B. The Transaction's Effects in the Facial Tissue Industry

Facial tissue is a soft, thin, pliable and absorbent sheet of paper, typically folded and packed in a box. It is primarily used to catch a sneeze, blow a nose, or remove make-up. There are no good substitutes for facial tissue.

For all practical purposes, the retail facial tissue market is dominated by three major firms—Kimberly-Clark, Scott and Procter & Gamble—which together account for nearly 90 percent of sales of facial tissue, a $1.34 billion dollar market. Kimberly-Clark's popular Kleenex® is by far the leading brand of facial tissue sold, commanding 48.5 percent of all sales.

Scott's Scotties® facial tissue, a value brand offering consumers more product for the money, has a 7 percent share of sales, but significantly greater presence and consumer acceptance in the Northeast, where the brand was first introduced. Procter & Gamble, the only other significant firm, makes Puffs®, which has about a 30 percent market share.[1]

Scott's market share, however, understates its competitive significance. As a value brand, Scotties® has, in the past, imposed a significant constraint on Kimberly-Clark's prices for facial tissue. Kimberly-Clark's Kleenex® likewise has been a significant constraint on prices of Scotties® facial tissue.

The Complaint alleges that Kimberly-Clark's acquisition of Scott would remove these constraints, and provide Kimberly-Clark both the power and the incentive to increase unilaterally and profitably the price of either, or both, brands of facial tissue. Kimberly-Clark's acquisition of Scott would also increase the likelihood of cooperative increases in the price of consumer facial tissue, since the merger would leave Kimberly-Clark with a single significant rival, Procter & Gamble's Puffs®, in the facial tissue market.

Because entry into the facial tissue market is difficult, requiring a significant investment in plant equipment and brand building, successful new entry or repositioning after the merger is unlikely to restore the competition lost through Kimberly-Clark's removal of Scott from the marketplace.

C. The Transaction's Effect in the Baby Wipes Industry

Baby wipes are soft, moist and absorbent sheets of paper substrate, about the size of a wash cloth, that are packaged in a plastic tub or canister. Consumer use baby wipes to clean babies, especially during a diaper change. Stronger, softer and more convenient or sanitary than any alternative product, baby wipes are a popular staple of families with babies, and are bought by 95 percent of such households. There are no good substitutes for baby wipes.

Kimberly-Clark and Scott are the nation's two largest and most significant manufacturers of baby wipes. Scott's Baby Fresh® and Wash A Bye Baby® baby wipes account for about 31 percent of all baby wipes sold, while Kimberly-Clark's Huggies® baby wipes command nearly 25 percent of all sales. They are each other's primary competitor and most significant constraint on prices for baby wipes. Kimberly-Clark and Scott aggressively compete in pricing, promotion, and product innovation.

Following its acquisition of Scott, Kimberly-Clark would control nearly 60 percent of all baby wipes sold,[2] and leave it seven times larger than its next largest competitor in a market with $500 million in annual sales. By eliminating Scott, the Complaint alleges, Kimberly-Clark would acquire market power that would enable it unilaterally to increase prices to consumers of either, or both, Huggies®, Baby Fresh® and Wash A Bye Baby® wipes. New market entry is difficult, time-consuming and unlikely, and hence cannot be expected to constrain the unlawful effects of Kimberly-Clark's acquisition of Scott.

D. Harm to Competition as a Consequence of the Acquisition

The Complaint alleges that the transaction would have the following effects, among others: competition generally in the facial tissue and baby wipes markets will be substantially lessened; actual and potential competition between Kimberly-Clark and Scott in the market for facial tissue and baby wipes will be eliminated in the United States; prices for facial tissue and baby wipes in the United States are likely to increase; and product innovation in facial tissue and baby wipes in the United States will suffer.

III. Explanation of the Proposed Final Judgment

The proposed Final Judgment would preserve competition in production and retail sale of branded baby wipes and facial tissue in the United States. Within 150 days after filing the proposed Final Judgment, defendants must divest Scott's wet wipes plant in Dover, Delaware; grant a 25-five year, royalty-free, exclusive and assignable, perpetually renewable license for the baby wipes labels produced at that plant; and divest other associated assets—sell, in essence, the entire Scott baby wipes business and brands. Within 180 days after filing the proposed Final Judgment, defendants must similarly divest Scott's Scotties® brand facial tissue business, grant a 25-year, royalty-free, exclusive and assignable, perpetually renewable license for the Scotties® facial tissue label, and divest any two of four tissue mills specified in the Final Judgment and associated assets. These businesses must be sold to a purchaser or purchasers who demonstrate to the sole satisfaction of the United States and the State of Texas that they will be an economically viable and effective competitor, capable of maintaining or surpassing Scott's market performance in the sale of branded baby wipes and consumer facial tissue in the United States.

Until the ordered divestitures take place, defendants must take all reasonable steps necessary to accomplish the divestitures, and cooperate with any prospective purchaser. If defendants do not accomplish the ordered divestitures within the specified 150 and 180 day time periods, the Final Judgment provides for procedures by which the Court shall appoint a trustee to complete the divestitures. Defendants must cooperate fully with the trustee.

If a trustee is appointed, the proposed Final Judgment provides that Kimberly-Clark will pay all costs and expenses of the trustee. The trustee's compensation will be structured so as to provide an incentive for the trustee to obtain the highest price for the assets to be divested, and to accomplish the divestiture as quickly as possible. After the effective date of his or her appointment, the trustee shall serve under such other conditions as the Court may prescribe. After his or her appointment becomes effective, the trustee will file monthly reports with the parties and the Court, setting forth the trustee's efforts to accomplish divestiture. At the end of six months, if the divestiture has not been accomplished, the trustee shall promptly file with the Court a report setting forth the trustee's efforts to accomplish the divestiture, explaining why the divestiture has not been accomplished, and making recommendations. The trustee's report will be furnished to the parties and shall

[1] The approximate post-merger Herfindahl-Hirschman Index (''HHI'') for the facial tissue market, based on 1994 dollar sales, would be 4031, with an increase in the HHI as a result of the merger of 705 points.

[2] The approximate post-merger HHI for the relevant market based on 1994 dollar sales would be over 3137, with a change in the HHI concentration index resulting from the merger of 1501 points.