IN THE MATTER OF

ATLANTIC RICHFIELD COMPANY

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 9089. Order, Oct. 29, 1979—Modifying Order, Oct. 7, 1980

This order reopens the proceeding and modifies definition (h)(1) and (2) of the divestiture order issued on October 29, 1979, 44 FR 67643, 94 F.T.C. 1054, so that, upon prior Commission approval, Noranda Mines Ltd., INCO Ltd., the Anglo American Group, or any of their respective subsidiaries (previously designated as "ineligible"), may be considered as "eligible" to purchase properties to be divested or to engage in certain joint ventures with Atlantic Richfield.

ORDER REOPENING PROCEEDING AND MODIFYING CONSENT ORDER

By letter dated January 14, 1980, Noranda Mines Ltd. ("Noranda") requested that the Commission reopen this proceeding to reconsider the designation of Noranda as absolutely ineligible to purchase the properties subject to divestiture under the consent order issued in this proceeding on October 29, 1979.[1] One of the principal objectives of the consent order was to promote deconcentration of the copper industry through divestiture of the subject properties to firms that presently are not major producers. Atlantic Richfield may divest the properties to, or engage in certain joint ventures with, any person who is "eligible" under the terms of the order.[2] Because eligibility based solely on market share criteria could not meet the Commission's competition objectives in this instance, three major companies—Noranda, INCO Ltd. and the Anglo American Group—were designated by name as ineligible. Those companies' actual or potential competitive positions were believed to be inadequately reflected by reference solely to market share criteria.

Upon consideration of Noranda's request, the Commission determined that it would be in the public interest to reopen the

[1] The Commission has treated Noranda's correspondence as a request that the Commission reopen this proceeding on its own initiative, as authorized by Sections 3.71 and 3.72 of the Commission's Rules of Practice. Rules 3.71 and 3.72(b)(1), 45 F.R. 21622 (Apr. 2, 1980).

[2] To determine eligibility, the October 29 consent order defines "Eligible Person" and "Ineligible Person." It designates as absolutely ineligible any person having more than ten percent (10%) of the United States copper market for any of the three calendar years preceding an attempt to purchase the subject properties or to engage in certain joint ventures with Atlantic Richfield. Any person having between five percent (5%) and ten percent (10%) of the United States copper market for any of the three calendar years is eligible to purchase the subject properties or to engage in certain joint ventures with Atlantic Richfield only upon prior approval of the Commission. Three companies, Noranda, INCO Ltd. and the Anglo American Group, are declared absolutely ineligible. Definitions (h) and (i) of the order.

proceeding for the purpose of modifying the consent order. The Commission was of the opinion that the public interest in improving competition in the copper industry may adequately be served by designating Noranda, INCO Ltd. and the Anglo American Group as eligible upon prior approval of the Commission.[3] On June 19, 1980, the Commission issued an order to show cause why the consent order should not be modified. The show cause order invited interested persons to comment on the proposed change.

Having carefully considered the comments received,[4] the Commission continues to believe that the competitive positions of Noranda, INCO Ltd. and the Anglo American Group are not adequately reflected by reference solely to market share criteria. The Commission has concluded that the public interest would adequately be served by giving each of the three firms an opportunity to present its views in the context of a specific request for prior Commission approval of a proposed divestiture transaction or a proposed joint venture subject to Paragraphs IX and X of the consent order.

Now, therefore, it is hereby ordered, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Rule 3.72(b) of the Commission's Rules of Practice, 16 C.F.R. 3.72(b) (1979), that the October 29, 1979 consent order be modified in part as follows (new language is italicized, deleted language is hyphened out):

For purposes of this Order, the following definitions shall apply:

* * * * * * *

(h) (1) Subject to the provisions of subparagraph (2) of this definition "h", "Eligible Person" means all Persons ~~other than Noranda Mines Ltd., INCO Ltd., the Anglo American Group, and any of their respective subsidiaries, and any other Person~~ having *not* more than ten percent (10%) of the Copper Market for any of the three calendar years immediately preceding (i) an attempt by such Person to acquire a property or interest to be divested under the provisions of Paragraphs I through V of this Order, or (ii) an attempt by such Person to enter into a Joint Venture with Respondent which may be subject to the provisions of Paragraphs IX and X of this Order. ~~The "Anglo American Group" means the Anglo American Corporation of South Africa Limited, Charter Consolidated Ltd., De Beers Consolidated Mines Ltd., Hudson Bay Mining and Smelting Co., Limited, Minerals and Resources Corporation Ltd., Anglo American Corporation of Canada Limited, and Inspiration Consolidated Copper Company and their respective subsidiaries.~~

(2) *Noranda Mines Ltd., INCO Ltd., the Anglo American Group, and any of their respective subsidiaries, and any* Person otherwise eligible under subparagraph (1) of

[3] Although Noranda is the only one of the three companies that has requested a reopening of this proceeding, its position is not substantially different from that of INCO Ltd. or the Anglo American Group. Therefore, the Commission has concluded that it would be appropriate to modify the order with respect to all three firms.

