

IN THE MATTER OF
AMERSHAM INTERNATIONAL PLC

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

Docket C-3305. Complaint, Sept. 14, 1990—Decision, Sept. 14, 1990

This consent order prohibits, among other things, a Buckinghamshire, England company from consummating the acquisition of Medi-Physics, Inc. by respondent until after the closing of the sale of Medi-Physics' SPECTamine business to IMP, Incorporated or any other Commission-approved acquirer. In addition, for a period of ten years, respondent is prohibited from acquiring, without prior Commission approval, any stock, share capital, or equity interest in, or any assets relating to SPECT brain imaging.

Appearances

For the Commission: *Phillip L. Broyles, Susan Pettee, and Steven Newborn.*

For the respondent: *D. Stuart Meiklejohn, Sullivan & Cromwell, New York, N.Y.*

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent, Amersham International plc ("Amersham"), a corporation subject to the jurisdiction of the Federal Trade Commission, proposes to acquire Medi-Physics, Inc., from Hoffman-La Roche, Inc., a corporation subject to the jurisdiction of the Federal Trade Commission, 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 ("FTC Act"), as amended, 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. PARTIES

A. *Amersham International plc.*

1. Respondent Amersham is a corporation organized and existing

under the laws of England, with its offices and principal place of business at Amersham Place, Little Chalfont, Buckinghamshire, England HP7 9NA. Amersham does business in the United States through its wholly owned subsidiary, Amersham Corporation, an Illinois corporation with its offices and principal place of business at 2636 South Clearbrook Drive, Arlington Heights, Illinois.

2. Amersham is, and at all times relevant herein has been, engaged in commerce as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as “commerce” is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

B. Medi-Physics, Inc.

3. Medi-Physics, Inc. is a corporation organized and existing under the laws of the State of New Jersey, with its headquarters at 140 East Ridgewood Avenue, Paramus, New Jersey.

4. Medi-Physics is, and at all times relevant herein has been engaged in commerce as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as “commerce” is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

C. Hoffman-La Roche, Inc.

5. Hoffman-La Roche, Inc. is a New Jersey corporation, with its headquarters at 340 Kingsland Street, Nutley, New Jersey. Hoffman-La Roche is the owner of all of the voting securities of Medi-Physics.

6. Hoffman-La Roche is, and at all times relevant herein has been engaged in commerce as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as “commerce” is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

II. THE ACQUISITION

7. On or about April 25, 1990, Amersham and Hoffman-La Roche entered into an agreement whereby Amersham will acquire all of the voting securities of Medi-Physics from Hoffman-La Roche for a price of approximately \$45 million. The parties plan to consummate the transaction on May 11, 1990, or as soon thereafter as possible.

III. THE RELEVANT MARKET

8. For purposes of this complaint, the relevant line of commerce in

which to analyze Amersham's acquisition of Medi-Physics is the business of formulating, manufacturing, marketing and selling radiopharmaceutical brain perfusion imaging agents for use with Single Positron Emission Tomography ("SPECT") equipment.

9. For purposes of this complaint, the relevant section of the country is the United States.

10. The relevant market is highly concentrated, whether measured by Herfindahl-Hirschmann Indices ("HHI") or two-firm and four-firm concentration ratios.

11. Entry into the relevant market set out in paragraphs 8 and 9 herein is very difficult.

12. Amersham and Medi-Physics are actual competitors in the relevant market.

IV. EFFECTS OF THE ACQUISITION

13. The effect of the acquisition may be substantially to lessen competition and to tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the FTC Act, 15 U.S.C. 45, in the following ways, among others:

a. Actual competition between Amersham and Medi-Physics will be eliminated;

b. Amersham will acquire a monopoly in the business of formulating, manufacturing, marketing and selling brain perfusion imaging agents for use with SPECT equipment in the United States; and

c. The resulting Amersham monopoly in the business of formulating, manufacturing, marketing and selling brain perfusion imaging agents for use with SPECT equipment would increase the likelihood of collusion if another firm should enter the market.

V. VIOLATIONS CHARGED

14. The acquisition agreement described in paragraph 7 would constitute a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

15. The acquisition described in paragraph 7, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of

certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of the 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 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

Respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by 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 Amersham International plc ("Amersham") is a corporation organized and existing under the laws of England, with its offices and principal place of business at Amersham Place, Little Chalfont, Buckinghamshire, England HP7 9NA. Amersham does business in the United States through its wholly owned subsidiary, Amersham Corporation, an Illinois corporation with its offices and principal place of business at 2636 South Clearbrook Drive, Arlington Heights, Illinois.

