

IN THE MATTER OF
WARNER-LAMBERT COMPANY

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

*Docket 8850. Complaint, June 30, 1971—Final Order, Oct. 5, 1976**

Opinion and order requiring a Morris Plains, N.J., major industrial corporation and a leading manufacturer and seller of drugs, to partially divest itself of particular assets whose retention would substantially lessen competition in drug manufacturing submarkets relating to thyroid preparations, cough medications, serum albumin and tetanus immune globulin; and to furnish the necessary assistance to enable respective purchasers to become effective competitors in these submarkets. Additionally, the order bans further acquisitions by respondent in the particular product areas for ten years without prior F.T.C. approval.

Appearances

For the Commission: *Thomas P. Athridge.*

For the respondent: *Mudge, Rose, Guthrie & Alexander*, New York City, and *Bergson, Borkland, Margolis & Adler*, Washington, D.C.

OPINION ACCOMPANYING FINAL ORDER

In the Commission's decision of April 27, 1976 in this matter, it found that the acquisition of Parke, Davis & Company ("Parke, Davis") by Warner-Lambert Company ("Warner-Lambert") violated Section 7 of the Clayton Act (15 U.S.C. § 18) in five therapeutic product submarkets: thyroid preparations, cough remedies, cough drops and lozenges, normal serum albumin, and tetanus immune globulin. At the same time, the Commission ruled that no violation of Section 7 had been demonstrated in seventeen other asserted lines of commerce, including an alleged overall drug market and an ethical drug market segment thereof.¹

In view of the fact that the lines of commerce in which the Commission found Section 7 violations accounted for only a small portion of Parke, Davis' sales (less than 5 percent of total sales for 1969, the year prior to the merger),² it did not enter an order requiring divestiture of Parke, Davis, but called for proposed orders and supplemental briefs addressed to the issue of "what relief is necessary and sufficient to restore competition in the submarkets in which violations have been found" (Comm. Op. p. 50). The Commission noted

* For the Complaint, Initial Decision, Opinion, Findings of Facts and Conclusions of Law, see 87 F.T.C. 812.

¹ The complaint originally alleged unlawful effects in some 55 lines of commerce. A majority of the lines of commerce dropped out of the case by the time the matter reached the Commission for final decision.

² Total sales of Parke, Davis in 1969 were \$273 million. Sales in the affected submarkets were as follows: thyroid preparations—\$837,000; cough remedies (including cough drops and lozenges)—\$8,771,000; normal serum albumin \$2,400,000; tetanus immune globulin—\$701,000. (Comm. Find. 51, 64; Comm. Op. p. 4, 46).

that "where the offending line or lines of commerce constitute a relatively small proportion of the entire business of the acquired corporation, partial divestiture may be appropriate if competition can be effectively restored in the affected markets," citing *Federal Trade Commission v. Pepsico, Inc.*, 477 F.2d 24, 29 (2d Cir. 1973); *United States v. Reed Roller Bit Co.*, 274 F. Supp. 573, 584-92 (W.D. Okl. 1967); *Union Carbide*, 59 F.T.C. 614, 659 (1961); and *United States v. CIBA*, 1970 Trade Cases ¶ 73,269 (S.D.N.Y. 1970) (consent decree).³

In accordance with this request, respondent, without waiving its rights to appeal from the Commission's adverse decision, has submitted a proposed order which would entail product line divestitures in the thyroid preparations, cough remedies, and cough drops/lozenges submarkets and provides for the introduction of new competition in the blood fractions submarkets, normal serum albumin and tetanus immune globulin.

Complaint counsel, on the other hand, adhere to their original proposed order which would require complete divestiture of Parke, Davis. Their principal argument is that anything less would result in leaving a substantial part of Parke, Davis in the hands of Warner-Lambert thereby increasing economic concentration in the overall drug industry and permanently eliminating Parke, Davis as an independent entity.

These arguments ignore the fact that the Commission has determined that the merger did *not* produce "a firm controlling an undue percentage share of the relevant market" or result in "a significant increase in concentration" (Comm. Op. p. 12). The Commission further found that the drug industry is composed of a large number of viable competitors and that removal of Parke, Davis (which ranked fourteenth in the industry in 1969 with a 2.9 percent share of drug sales) did not exacerbate any discernible trend toward concentration or effect a substantial diminution in the number of effective competitors (Comm. Op. 12, 15, 19).