[4] Comments were received from Noranda and from respondent Atlantic Richfield. Noranda proposed an alternative modification. Atlantic Richfield stated that it does not object to the Commission's proposed modification.

this definition "h" having between five percent (5%) and ten percent (10%) of the Copper Market for any of the three calendar years immediately preceding any of the events described in sections (i) and (ii) of subparagraphs (1) of this definition "h", shall be considered to be an "Eligible Person" only upon prior approval of the Commission. *The "Anglo American Group" means the Anglo American Corporation of South Africa Limited, Charter Consolidated Ltd., De Beers Consolidated Mines Ltd., Hudson Bay Mining and Smelting Co., Limited, Minerals and Resources Corporation Ltd., Anglo American Corporation of Canada Limited, and Inspiration Consolidated Copper Company and their respective subsidiaries.*

IN THE MATTER OF

ZAYRE CORPORATION

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2908. Decision, Oct. 27, 1977—Modifying Order, Oct. 8, 1980

This order reopens the proceeding and modifies the order issued against the firm on October 27, 1977, 42 FR 60138, 90 F.T.C. 329, in connection with the availability and pricing of advertised specials. In conformity with the modification allowed on April 9, 1980 to the order issued against Pay'N Pak Stores, Inc., Docket C-2780, the order requires only a limited disclosure of availability where closeout merchandise is involved (merchandise whose entire inventory is being disposed of at a reduced price and which is not planned to be restocked).

ORDER REOPENING THE PROCEEDING AND MODIFYING DECISION AND ORDER

On October 27, 1977, the Commission issued a Decision and Order against Zayre Corp. in connection with the availability and pricing of advertised specials. The Order includes a provision to prevent Zayre from representing in its advertisements that merchandise is available at its stores at any price unless each advertised item is readily available for sale at or below the advertised price and that each advertised item is properly marked. There are certain exceptions to the availability and pricing requirements of the Order.

On July 18, 1980, Zayre Corp. petitioned the Commission pursuant to Section 5(b) of the Federal Trade Commission Act, as amended on May 28, 1980, and Section 2.51 of the Commission's Organization, Procedures and Rules of Practice, 16 C.F.R. 2.51, to reopen the proceeding for the limited purpose of modifying the consent order in conformity with the modification allowed on April 9, 1980, to the Order issued against *Pay'N Pak Stores, Inc.*, Docket C-2780, dealing with "closeout" merchandise. On August 15, 1980, Zayre filed supplemental papers with respect to its petition.

"Closeout" merchandise was defined in the modified Pay'N Pak order as merchandise whose entire inventory is being disposed of at a reduced price and which is not planned to be restocked. Zayre's proposal embodies the same definition. It would, as the Pay'N Pak order, require only a limited disclosure of availability where closeout merchandise is involved.

After due consideration, the Commission believes that the public interest will be served by modifying the Zayre Corp. Decision and

Order to allow a general availability limitation on "closeout" merchandise.

It is ordered, That the proceeding is reopened.

It is further ordered, That the Zayre Corp. Decision and Order issued on October 27, 1977, is modified as follows:

The following paragraph is to be inserted after the first subparagraph in Section 2(b) of the Order which concludes with the words "rain check.":

For closeout items, in instances where an advertisement is for more than one store, the quantity limitation will be deemed to be complied with by disclosures that the items are closeout items and that the 'quantities are limited to stock on hand'. Closeout designation is only appropriate for items where Zayre both is disposing of the entire inventory of an item at a reduced price and is not planning on restocking the item.

IN THE MATTER OF

KELLOGG COMPANY, ET AL.