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

I.

It is ordered, That for the purposes of this order the following definitions shall apply:

A. “*Acquisition*” means Amersham’s acquisition of any or all of the stock or assets of Medi-Physics.

B. “*Amersham*” means Amersham International plc, a corporation organized, existing, and doing business under and by virtue of the laws of England, its directors, officers, employees, agents and representatives, its domestic and foreign parents, predecessors, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures, and the directors, officers, employees, agents and representatives of its domestic and foreign parents, predecessors, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures. The words “subsidiary”, “affiliate” and “joint venture” refer to any firm in which there is partial (10 percent or more) or total ownership or control between corporations.

C. “*Assignment Agreement*” means the series of agreements between Medi-Physics (to which Amersham will become successor after Amersham acquires Medi-Physics) or Hoffman-La Roche, Inc. and IMP, Incorporated, consisting of the following documents: (1) an executed Assignment Agreement between IMP, Incorporated and Medi-Physics, Inc.; (2) a Security Agreement between IMP, Incorporated and Hoffman-La Roche, Inc.; (3) a Manufacturing Agreement between IMP, Incorporated and Medi-Physics, Inc.; (4) a Promissory Note, from IMP, Incorporated to Hoffman-La Roche, Inc.; (5) a Bill of Sale, showing Medi-Physics’ sale of the SPECTamine product to IMP, Incorporated; (6) a Trademark Assignment, from Medi-Physics, Inc. to IMP, Incorporated; and (7) an Assignment of U.S. Patent No. 4,360,511 from Medi-Physics, Inc. to IMP, Incorporated.

D. “*Brain perfusion imaging product for use with SPECT equipment*” (also referred to as “*Spect brain imaging agent*”) means a substance injected into the bloodstream, capable of crossing the blood-brain barrier, tagged with a short-lived radioactive isotope (Iodine 123 or Technetium 99) that enables blood perfusion of the brain to be imaged by using a computerized scintillation camera that produces tomographic images.

E. “*Commission*” means the Federal Trade Commission.

F. "*Hoffman-La Roche*" means Hoffman-La Roche, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of New Jersey, with its principal offices at 340 Kingsland Street, Nutley, New Jersey, as well as its directors, officers, employees, agents and representatives, its domestic and foreign predecessors, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures, and the directors, officers, employees, agents and representatives of its domestic and foreign predecessors, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures. The words "subsidiary", "affiliate" and "joint venture" refer to any firm in which there is partial (10 percent or more) or total ownership or control between corporations.

G. "*IMP, Incorporated*" means IMP, Incorporated, a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its headquarters at 8044 El Rio, Houston, Texas.

H. "*Medi-Physics*" means Medi-Physics, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its principal offices located at 140 East Ridgewood Avenue, Paramus, New Jersey, as it was constituted prior to the Acquisition, as well as its directors, officers, employees, agents and representatives, its domestic and foreign predecessors, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures, and the directors, officers, employees, agents and representatives of its domestic and foreign predecessors, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures. The words "subsidiary", "affiliate" and "joint venture" refer to any firm in which there is partial (10 percent or more) or total ownership or control between corporations.

I. "*Medi-Physics' SPECTamine business*" means and includes Medi-Physics' approved New Drug Applications ("NDA") for its Iofetamine HCl I-123 injection brain perfusion imaging product for use with Single Positron Emission Tomography ("SPECT") equipment, brand named SPECTamine ("SPECTamine"); U.S. Patent Number 4,360,511, expiration date 11/23/01, entitled "AMINES USEFUL AS BRAIN IMAGING AGENTS;" U.S. Trademark No. 1,438,930; the U.S. SPECTamine customer lists; business records insofar as they relate to SPECTamine; all United States production technology and know-how related to SPECTamine as developed and currently produced and marketed by Medi-Physics in the United

States; and all the results of research and development efforts by Medi-Physics relating to improvements, developments and variants of the SPECTamine product.

II.

It is further ordered, That Amersham shall not consummate the acquisition until after the closing of the sale of the Medi-Physics' SPECTamine business to:

- A. IMP, Incorporated, pursuant to the Assignment Agreement;
- or
- B. Any other acquirer approved in advance by the Commission and in a manner approved in advance by the Commission.

III.