Complaint counsel also contend that the sale of overlapping product lines is unacceptable because it would eliminate another "actual or potential competitor" even though purchasers must be approved by the Commission under the order. But the record shows there are numerous well-financed pharmaceutical firms which are not competitors in these

³ In the analogous context of a merger involving companies competing in only a limited geographic area, the Supreme Court has observed that while that fact would not "immunize the merger in those markets in which competition might be adversely affected" * * * [it] would, of course, be properly considered in determining the equitable relief to be decreed." *Brown Shoe Co. v. United States*, 370 U.S. 294, 337 n.65 (1962).

See also *Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 129-30 (1962) reversing an ICC order of divestiture because the Commission failed to consider whether less harsh measures would eliminate the illegality of the merger in question. The Court emphasized the agency's "heavy responsibility to tailor the remedy to the particular facts of each case" * * * (371 U.S. at 130).

submarkets or at best have but a tiny market share. In 1971, 36 firms had ethical drug sales above \$20 million and 50 had sales above \$10 million. No more than six to eight drug firms held significant positions in the affected submarkets.

Assuming all firms in the drug industry which are not competitors in these submarkets should be viewed as potential entrants in these submarkets, the loss of one of these firms as a potential entrant (by allowing it to purchase a Parke, Davis line) would not significantly lessen competition. It has long been recognized in Commission decisions that eliminating one of a large number of equally able potential entrants does not significantly lessen competition. *Sterling Drug Co.*, 80 F.T.C. 477, 604 (1972); *Beatrice Foods Co.*, Dkt. 8864, slip opinion p. 13 (July 1, 1975) [86 F.T.C. 1]. Moreover, none of the product lines to be divested occupies a leading market position. Parke, Davis' thyroid products sales amounted to 4.7 percent of the thyroid preparations submarket prior to the merger. Its Medicated Throat Discs represented about three percent of the cough drops/lozenges submarket. In the larger cough remedies submarket, respondent's proposal involves divestiture of essentially four product lines accounting for a total of about three percent of that market (and these products may eventually be sold to more than one purchaser).

For the foregoing reasons we do not believe that an order requiring total divestiture is appropriate in this case. Instead we shall consider the divestiture of specific product lines as proposed by respondent.

I. *Thyroid preparations*

As the Commission found in its previous decision, Parke, Davis markets two thyroid products: thyroid U.S.P. and "Thyroid Strong," combined sales of which amounted to \$837,000 in the year prior to the merger. Warner-Lambert markets two competitive thyroid products, which sell at from two to four times the price of Parke, Davis' products. Warner-Lambert enjoyed an overall market share of 20.3 percent in 1969 compared to 4.7 percent for Parke, Davis.

The Commission further found, *inter alia*, that "continued presence of Parke, Davis' product in the hands of an independent marketer is important to assure prescribing physicians the choice of Parke, Davis' lower priced [thyroid] product." (Op. p. 24). Warner-Lambert states that its proposed order would accomplish this by requiring Warner-Lambert to sell to a purchaser approved by the Commission "such assets, tangible and intangible, as will enable [the purchaser] to become an effective marketer" of Thyroid Strong and U.S.P. thyroid. Respondent would sell all inventories on hand at the close of the transaction, grant to the purchaser rights to the trade name "Thyroid Strong," and

provide affirmative assistance in establishing the purchaser's thyroid manufacturing capability. Furthermore, Warner-Lambert would furnish the purchaser with all formulations, specifications, manufacturing know-how and scientific data relating to the Parke, Davis thyroid products and provide various other types of assistance needed to establish the purchaser's ability to manufacture Thyroid Strong and U.S.P. thyroid. Warner-Lambert would also agree, as an interim measure, pending the establishment or expansion of the purchaser's manufacturing capability, to supply adequate quantities of Thyroid Strong and U.S.P. thyroid and provide the purchaser with all relevant Parke, Davis customer lists and other sales and marketing materials. Additionally, Warner-Lambert will not compete in this submarket with the approved purchaser for a period of three years.

Warner-Lambert contends that when the order is effectuated, Parke, Davis' "Thyroid Strong" and its U.S.P. thyroid will be in the hands of a marketer wholly independent of Warner-Lambert, and the pricing of these products will be entirely beyond Warner-Lambert's control.