Docket 8883. Interlocutory Order, Oct. 9, 1980

ORDER DENYING IN PART MOTION TO DISMISS AND DIRECTING THE FILING OF A REPORT AND OF SUBSEQUENT BRIEFS

In its Order of July 31, 1980, the Commission deferred ruling on one portion of the motion of General Foods Corporation ("General Foods") dated April 3, 1980, for dismissal of the complaint in this matter.[1] In this portion of its motion General Foods contends that the Commission has deprived it of due process of law "by impermissibly intermingling its prosecutorial, administrative and judicial functions to the point where the prosecution formulated the course which the Commission then followed." Motion at 2. In the alternative, General Foods seeks a full evidentiary hearing into the matters raised in its motion.

General Foods contends that dismissal of the complaint is required because of the "improper and prejudicial" participation of former chief administrative law judge Daniel Hanscom and of officials of the Bureau of Competition "in determining Judge Hinkes' status." Memorandum of General Foods Corporation (1) In Support of its Motion to Dismiss the Complaint, and (2) In Response to the Federal Trade Commission Order of March 4, 1980 ("Memorandum") at 38. In our order of July 31, we noted that this contention had not previously been raised, and before addressing it we determined to augment the record by obtaining affidavits from those who appeared best able to provide evidence relevant to the negotiation process with Judge Hinkes and the role of Bureau of Competition officials in that process. In compliance with our order, Messrs. Daniel C. Schwartz, Peter Brickfield, Barry R. Rubin, John F. Dugan and Barry Kefauver have filed affidavits.[2] Having reviewed these affidavits, Mr. Kefauver's affidavit of December 13, 1979, Judge Hanscom's affidavit of December 5, 1979, and certain additional material, discussed in Part II of this order, we have determined (1) to deny the reserved portion of General Foods' motion of April 3, 1979, insofar as it relates to the activities of Judge Hanscom; (2) to defer disposition of that portion of the motion insofar as it relates to the activities of officials of the Bureau of Competition; (3) to direct the Bureau of Competition to file the report specified in Part II of this order; and (4) to direct the parties to file their views on the need for additional factfinding.

[1] The motion was in other respects denied in our order of July 31.

[2] By memorandum of August 21, 1980, Mr. Rubin corrected typographical errors in his affidavit.

I.

General Foods asserts that Judge Hanscom, in his former capacity as Assistant Director for Evaluation in the Bureau of Competition, had signed and approved the memorandum to the Commission recommending issuance of the complaint in this proceeding. Memorandum at 35. While the memorandum recommending the complaint is not part of the record in this adjudication, General Foods' assertion is evidently correct.[3] Having acted in this prosecutorial capacity, Judge Hanscom was disqualified from participating in adjudicative decision-making in the proceeding. 5 U.S.C. 554(d).[4] The question, therefore, is whether Judge Hanscom's participation in the process leading up to the contract with Judge Hinkes violated this separation of functions requirement, or whether it was a permissible involvement in an administrative decision divorced from the merits of the proceeding.

We held, in our order of July 31, that Judge Hanscom could properly appoint a successor to Judge Hinkes, though he is disqualified from the adjudication. Order at 13. As noted in our order, the Commission some years ago held that the Chairman, who was not participating in the adjudication in question, might nevertheless properly exercise his discretion as administrative head of the agency in the decision whether to seek to retain an ALJ in the very proceeding as a retired annuitant. *Hearst Corp.*, 81 F.T.C. 1028, 1029 (1972).

This distinction between adjudicative and administrative decision-making will inevitably be clearer in some instances than in others. Whenever a decisionmaker acts in his or her administrative capacity, and that decision directly relates to the adjudication, as would always be true of a decision on retention of an ALJ, the action will perhaps inescapably be susceptible to the accusation of improper motive. But suspicion alone is not enough. Officials who routinely make administrative decisions of a particular kind will not be held to have exceeded the proper scope of their authority without clear evidence of impropriety.

The evidence here falls short. There is not the slightest suggestion in the record that Judge Hanscom recommended the contract out of any belief that retention of Judge Hinkes in the *Kellogg* case would result in rulings favorable either to complaint counsel or to respondents.

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[3] In a colloquy at a hearing in November, 1977, complaint counsel identified Judge Hanscom as one of the signatories of the memorandum. Tr. 26281.

[4] "An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision * * *."

