

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

_____)	
UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	Civil Action No. 90-5144
)	
v.)	COMPLAINT FOR EQUITABLE
)	RELIEF FOR VIOLATION OF
THE PROCTER & GAMBLE COMPANY;)	TITLE 15 U.S.C. § 18,
RHONE-POULENC RORER, INC.,)	CLAYTON ANTITRUST ACT
)	
Defendants.)	FILED: 8/7/90
_____)	

Judge Marvin Katz

VERIFIED COMPLAINT

The United States of America, by its attorneys, acting under the direction of the Attorney General of the United States, brings this civil action to obtain equitable and other relief against the defendants named herein and complains and alleges as follows:

I.

JURISDICTION AND VENUE

1. This verified complaint is filed and this action is instituted under Section 15 of the Clayton Act, as amended, 15 U.S.C. § 25, to prevent and restrain the violation by defendants, as hereinafter alleged, of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

2. The Procter & Gamble Company transacts business and is found in the Eastern District of Pennsylvania, within the meaning of 15 U.S.C. § 22 and 28 U.S.C. § 1391(c).

3. Rhone-Poulenc Rorer, Inc. transacts business and is found in the Eastern District of Pennsylvania, within the meaning of 15 U.S.C. § 22 and 28 U.S.C. § 1391(c).

II.

DEFINITIONS

4. "OTC stomach remedy" means any nonprescription or over-the-counter drug labeled, promoted, and used for relief of gas, indigestion, heartburn, upset stomach, nausea, or diarrhea. Products that relieve these symptoms are generally known as antacids, antinauseants, antiflatulents, antidiarrheals, and overindulgence remedies.

5. "Maalox" means any OTC stomach remedy sold by Rhone-Poulenc Rorer, Inc. under the trade name "Maalox," "Camalox," or "Fermalox."

6. "Pepto-Bismol" means any OTC stomach remedy sold by The Procter & Gamble Company under the trade name "Pepto-Bismol."

7. "HHI" means the Herfindahl-Hirschman Index, a measure of market concentration calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, a market consisting of four firms with market shares of 30, 30, 20, and 20 percent, has an HHI of 2,600 (30 squared + 30 squared + 20 squared + 20 squared = 2,600). The HHI, which takes into account the number and size distribution of the firms in a market, ranges from

virtually zero to 10,000. The index approaches zero when a market consists of a large number of firms of relatively equal size. The index increases as the number of firms in the market decreases and may also increase as the disparity in size between the leading firms and the remaining firms increases.

III.

DEFENDANTS

8. The Procter & Gamble Company ("P&G") is made a defendant herein. P&G is an Ohio corporation with its principal offices in Cincinnati, Ohio. P&G produces and sells Pepto-Bismol, which it markets and promotes as the only OTC stomach remedy needed for relief of most common stomach or digestive discomforts, including indigestion, heartburn, upset stomach, nausea, and diarrhea. Pepto-Bismol is manufactured by P&G at a plant in Greenville, South Carolina, and is sold by P&G throughout the United States. In 1989, total domestic retail sales of Pepto-Bismol were at least \$125 million. P&G is engaged in interstate commerce and in activities substantially affecting interstate commerce.

9. Rhone-Poulenc Rorer, Inc. ("Rorer") is made a defendant herein. Rorer is a multinational corporation which maintains its principal United States offices and a major manufacturing facility in Fort Washington, Pennsylvania. Rorer produces and sells Maalox, an OTC stomach remedy which is marketed for relief from acid indigestion, heartburn, sour

stomach, upset stomach, and, in some formulations, gas. Rorer produces Maalox in its Fort Washington plant and sells the product throughout the United States. In 1989, total Maalox retail sales in the United States were in excess of \$111 million. Rorer is engaged in interstate commerce and in activities substantially affecting interstate commerce.

IV.

TRADE AND COMMERCE

10. OTC stomach remedies are nonprescription drugs promoted and used for symptomatic relief from common stomach and digestive discomforts. OTC stomach remedies are produced and sold in different forms (liquid, tablet, and effervescent), strengths (regular and maximum), flavors, and sizes.

11. Many OTC stomach remedies are efficacious for a variety of symptoms. Antacids are frequently combined with antiflatulents to produce combination remedies that relieve gas as well as indigestion, heartburn, upset stomach, and sour stomach. Many overindulgence products also relieve some or all of the symptoms for which antacids are taken.

12. Pepto-Bismol is a combination OTC stomach remedy that provides relief from a variety of symptoms, including indigestion, upset stomach, heartburn, nausea, and diarrhea. Similarly, Maalox is widely promoted as providing symptomatic relief from acid indigestion, heartburn, sour stomach, and

upset stomach--and, in some formulations, gas--and is a good substitute for Pepto-Bismol. Pepto-Bismol is in direct competition with Maalox.

13. The relevant market in which to assess the competitive significance of the transaction described in Paragraph 20 herein (the "acquisition") is the market for OTC stomach remedies sold in the United States. The products in this market are perceived by consumers to be good substitutes for Pepto-Bismol or Maalox. Because of the significant differences between OTC stomach remedies and prescription gastrointestinal drugs and other products in, among other things, their cost, convenience, safety, efficacy, reliability, methods of promotion, and manner of distribution, a small but significant and nontransitory increase in the price of OTC stomach remedies is not likely to cause a significant number of consumers to substitute prescription gastrointestinal drugs for OTC stomach remedies.