Complaint counsel, on the other hand, predict that any purchaser of Parke, Davis' line will not be able to market successfully these products even though it may be a successful marketer of other prescription drug products. No reasons are presented why this would be so. The sale of product lines consisting of the transfer of trade names, manufacturing processes, sales and marketing data is fairly common in this industry. The record reveals many instances where drug companies have purchased product lines from other companies and successfully marketed them.

II. *Cough remedies and cough drops and lozenges*

Parke, Davis' position in the cough medication field was due primarily to Benylin Expectorant cough syrup, Ambenyl Expectorant cough syrup, and Cosanyl cough syrup. Benylin and Ambenyl are prescription drugs, although Benylin has also recently become available as an over-the-counter ("OTC") ethical product. Cosanyl, too, is an OTC ethical cough syrup. In the cough drop and lozenges submarket, Parke, Davis' primary product has been Medicated Throat Discs (recently reformulated and now sold under the name "Throat Discs").

Most of Warner-Lambert's cough remedy products are proprietary cough drops or lozenges. These include Smith Brothers Cough Drops, Hall's Mentho-Lyptus Cough Tablets, Listerine Throat Lozenges and Listerine Cough Control Lozenges.

In the Commission's decision of April 27, 1976, it found that there is an overall cough remedies market as well as submarkets thereof consisting of cough drops/lozenges and cough syrups. It further found

that the cough remedies market is sufficiently concentrated to be concerned with the loss of a significant firm through acquisition, the four largest firms having 45 percent of sales in 1969 and the eight largest 63 percent. Warner-Lambert's share represented 4.4 percent and Parke, Davis' sales represented 4.2 percent. In cough drops/lozenges, concentration was even higher, with Warner-Lambert the leading firm with a 27 percent market share and Parke, Davis with 3 percent represented by sales of Medicated Throat Discs.⁴

Although one approach to relief in these submarkets would be to require divestiture of all of Parke, Davis' cough remedy products, respondent notes that this would completely remove it as a competitor in ethical prescription or OTC cough remedies. It proposes, instead, that it dispose of Parke, Davis' prescription product Ambenyl Expectorant (\$1.5 million sales in 1969) and ethical OTC Cosanyl products (Cosanyl and Cosanyl DM) (\$1.3 million), and Warner-Lambert's Nilcol cough syrup (not introduced until 1970), allowing respondent to retain Benylin Expectorant (\$3.5 million). Warner-Lambert would also dispose of Parke, Davis' Throat Discs (\$1.5 million) and its own Smith Brothers Cough Drops line (\$2.4 million).

As in the case of thyroid preparations, Warner-Lambert would be obligated to sell to the purchasers of these product lines all inventories of the above products, grant them all trademark rights, assist them in becoming effective manufacturers and marketers of the above cough remedies, and, as an interim measure, agree to supply these products for resale by the purchasers.

Respondent contends that these product-line divestitures would effectively nullify most of the increase in concentration found by the Commission and create even stronger incentives to competition than existed before the merger, because the Parke, Davis ethical lines of cough syrups will be split among at least two companies. Also, a firm that does not already have cough drops or lozenges will be more likely to promote Smith Brothers Cough Drops than did Warner-Lambert which has concentrated promotion in this area on its Listerine Lozenges.

We generally agree with this analysis and find the proposed order with respect to cough remedies appropriate.

III. *Normal serum albumin and tetanus immune globulin*

Parke, Davis had normal serum albumin (NSA) sales of \$2.4 million in 1969, and a market share of 34 percent. In the smaller tetanus immune globulin (TIG) market, Parke, Davis' sales were \$701,000, or a 28 percent market share. Warner-Lambert never manufactured or sold either of

⁴ The figures for Warner-Lambert in both markets exclude \$5.2 million in sales of Hall's Cough Drops, which were imported from England and, therefore, were not included in the Census universe relied upon in the April 27 decision.

these products (or any other therapeutic blood fraction products) but had investigated the possibility of either acquiring a leading blood fractionator or entering into the distribution of blood fractions to be supplied by a blood fractionator. The Commission concluded that there was a reasonable probability that Warner-Lambert would eventually enter these markets and that the acquisition of Parke, Davis eliminated it as a future entrant.