Instead, the record reflects that Judge Hanscom's only concern was that if Judge Hinkes left the case, a retrial might be required, at enormous expenditure, which could do little more than replicate the record that had already been before Judge Hinkes. Such a concern is not, as General Foods claims, a "direct, partisan interest in preserving the consequences of [Judge Hanscom's] earlier involvement," because it is not in any way addressed to the merits of the adjudication. Rather, it is a purely administrative concern that public resources not be wasted on duplicative proceedings. It follows from these facts that as a matter of law, Judge Hanscom's action involving the contract with Judge Hinkes did not amount to participation in the decisionmaking process of the adjudication, within the meaning of the applicable restriction in 5 U.S.C. 554(d).[5]

Even if it be assumed that Judge Hanscom's participation in the negotiations and his recommendations to the Chairman violated the separation of functions requirement in the Administrative Procedure Act, we hold that the remedy of dismissal sought by General Foods is altogether inappropriate and unnecessary. If the contract with Judge Hinkes was fundamentally flawed because of Judge Hanscom's involvement in the process leading up to it, as General Foods alleges, then the remedy would be removal of Judge Hinkes, which indeed is what General Foods urged when it first contended that the contract was improper. Motion of General Foods Corporation to Disqualify the Administrative Law Judge, dated October 13, 1978. The Chairman's decision of December 8, 1978, not to submit the contract to the Civil Service Commission for approval, together with the Commission's order of the same date holding that, in the circumstances, Judge Hinkes had become unavailable within the meaning of 5 U.S.C. 554(d) as of the date of his retirement, had precisely the effect of removing Judge Hinkes from the proceeding. Thus we conclude that, even if we were to accept (which we do not) that Judge Hanscom erred in recommending the contract, General Foods has not been prejudiced, for any arguable harm has been ameliorated by the removal of Judge Hinkes.

II.

With respect to the contentions of General Foods about the role of officials of the Bureau of Competition in the process leading to the offer of the contract to Judge Hinkes, we have concluded that more evidence is needed before we can rule.

[5] Insofar as General Foods intends to suggest that Judge Hanscom's actions were unlawful under any of the theories outlined on pages 43 to 46 of its Memorandum, we find that suggestion to be wholly without merit.

As we indicated in our order of July 31, the purpose of the ancillary inquiry now is to establish facts sufficient to permit our disposition of allegations that officials of the Bureau of Competition violated the Commission's *ex parte* rule, Rules of Practice Section 4.7, or otherwise improperly breached the separation of functions requirement of the Administrative Procedure Act, 5 U.S.C. 554(d). The affidavits submitted in response to that order, together with materials previously entered in the record, provide an account of the Bureau's involvement from August 14, 1978, in the negotiation process that culminated in the contract with Judge Hinkes. With one exception,[6] the Commission concludes that no further factual development is necessary at this time with respect to the actions of the various participants in the process from August 14, 1978, on.

However, the affidavits do not establish how officials of the Bureau first learned that Judge Hinkes was contemplating retirement. Mr. Schwartz states that he "first learned of Judge Hinkes' contemplated retirement from members of the staff of the Bureau of Competition on or about the date of the meeting which was held on August 14, 1978, * * * ." Schwartz Aff. ¶ 1; see also *id.* ¶ 4. He does not state who the "members of the staff" were.

There is a second ground for our continuing the inquiry. It arises from material brought to the Commission's attention by the General Counsel. In the course of preparing the Commission's defense to an action brought by Kellogg Co. on July 24, 1980, under the Freedom of Information Act for, *inter alia,* documents referring or relating to the employment of law judges who have stated an intention to leave their regular law judge position, and for documents referring or relating to any policy or practice of the Commission regarding actions to be taken by Commission employees upon an ALJ's leaving or stating an intention to leave, the staff of the General Counsel's office undertook a thorough canvass to be certain that all responsive documents had been located. In the course of that search, the General Counsel obtained, from the files of complaint counsel, documents which appeared relevant to this ancillary inquiry. The General Counsel brought these documents to our attention, and we now direct that they be placed on the record.

The first document is a memorandum to the file from Anthony Low Joseph, dated December 10, 1978, reporting a telephone conversation with counsel for one respondent:

> Mr. Savarese called to ask when I learned about the Judge's contract. I told him that I learned of it via FTC: Watch. He asked about discussions between the Judge and

[6] See footnote 7 *infra.*

me. I said that the Judge had mentioned he was considering retirement before the announcement on the record, but that we had not discussed a contract. He asked if the Judge and I had ever discussed the contract. I said no.

The others are a series of FTC staff proposed draft filings, some of which are hand-dated December 1977, that embody a projected request that Judge Hinkes make notes on the demeanor of witnesses. "Should Administrative Law Judge Hinkes, for any reason, be unable to continue presiding over the *Kellogg* hearings," the drafts state, "such preliminary notes would facilitate the transition to a successor administrative law judge * * *."

