

Complaint

96 F.T.C.

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-prescription pharmaceutical products in the specialty fields of ophthalmology and dermatology.

9. Allergan, through its Herbert Laboratories division, has been 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 manufacture and sale of sun care products since 1974.

16. In 1979, SmithKline, through Sea & Ski, and Allergan ranked approximately fourth and seventh respectively in total sales among all sun care products manufacturers. SmithKline's share is estimated to have been approximately 8.8% and Allergan's share approximately 2.7%.

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

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

VII.

EFFECTS OF THE ACQUISITION; VIOLATIONS CHARGED

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

be substantially to lessen competition or tend to create a monopoly in the manufacture and sale of sun care products in the United States in violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, in the following ways, among others:

- a. Actual competition between respondent and Allergan in the manufacture and sale of sun care products will be eliminated;
- b. Allergan as a substantial, independent competitive factor in the manufacture and sale of sun care products will be eliminated;
- c. Concentration in the manufacture and sale of sun care products will be increased, and the possibility of deconcentration may be diminished;
- d. Additional acquisitions and mergers in the industry may be encouraged.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed merger of SmithKline Corporation and Allergan Pharmaceuticals, Inc., and the respondent having been furnished thereafter with a copy of a draft of a complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission would charge respondent with violation of the Clayton and Federal Trade Commission Acts; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent SmithKline Corporation is a corporation orga-

nized, existing, and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania with its office and the principal place of business located at 1500 Spring Garden St., in the City of Philadelphia, Commonwealth of Pennsylvania.

Allergan Pharmaceuticals, Inc. was a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its offices and principal place of business located at 2525 Dupont Drive in the City of Irvine, State of California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

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

I

It is ordered, That, subject to the prior approval of the Federal Trade Commission, respondent, through its officers, directors, employees, subsidiaries, affiliates, divisions, successors, and assigns, shall within six (6) months from the date on which this order becomes final divest absolutely and in good faith all assets, properties, rights, and privileges, tangible and intangible, of the subsidiary of respondent SmithKline Corporation known as the Sea & Ski Corporation, including but not limited to molds for the fabrication of plastic bottles, raw material reserves, inventory, lists of customers, product trade names, product trademarks, patents, assignable licenses (non-assignable licenses shall be relinquished), manufacturing specifications and procedures, market research materials, sales training materials, research and development projects (including licenses, license applications Notices of Claimed Investigational Exemption for a New Drug (IND's)), but excluding real property, plant, equipment and machinery of the Reno, Nevada, facility other than molds for the fabrication of plastic bottles. Such divestiture shall be made to a third party which represents that it intends to use the assets in the manufacture, distribution or sale of sun care products in the United States.

II

It is further ordered, That, upon the written request of the acquirer of the divested property, respondent shall, for no longer than one (1) year from the date of the agreement with such acquirer to transfer the assets referred to in Paragraph I, furnish such technical, market, and quality control information of SmithKline Corporation accumulated as a result of its ownership of the Sea & Ski Corporation and make available such personnel and technical assistance as may be necessary to enable the acquirer to manufacture and market those sun care products manufactured in the United States by SmithKline Corporation at the time of its merger with Allergan Pharmaceuticals, Inc.

III

It is further ordered, That, pending the divestiture required by this order, respondent shall not cause and shall use its best efforts to prevent, any diminution of value of the products or assets of Sea & Ski Corporation, and shall preserve the Sea & Ski Corporation as a viable, ongoing business.

IV

It is further ordered, That, pursuant to the requirements of Paragraph I above, none of the assets of the Sea & Ski Corporation shall be divested directly or indirectly to anyone who is, at the time of divestiture, an officer, director, employee, or agent of, or under the control, direction, or influence of, respondent or any of respondent's subsidiaries or affiliated corporations whether direct or indirect, or who owns or controls more than one (1) percent of the outstanding shares of the capital stock of respondent.

V

It is further ordered, That respondent shall, within sixty (60) days after the date of service of this order, and every sixty (60) days thereafter until respondent has fully complied with the divestiture provision of this order, and once thereafter on the expiration of the provisions of Paragraph II of this order, submit in writing to the Federal Trade Commission a verified report setting forth in detail the manner and form in which respondent intends to comply, is complying or has complied with this order. Until divestiture is accomplished, all compliance reports shall include, among other

things that are from time to time required, a summary of contacts or negotiations with anyone for the disposition of the assets specified in Paragraph I of this order, the identity of all such persons and copies of all written communications between such persons and respondent.

VI

It is further ordered, That respondent notify the Federal Trade 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 this order.

IN THE MATTER OF
BENTON & BOWLES, INCORPORATED

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket C-3044. Complaint, Oct. 10, 1980—Decision, Oct. 10, 1980

This consent order requires, among other things, a New York City advertising agency to cease depicting, in advertising, children eight years of age or younger operating non-motorized two- or three-wheeled vehicles in an unsafe or illegal manner. This includes representing children operating such vehicles in traffic thoroughfares without adult supervision, and performing stunts or similar acts which create an unreasonable risk of harm to person or property.

Appearances

For the Commission: *Susan Elliott.*

For the respondent: *Stuart Lee Friedel, Davis & Gilbert, New York, N.Y.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Benton & Bowles, Incorporated, a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Benton & Bowles, Incorporated is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 909 Third Ave., New York, New York.

PAR. 2. Respondent has been retained by AMF, Incorporated as its advertising agency and is now and for all times relevant to this complaint has been engaged in the production and distribution of advertisements for a variety of bicycles, tricycles and other wheeled toys manufactured by AMF, Incorporated.

PAR. 3. Respondent has prepared and placed for publication and has disseminated advertising material, including, but not limited to, the advertising referred to herein, to promote the sale of bicycles and