Respondent's proposed order, rather than requiring divestiture of Parke, Davis' entire blood fractionation business, requires respondent to produce NSA and TIG for distribution by an approved purchaser. Warner-Lambert explains that the order has two objectives:

First to introduce immediate actual competition on a distributor basis; and, second, to create the opportunity for the purchaser then either to become a *de novo* entrant into the fractionation of NSA and TIG, or to expand a pre-existing toehold position. Since the merger did not eliminate any actual competition, the relief proposed by respondent will more than restore the pre-merger competitive *status quo*.

To accomplish the first objective, respondent's order would require Warner-Lambert to enter into an arrangement for the manufacture of NSA and TIG from plasma supplied by the purchaser. Respondent is required to dedicate up to 40 percent of Parke, Davis' present fractionation capacity to this arrangement, and to use its best efforts in assisting the purchaser in procuring adequate supplies of plasma. Warner-Lambert shall also assist the purchaser in developing relevant promotional, advertising and sales training material.

The second objective is said to be accomplished by giving the purchaser a call upon Parke, Davis' manufacturing know-how and scientific expertise for the purpose of establishing or expanding the purchaser's own fractionating capacity. Paragraph 3D of the proposed order requires Warner-Lambert, upon request, to assist the purchaser in plant design, to make available all Parke, Davis scientific data pertaining to NSA and TIG, and, if necessary, to help the purchaser obtain the requisite licenses for the Bureau of Biologicals of the Food and Drug Administration.

It appears to the Commission that this two-phased approach may well have a more immediate and concrete pro-competitive effect than wholesale divestiture of Parke, Davis' blood fractionation business. The latter would not assure that Warner-Lambert/Parke, Davis would re-enter the blood fractionation market in the near future, whereas the proposed order would at least assure that 40 percent of respondent's present fractionation capacity will be at the immediate disposal of a

presently interested potential entrant or toehold firm. On balance, the Commission believes the proposed order is preferable to divestiture of Parke, Davis' entire blood fractionation business.⁵

IV. *Miscellaneous Provisions*

The Commission's order will require divestiture to be accomplished within a period of one year, the time ordinarily allowed by the Commission in Section 7 cases. Although respondent has proposed a time period of 18 months, no reason has been suggested as to why the additional time should be necessary.⁶

Our order will also require that for a period of ten years following its effective date, respondent not acquire any company or product lines accounting for sales in the five submarkets in which violations have been found without prior notice to, and approval by, the Commission. A prohibition on future acquisitions in the affected markets without review and approval by the Commission is obviously necessary to ensure that no repetition of respondent's prior illegal conduct occurs. Respondent's proposal in this regard, which would permit it to make acquisitions in the affected submarkets with only advance notice to the Commission, and then only when feasible, is wholly inadequate, taking no account of the fact that its prior acquisitions have been found to restrain competition.

Finally, we must reject respondent's suggestion that notice (and approval) requirements be limited to acquisitions involving sales in excess of \$500,000 in the submarkets in which violations have been found. As the record reveals, Parke, Davis' sales amounted to \$837,000 in thyroid preparations and \$701,000 in tetanus immune globulin at the time of its acquisition. Quite clearly, future acquisitions by Warner-Lambert of product lines accounting for sales of less than \$500,000 in these submarkets might well threaten anti-competitive consequences.⁷ In light of this, we believe that respondent must be required to obtain prior clearance for acquisitions involving any sales in the markets in which violations have been found. Since this requirement is limited to only a small fraction of the markets in which respondent operates, we do

⁵ A similar approach was taken by the Commission in *Inland Container Corp.*, 69 F.T.C. 201 (1966). Inland had been a potential competitor in the Louisville market prior to its purchase of a box company there. Inland was permitted to remain in the market, but was ordered to assist another manufacturer in setting up a competing plant in Louisville.

⁶ We have also omitted paragraph "4" of the order proposed by respondent. Since purchasers are, by terms of the order, subject to prior Commission approval, this paragraph is unnecessary, although obviously purchasers with the sorts of affiliations described in the paragraph will be viewed with suspicion.