It is further ordered, That until the date at which all of its obligations under the Assignment Agreement cease, Amersham, as successor in interest to Medi-Physics, shall not, without prior approval of the Commission, make or agree to any modification with respect to any terms (other than those concerning technical or mechanical aspects of either party's performance) contained in the Assignment Agreement or any other instruments approved by the Commission to execute the divestiture of Medi-Physics' SPECTamine business to an Acquirer.

IV.

It is further ordered, That Amersham shall provide to the Federal Trade Commission, as promptly as possible and in any event no later than thirty (30) days after their receipt or transmittal, copies of all communications between Amersham and Medi-Physics, Hoffman-La Roche, IMP, Incorporated, or any other Acquirer of the Medi-Physics' SPECTamine business, regarding changes in or alleged breaches of the Assignment Agreement or any other instruments approved by the Commission to execute the divestiture of Medi-Physics' SPECTamine business to any acquirer.

V.

It is further ordered, That for a period of ten (10) years from the

date this order becomes final, Amersham shall cease and desist from acquiring, without the prior approval of the Commission, directly or indirectly, through any subsidiary, corporate or other device, any stock, share capital, or equity interest in, or any assets relating to SPECT brain imaging agents of, any concern, corporate or noncorporate, engaged in the manufacture or sale, in or to the United States, of any SPECT brain imaging agent; *provided, however*, that nothing in this order shall require Amersham to obtain Commission approval of any action taken by Amersham in the ordinary course of Amersham's own business, whether in the manufacture or sale of products it currently manufactures or sells, or in the development of new products.

VI.

It is further ordered, That on the first anniversary of the date that this order becomes final, and on every anniversary date thereafter for the following nine (9) years, and at such other times as the Commission or its staff may request, Amersham shall submit a verified written report setting forth in detail the manner and form in which Amersham intends to comply, is complying, and has complied with the terms of this order and the Assignment Agreement.

VII.

It is further ordered, That Amersham shall notify the Commission at least thirty (30) days prior to any proposed change in Amersham, such as dissolution, assignment or sale resulting in the emergence of a successor, or the creation or dissolution of subsidiaries or any other change that may affect compliance with this order.

VIII.

It is further ordered, That Amersham shall notify the Commission within thirty (30) days of the date of FDA approval of the SPECTamine manufacturing facility of the acquirer of Medi-Physics' SPECTamine business.

IN THE MATTER OF
SEEKONK FREEZER MEATS, INC., ET AL.

Docket 8880. Interlocutory Order, September 21, 1990

ORDER

It is ordered, That this show cause proceeding is dismissed.
Commissioner Strenio dissenting.

OPINION OF THE COMMISSION

Per Curiam:

The Commission has reopened this matter to consider modifying our earlier decision and order, which found that respondents had violated the Truth-In-Lending Act and Regulation Z. Staff now urges that we find that respondents' conduct constitutes an unfair act or practice under Section 5 of the FTC Act. The issue presented is nearly identical to that posed by *Reliable Mortgage Corporation, et al.*, D. 8956, where, in an accompanying decision, the Commission finds the record insufficient to support the proposed modification. For similar reasons, we reject the arguments proffered here and dismiss this show cause proceeding.

I. Procedural History

On March 15, 1973, the Commission issued an order against Seekonk Freezer Meats, Inc. and its chief executive officer Lawrence Fontes ("Seekonk" or "respondents") for violations of Section 5 of the FTC Act, 15 U.S.C. 45, the Truth-In-Lending Act ("TILA"), 15 U.S.C. 1601 *et seq.* and Regulation Z, 12 CFR 226, which implements TILA. *Seekonk Freezer Meats, Inc., et al.*, 82 FTC 1025 (1973) ("*Seekonk*"). The Commission found that respondents advertised certain credit terms without disclosing others in violation of Regulation Z's triggering term provision,¹ TILA and the FTC Act. *Seekonk*, 82 FTC at 1052.² The Commission's order, among other things,

¹ Regulation Z's triggering term provision currently appears at 12 CFR 226.24(c) (1981) (previously 12 CFR 226.10(d)(2)).

² Through advertising such as "only \$4.72 per week for 26 weeks" and "only \$3.30 per week for 52 weeks", respondents represented the amount of an installment payment, the number of installments and the period of repayment without also disclosing: (1) cash price; (2) amount of down payment required; (3) amount of finance charge expressed as an annual percentage rate; and (4) deferred payment price. *Seekonk*, 82 FTC at 1052.