The circumstances under which complaint counsel learned of Judge Hinkes' plans to retire, and any actions taken in consequence by complaint counsel or other Bureau staff, are potentially material to our disposition of the reserved portion of General Foods' motion. The documents brought to our attention by the General Counsel may or may not be relevant, but they do require explanation.

We turn, then, to the means by which this further inquiry is to be carried out. In endeavoring to establish the facts relevant to the disposition of motions before us in the ancillary proceeding, we have twice requested affidavits from those who appeared best able to provide such facts. Order of November 13, 1979; Order of July 31, 1980. The taking of affidavits is a proper means of initial inquiry. *Grolier, Inc.* v. *FTC,* 615 F.2d 1215 (9th Cir. 1980), and cases cited in our order of July 31, 1980, at 19, note 15. Indeed, this device yielded a satisfactory evidentiary basis for our conclusion that, measuring the material facts against applicable legal standards, the relief sought by respondents as a consequence of the contract with Judge Hinkes and the negotiations preceding it was unwarranted. Order of July 31, 1980, at 14–23.

In this new phase of the inquiry, focusing on allegations of misconduct by the Bureau of Competition, the affidavits filed in compliance with our order of July 31 have likewise provided useful evidence. In particular, the affidavits set forth the discussions at the meetings of August 14 and 16, 1978, in sufficient detail so that no additional inquiry of the known participants in those events appears necessary. However, as noted earlier, the affidavits fail to establish how the Bureau of Competition learned of Judge Hinkes' intention to retire, and of course they do not account for the documents from complaint counsel's files quoted above.

While additional affidavits might resolve these matters, it is not clear to whom instructions to file such affidavits ought to be directed. Therefore, we are imposing on the Bureau of Competition itself the obligation to file, within 45 days, a report stating with

specificity, and accompanied by appropriate affidavits and documents, the date, circumstances, and content of any extrarecord conversation between Judge Hinkes and any member of the Bureau staff, presently or formerly employed, concerning Judge Hinkes' possible retirement, or of any conversation between any other law judge or any employee of the Office of Administrative Law Judges and any member of the Bureau staff, presently or formerly employed, concerning Judge Hinkes' possible retirement; and the date, circumstances, and content of any subsequent conversation among members of the Bureau staff, presently or formerly employed, concerning actions to be taken with respect to the employment or other status of Judge Hinkes, or the content of any document concerning such actions.[7]

It is impossible at this point to predict whether further factfinding will be needed after the Bureau files its report, and if so, by what precise method such factfinding ought to be accomplished. The report of the Bureau is a means by which those who know the facts may explain on the record the significance, if any, of the documents and events in question to the issues before us. If this report, together with the other evidence of record, proves to be insufficient to permit our determination of the allegations that officials of the Bureau of Competition breached the separation of functions and *ex parte* barriers in the Administrative Procedure Act and the Commission's rules, it may be necessary to seek the services of an administrative law judge from another agency to superintend such additional inquiry as will be required.

We want the facts to be produced, promptly and fully, that will enable us to sustain or reject these allegations. An ambiguity in one affidavit, and newly discovered documents that require explanation, leave us unable to find those facts after the initial round of affidavits. Aided by the views of the parties, we shall review the report and other evidence to determine whether further inquiry, under the superintendence of an outside law judge, is needed.

It is therefore ordered, That:

A. General Foods' motion to dismiss the complaint is denied, insofar as the motion is based upon allegations concerning the activities of Judge Hanscom;

B. The Bureau of Competition shall file with the Commission, within 45 days of the date of this Order, the report specified in Part I of this Order.

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[7] In addition, if it is a fact that Anthony Low Joseph attended the meeting with Messrs. Schwartz, Brickfield, Hogan, Kefauver, and Rubin on August 14, 1978 (see Rubin Aff. ¶ 5), then the Bureau's report shall be accompanied by an affidavit from Mr. Joseph, responding to the questions posed in Paragraph F of our Order of July 31.

C. Within 20 days of the filing of the report, the parties shall file their views on whether additional factfinding is necessary prior to our determination of the reserved portion of General Foods' motion, and if so, what material facts they believe need to be adduced in such additional factfinding.