⁷ Indeed, by means of two sub-\$500,000 acquisitions respondent under its own proposal could conceivably reacquire the entire thyroid preparations position it is being required to divest without even the necessity to provide notice to the Commission. While the administrative proceeding which would ensue once the Commission learned of such an occurrence might well be as short as the present proceeding has been long, an effective order should obviously forbid recurrence of the very violations which gave rise to it.

not foresee that it will impose a significant or unwarranted burden upon it.

An appropriate order is appended.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of complaint counsel from the initial decision; the Commission having vacated the initial decision and granted, in part, the appeal to the extent set forth in the Opinion of the Commission and its Findings of Fact and Conclusions of Law; each party, pursuant to the Commission's Order of April 27, 1976, having submitted a proposed form of order and supporting and reply memoranda; and the Commission having determined that an order requiring partial divestiture of certain assets of respondent Warner-Lambert Company (hereinafter "Warner-Lambert") and Parke, Davis & Co. (hereinafter "Parke, Davis") is appropriate for the reasons stated in the accompanying opinion,

1. *It is ordered*, That respondent, Warner-Lambert, a corporation, and its successors and assigns, within twelve (12) months from the effective date of this order, shall enter into an agreement with a purchaser approved by the Commission whereby the said purchaser shall acquire such assets, tangible and intangible, as will enable it to become an effective marketer of the thyroid preparations presently being manufactured and sold by Parke, Davis; namely "Thyroid Strong" and "U.S.P. Thyroid." In furtherance of the requirements of this provision,

A. Warner-Lambert shall sell to the purchaser all inventories of Thyroid Strong and U.S.P. Thyroid on hand at the date the transaction with the purchaser is closed.

B. Warner-Lambert shall grant to the purchaser, in perpetuity, all of its rights to the trade name "Thyroid Strong."

C. Warner-Lambert shall agree to assist the purchaser in becoming an effective and competitive manufacturer of Thyroid Strong and U.S.P. Thyroid comparable in quality to the products presently being manufactured by Parke, Davis, and in furtherance of this requirement shall

(1) Provide the purchaser with Parke, Davis' formulations, specifications, and manufacturing procedures, including Parke, Davis' quality control standards and methods relating to Thyroid Strong and U.S.P. Thyroid;

(2) Provide the purchaser with all of Parke, Davis' scientific and research data relating to Thyroid Strong and U.S.P. Thyroid;

(3) Provide the purchaser, at reasonable cost, with the assistance of such technical and production personnel as may reasonably be necessary

in establishing or expanding the purchaser's facility for the production of Thyroid Strong and U.S.P. Thyroid; and

(4) Use its best efforts to assist the purchaser in obtaining raw materials required to manufacture Thyroid Strong and U.S.P. Thyroid of acceptable quality.

D. Warner-Lambert shall assist the purchaser in becoming an effective marketer of Thyroid Strong and U.S.P. Thyroid by providing it with all relevant Parke, Davis customer lists, sales and promotional materials, market research materials, and sales training material and devices relating thereto.

E. As an interim measure, and for not more than three (3) years, pending the establishment or expansion of the purchaser's manufacturing capability, Warner-Lambert shall agree to supply the purchaser with adequate quantities of Parke, Davis-manufactured Thyroid Strong and U.S.P. Thyroid. At the purchaser's option, Warner-Lambert will sell thyroid preparation tablets to the purchaser in bulk or finished package form. Warner-Lambert shall be required to sell the purchaser such products up to the maximum quantity that Warner-Lambert is capable of manufacturing on the Parke, Davis equipment now used for such products without further capital investment in new machinery and without incurring extraordinary operating expenses above those arising in the normal course of business. Warner-Lambert shall grant the purchaser the right to state on the label of all Thyroid preparation packages containing products manufactured by Parke, Davis that such products were "Manufactured by Parke, Davis for Distribution by [Purchaser]."

F. Warner-Lambert shall, at the option of the purchaser, agree with the purchaser not to engage in the distribution and sale of Thyroid Strong and U.S.P. Thyroid within the United States for a period of up to three (3) years.

2. *It is ordered*, That Warner-Lambert and its successors and assigns, within twelve (12) months from the effective date of this order, shall enter into agreements with purchasers approved by the Commission whereby the said purchasers shall acquire such assets, tangible and intangible, as will enable them to become effective marketers of one or more of the following Warner-Lambert and Parke, Davis cough remedies, and as will result in all of the following products being marketed by parties other than Warner-Lambert and Parke, Davis:

Smith Bros. Cough Drops;
Throat Discs;
Ambenyl Expectorant;
Cosanyl;

Cosanyl DM;
Nilcol.