14. The sale of OTC stomach remedies constitutes a line of commerce and relevant product market within the meaning of Section 7 of the Clayton Act.

15. Firms that produce OTC stomach remedies sell them throughout the United States. OTC stomach remedy exports from and imports to the United States are not substantial and are effectively limited by stringent Food and Drug Administration regulations on production, marketing, and sale of drugs in

interstate commerce in the United States. The United States is a section of the country and a relevant geographic market within the meaning of Section 7 of the Clayton Act.

16. In 1989, total United States retail sales of OTC stomach remedies were approximately \$1 billion. P&G and Rorer were, respectively, the second and third largest competitors in the market for OTC stomach remedies. Based on 1989 sales data, P&G and Rorer market shares were, respectively, in excess of 14 and 12 percent. The OTC stomach remedies market is moderately concentrated and would become substantially more concentrated as a result of the acquisition. The proposed acquisition would raise the HHI approximately 342 points to 1374.

17. The OTC stomach remedies market is dominated by six firms -- Johnson and Johnson/Merck Consumer Pharmaceuticals (Mylanta, Imodium), P&G (Pepto-Bismol), Rorer (Maalox), SmithKline Beecham (Tums), Warner-Lambert (Rolaids), and Bayer USA (Alka-Seltzer) -- which, among them, control in excess of 75 percent of all sales of OTC stomach remedies in the United States. After the acquisition, P&G would be the largest seller of OTC stomach remedies in the United States, with well over 26 percent of all OTC stomach remedy sales.

18. Successful entry into the United States OTC stomach remedies market is difficult. Among the factors that make entry difficult are the time and expense required to construct

production facilities, develop and obtain regulatory approval for an OTC stomach remedy with new safety, efficacy, or reliability claims, and develop consumer acceptance through promotion and advertising efforts. These tasks cannot be easily accomplished, in light of government restrictions on active ingredients and labeling claims for OTC stomach remedies and consumers' reluctance to abandon familiar and proven products. For these and other reasons, a small but significant and nontransitory increase in the price of OTC stomach remedies will not result in significant new entry or expansion by existing competitors in the OTC stomach remedies market.

19. Manufacturers of OTC stomach remedies ship and sell substantial quantities of OTC stomach remedies across state lines to locations throughout the United States. They purchase equipment and supplies from states other than the state in which their product is made, and the equipment and supplies are regularly shipped across state lines. They advertise their products in broadcast and print media across the United States. The marketing and sale of OTC stomach remedies are within the flow of, and substantially affect, interstate commerce.

V.

VIOLATION ALLEGED

20. The defendants have entered into an agreement, extending into perpetuity, under which P&G would acquire from Rorer the exclusive right to market and distribute, as well as an option to purchase the assets used to manufacture, the Maalox line of OTC stomach remedies.

21. The effect of P&G's acquisition of the Maalox marketing rights and purchase option may be substantially to lessen competition in interstate trade and commerce in violation of Section 7 of the Clayton Act in the following ways, among others:

a. Actual and potential competition between P&G and Rorer in the OTC stomach remedies market in the United States will be eliminated; and

b. Competition generally in the OTC stomach remedies market in the United States may be substantially lessened.

VI.

PRAYER

WHEREFORE, plaintiff prays:

1. That preliminary and permanent injunctions be issued preventing and restraining the defendants and all persons acting on their behalf from consummating the acquisition, or from consummating any other plan or agreement which would give P&G any direct or indirect control over the production, marketing, or sale of Maalox;

2. That the proposed acquisition be adjudged a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18;


3. That plaintiff have such other and further relief as this Court may deem just and proper; and

4. That plaintiff recover the costs of this action.


Dated: August 3, 1990.



JAMES F. RILL
Assistant Attorney General



ALISON L. SMITH



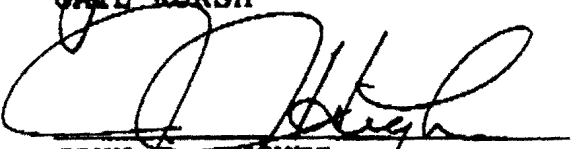
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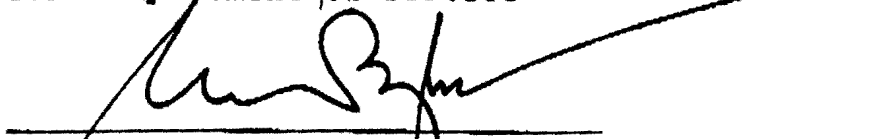
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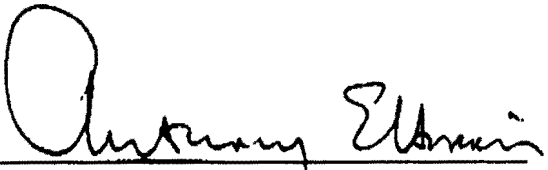
VERIFICATION OF COMPLAINT

I, Anthony E. Harris, declare:

1. I am an attorney employed by the Antitrust Division of the United States Department of Justice.

2. The foregoing civil antitrust complaint for and on behalf of the United States of America was duly prepared under the direction of the Attorney General of the United States. The facts stated therein have been assembled by authorized employees and counsel for the United States of America. The allegations of the complaint are true and correct to the best of my knowledge, information, and belief.

I declare under penalty of perjury that the foregoing is true and correct. Executed in Washington, D.C. on this 3rd day of August 1990.


ANTHONY E. HARRIS