D. The Secretary shall place on the docket of this proceeding, and serve upon the parties, the following documents:

(1) A memorandum to the file from Anthony Low Joseph, dated December 10, 1978; and

(2) Five drafts of proposed requests pertaining to preparation of notes on demeanor, prepared by unidentified staff members of the Bureau of Competition.

Chairman Pertschuk and Commissioner Pitofsky did not participate.

IN THE MATTER OF

SMITHKLINE CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket C-3043. Complaint, Oct. 9, 1980—Decision, Oct. 9, 1980

This consent order requires, among other things, a Philadelphia, Pa. manufacturer of prescription medicines, proprietary pharmaceuticals, and animal health products, to divest itself of the assets of Sea & Ski, except for its plant and equipment, within six months of the effective date of this order. Respondent is further required, upon request of the buyer, to furnish technical, market and quality control information for a one-year period specified in the order and to maintain the value of the products or assets of Sea & Ski and preserve it as a viable, ongoing business pending divestiture.

Appearances

For the Commission: *C. W. Corddry.*

For the respondent: *Robert Lewis, Ballard, Spahr, Andrews & Ingersoll,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above named respondent, subject to the jurisdiction of the Commission, will, on April 10, 1980, have acquired all the stock of Allergan Pharmaceuticals, Inc. in violation of Section 7 of the Clayton Act, as amended, (15 U.S.C. 18) and Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45), and having found that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

I.

DEFINITION

1. For purposes of this complaint, the term "sun care products" means any formulation designed, promoted, and sold for application to the skin before or during exposure to sunlight in order to prevent, inhibit, facilitate, or simulate any condition of the skin.

II.

RESPONDENT

2. SmithKline Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania with its principal office and place of business located at 1500 Spring Garden St., Philadelphia, Pennsylvania.

3. In 1979 SmithKline, including its foreign subsidiaries, had consolidated revenues of approximately $1.35 billion and consolidated assets of approximately $1.2 billion.

4. SmithKline is engaged primarily in the research, development, manufacture, and marketing of prescription medicines, proprietary pharmaceuticals, animal health products, ultrasonic and electronic instruments, cosmetics, and sun care products, and in the operation of numerous clinical laboratories.

5. SmithKline has been engaged in the manufacture and sale of sun care products through its subsidiary, the Sea & Ski Corporation, since the 1960's.

III.

THE ACQUIRED CORPORATION

6. Allergan Pharmaceuticals, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business at 2525 Dupont Drive, Irvine, California.

7. In 1979 Allergan, including its foreign subsidiaries, had consolidated revenues of approximately $82.45 million and consolidated assets of $88.75 million.

8. Allergan is engaged primarily in the research, development manufacture, and marketing of prescription and non-prescriptior pharmaceutical products in the specialty fields of ophthalmolog and dermatology.

9. Allergan, through its Herbert Laboratories division, has bee engaged in the manufacture and sale of sun care products since 197

IV.

JURISDICTION

10. At all times relevant herein, respondent has been and engaged in commerce within the meaning of the Clayton Act,

amended, and engaged in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

V.

THE ACQUISITION

11. As of April 10, 1980, respondent SmithKline Corporation will have acquired all of the issued and outstanding shares of Allergan Pharmaceuticals, Inc. and the former shareholders of Allergan will hold approximately 4,300,000 shares of SmithKline common stock worth approximately $259 million. In this manner Allergan will become a wholly-owned subsidiary of SmithKline.

VI.

TRADE AND COMMERCE

12. For the purposes of this complaint, the relevant product market is the manufacture and sale of sun care products and the relevant geographic market is the United States.

13. Sun care products are comprised primarily of sun tanning and sun screening preparations used to control the effects on the skin of exposure to sunlight.

14. Factory sales of sun care products in the United States in 1979 are estimated to have been approximately $94 million.

15. SmithKline and Allergan have been actual competitors in the nanufacture and sale of sun care products since 1974.

16. In 1979, SmithKline, through Sea & Ski, and Allergan ranked pproximately fourth and seventh respectively in total sales among ll sun care products manufacturers. SmithKline's share is estimat-d to have been approximately 8.8% and Allergan's share approxi-ately 2.7%.

17. The sun care products market is concentrated. In 1979 the ur top ranking firms accounted for approximately 70 percent of mestic sales.

18. The major manufacturers of sun care products, including pondent and Allergan Pharmaceuticals, Inc., market their prod-s in all fifty states.

VII.

EFFECTS OF THE ACQUISITION; VIOLATIONS CHARGED

). The effects of the acquisition by SmithKline of Allergan may