In furtherance of the requirements of this provision:

A. Warner-Lambert shall sell to the purchasers all inventories of these products on hand at the dates the transactions with the purchasers are closed.

B. Warner-Lambert shall grant to the purchasers, in perpetuity, all of its rights to all trademarks, trademark registrations and trade names pertaining to the above-specified cough remedies and shall transfer to the purchasers all approved new drug applications relating thereto.

C. Warner-Lambert shall agree to assist the purchasers in becoming effective and competitive manufacturers of each of the above-specified cough remedies comparable in quality to the products presently being manufactured by Warner-Lambert and Parke, Davis, and in furtherance of this requirement shall (1) provide the purchasers with all of the Warner-Lambert and Parke, Davis formulations, specifications and manufacturing procedures, including quality control standards and methods relating to the above-specified cough remedies; (2) provide the purchasers with all of Warner-Lambert's and Parke, Davis' scientific and research data relating to the above-specified cough remedies; (3) provide the purchasers, at reasonable cost, with the assistance of such technical and production personnel as may reasonably be necessary in establishing or expanding the purchasers' facilities for the production of the above-specified cough remedies; and (4) use its best efforts to assist the Purchasers in obtaining raw materials required to manufacture the above-specified cough remedies of acceptable quality.

D. Warner-Lambert shall assist the purchasers in becoming effective marketers of the above-specified cough remedies by providing them with all relevant Parke, Davis and Warner-Lambert customer lists, sales and promotional materials, market research materials and sales training material and devices relating thereto.

E. As an interim measure, and for not more than three (3) years, pending the establishment of the manufacturing capabilities of the purchasers, Warner-Lambert shall agree to supply the purchasers with adequate quantities of the above-specified cough remedies. At the purchasers' option, Warner-Lambert will sell such products to the purchasers in bulk or in finished dosage form. Warner-Lambert shall be required to sell the purchasers such products up to the maximum quantity that Warner-Lambert or Parke, Davis is capable of manufacturing on the existing equipment now used for such products without further capital investment in new machinery and without incurring

extraordinary operating expenses above those arising in the normal course of business.

3. *It is ordered*, That Warner-Lambert and its successors and assigns, within twelve (12) months from the effective date of this order, shall enter into an agreement with a purchaser approved by the Commission whereby the said purchaser shall be enabled to become an effective marketer of Normal Serum Albumin (hereinafter "NSA") and Tetanus Immune Globulin (hereinafter "TIG") in competition with Parke, Davis and other companies presently engaged in the marketing of said blood fractions. In furtherance of the requirements of this provision,

A. Warner-Lambert shall, at reasonable compensation from the purchaser, manufacture on a toll conversion basis, NSA and TIG from plasma supplied by the purchaser, for a period of up to five (5) years; *provided, however*, that Warner-Lambert shall not be required to fractionate for the purchaser in excess of the purchaser's domestic requirements of NSA and TIG, or in excess of forty percent (40%) of the present capacity of the Parke, Davis fractionation facility as operated without further capital investment in new machinery and without incurring extraordinary operating expenses above those arising in the normal course of business. Warner-Lambert shall use its best efforts to assist the purchaser in procuring adequate supplies of plasma for toll conversion pursuant to this provision.

B. Subject to regulations of the Food and Drug Administration's Bureau of Biologicals, NSA and TIG provided by Warner-Lambert to the purchaser shall be labeled "Manufactured by Parke, Davis for Distribution by [Purchaser]."

C. At the purchaser's option, Warner-Lambert shall, at reasonable cost, provide the purchaser with the assistance of marketing personnel for the development of promotional, advertising and sales training material for NSA and TIG.

D. At the purchaser's option, to be exercised within five (5) years, Warner-Lambert shall, at reasonable compensation from the purchaser, assist the purchaser in establishing or expanding an existing facility for fractionation of NSA and TIG from plasma. In furtherance of this requirement, Warner-Lambert shall do the following:

(1) Warner-Lambert shall make available to the purchaser Parke, Davis' know-how relating to the manufacture of NSA and TIG, including technical advice and assistance on plant location and design, procurement of plasma, quality control standards and methods, and such other information and advice as deemed appropriate by the parties.

