon it in view of his conclusions on the merits of the case.

In accordance with the findings above made and for the reasons above given, it is concluded and found that counsel supporting the complaint have failed to establish that the arrangement between respondent and Grand Union, whereby the latter agreed not to sell or handle duPont sponges, resulted in a foreclosure of competition in a substantial share of the line of commerce affected, or that there is a reasonable probability that the arrangement will substantially lessen competition or tend to monopoly in any line of commerce.

CONCLUSION OF LAW

It is concluded that counsel supporting the complaint have failed to establish, by reliable, probative and substantial evidence, that respondent has engaged in any unlawful conduct in violation of Section 3 of the Clayton Act, as alleged in the complaint, and that Count II of the complaint should, accordingly, be dismissed.

ORDER

It is ordered. That Count II of the complaint herein be, and the same hereby is, dismissed.