(2) Warner-Lambert shall make available to the purchaser all Parke, Davis scientific data and information pertaining to NSA and TIG,

including all internal research of Parke, Davis and all material relating to its establishment license and product licenses for NSA and TIG.

(3) If purchaser does not hold an establishment license from the Bureau of Biologicals of the Food and Drug Administration, Warner-Lambert shall use its best efforts to assist purchaser in acquiring such a license, including technical assistance in the construction of a fractionation facility. Warner-Lambert shall also use its best efforts to assist purchaser in acquiring from the Bureau of Biologicals product licenses for NSA and TIG, if purchaser does not already hold such product licenses.

4. *It is further ordered*, That for a period of ten (10) years from the effective date of this order, Warner-Lambert, and its successors and assigns, shall not merge with or acquire, directly or indirectly, through subsidiaries or in any manner, any company or product line accounting for domestic sales in any of the three product areas referred to in paragraphs 1, 2, or 3 of this order, without prior notice to, and approval by, the Commission.

5. *It is further ordered*, That Warner-Lambert, and its successors and assigns, shall, within thirty (30) days after the effective date of this order, and every ninety (90) days thereafter until it has fully complied with the provisions of this order, submit in writing to the Federal Trade Commission a verified report setting forth in detail the manner and form in which it intends to comply, is complying or has complied with this order. All compliance reports shall include, among other things that are from time to time required, (a) the steps taken to enter the required agreements; and (b) copies of all documents, reports, memoranda, communications and correspondence concerning or relating thereto.

6. *It is further ordered*, That until all of the transactions required by this order are accomplished, Warner-Lambert, and its successors and assigns, shall not take any action which diminishes the value of the products and other assets, tangible and intangible, that are subject to this order or which in any way impairs Warner-Lambert's ability to comply with the requirements of this order.

7. *It is further ordered*, That Warner-Lambert notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

Commissioner Dole did not participate by reason of absence.

IN THE MATTER OF
HORIZON CORPORATION

Docket 9017. Interlocutory Order, Oct. 5, 1976

Commission affirms ALJ's order denying respondent's claim of "self-evaluative privilege" for certain internal corporate records.

Appearances

For the Commission: *Alan N. Schlaifer, Eugene Kaplan, Paul L. Chassy, Lemuel W. Dowdy, and John M. Tifford.*

For the respondent: *Basil Mezines, David U. Fierst, Joel P. Bennett, Stein, Mitchell & Mezines, Washington, D.C., and Samuel Pruitt, Jr., J. Michael Brennan, Gibson, Dunn & Crutcher, Los Angeles, Calif.*

ORDER AFFIRMING ADMINISTRATIVE LAW JUDGE'S ORDER
RULING ON RESPONDENT'S CLAIM OF PRIVILEGE FOR
CERTAIN INTERNAL CORPORATE RECORDS

The administrative law judge on August 10, 1976, issued an order denying respondent's claim of a "self-evaluative privilege" for certain internal corporate documents responsive to a subpoena duces tecum issued on July 1, 1976. The documents concern internal corporate programs which investigated and evaluated the sales practices of respondent's sales offices and sales representatives. Respondent submitted the documents to the ALJ for *in camera* inspection and asked that the documents not be disclosed to complaint counsel. The ALJ subsequently authorized respondent to file an interlocutory appeal from his ruling pursuant to Section 3.23(b) of the Rules of Practice.

Respondent claims that disclosure would be contrary to the public interest because it would discourage efforts by firms to investigate and evaluate their compliance with the law. According to respondent,

A lack of confidentiality inevitably will result in serious cramping of the investigative process simply because the incentives for any institution or business entity to engage in self-evaluative investigations pale considerably with the knowledge that the results may be used against it. A company probably will initially decide not to investigate, or if an investigation is held, there will at least be an unconscious effort to tailor the findings with an eye toward eventual litigation.¹

While the public interest may justify a refusal to permit inquiry into particular matters of discovery, we believe that the public policy must be compelling before it can outweigh the interest in full disclosure. We agree with respondent that efforts by businessmen to monitor the

¹ Application for Review of Administrative Law Judge's Order Ruling on Respondent's Claim of Privilege for Certain Internal Corporate Records at 6.