

1 P. Terry Lubeck  
Andrew L. Pringle  
2 Sanford M. Adler  
Antitrust Division  
3 United States Department of Justice  
Washington, DC 20530  
4 Telephone: 202/724-7974

5 Robert E. Noel  
Assistant United States Attorney  
6 United States Court House  
940 Front Street  
7 San Diego, California 92189  
Telephone: 714/293-5662

8 Attorneys for Plaintiff  
9

10 UNITED STATES DISTRICT COURT  
11 SOUTHERN DISTRICT OF CALIFORNIA

|                              |   |                             |
|------------------------------|---|-----------------------------|
| 12 UNITED STATES OF AMERICA, | ) |                             |
|                              | ) |                             |
| 13 Plaintiff,                | ) |                             |
|                              | ) | Civil Action No. 79-09-62-T |
| 14 v.                        | ) |                             |
|                              | ) | <u>Antitrust</u>            |
| 15 MERCK & CO., INC.,        | ) |                             |
|                              | ) | <u>COMPLAINT</u>            |
| 16 Defendant.                | ) |                             |
| 17                           | ) | Filed: August 17, 1979      |

18 COMPLAINT

19 The United States of America, by its attorneys, acting  
20 under the direction of the Attorney General of the United  
21 States, brings this civil action against the above-named  
22 defendant and complains and alleges as follows:  
23

24 I

25 JURISDICTION

26 1. This complaint is filed and this action is instituted  
27 against the defendant under Section 15 of the Clayton Act, as  
28 amended (15 U.S.C. § 25), and Section 4 of the Sherman Act  
29 (15 U.S.C. § 4), in order to prevent and restrain the viola-  
30 tion by the defendant, as hereinafter alleged, of Section 7  
31 of the Clayton Act, as amended (15 U.S.C. § 18), and Sections  
32 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2).

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32

II  
VENUE

2. The defendant transacts business and is found within the Southern District of California.

III  
THE DEFENDANT

3. Merck & Co., Inc. (hereinafter referred to as "Merck") is named as the defendant herein. Merck is a corporation organized and existing under the laws of the State of New Jersey. It maintains its principal executive offices at Rahway, New Jersey.

4. Merck, a multinational company, produces and sells health-related products. In 1977, the company had total assets of almost \$2 billion and recorded net income of about \$290 million on sales of about \$1.7 billion. Merck's business divides into two classes: human and animal health products, and environmental health products. Outside the United States, the company operates primarily through subsidiaries.

5. Merck is a corporation engaged in commerce. Merck regularly purchases and sells in interstate commerce a substantial quantity of a wide variety of products. Significant amounts of Merck's products are manufactured in one state and shipped to customers located in other states.

6. Kelco, a division of Merck, has its principal executive offices in San Diego, California.

7. Kelco is primarily engaged in the production and sale of alginate and xanthan gum. It is the second largest producer of alginate in the world. In 1978, it produced approximately 25 percent of worldwide alginate supply. Kelco is the largest producer of alginate in the United States. In 1978, its United States sales of alginate were about \$21 million, approximately

//

1 80 percent of all such sales. Kelco is also the largest  
2 producer of xanthan gum in the world and the only producer  
3 of food grade xanthan gum in the United States. In 1978,  
4 Kelco sold about \$30 million worth of xanthan gum worldwide.

5 IV

6 THE ACQUIRED FIRM

7 8. Alginate Industries Ltd. (hereinafter referred to as  
8 "AIL") is a corporation organized and existing under the laws  
9 of the United Kingdom. It maintains its principal executive  
10 offices at London, England.

11 9. AIL is primarily engaged in the production and sale  
12 of alginate. It is the largest producer of alginate in the  
13 world. In 1978, it produced approximately 37 percent of the  
14 worldwide alginate supply.

15 10. AIL is a corporation engaged in commerce. In 1978,  
16 AIL's alginate constituted approximately 75 percent of alginate  
17 imported into the United States. ICI Americas Inc. (herein-  
18 after referred to as "ICI") is AIL's exclusive distributor  
19 of its alginate in the United States. AIL regularly produces  
20 and sells to ICI substantial quantities of alginate, which  
21 AIL ships or causes to be shipped to ICI in the United States.  
22 In addition, AIL is contractually obligated to assist ICI in  
23 the United States and it does so. In 1978, ICI's United  
24 States sales of alginate were about \$2 million, approximately  
25 8 percent of all such sales.

26 V

27 THE ACQUISITION OFFER

28 11. On or about January 15, 1978, Merck caused to be made  
29 a \$42.4 million tender offer covering all common and preferred  
30 stock of AIL. Although Merck directed and controlled the offer,  
31 it was made on Merck's behalf by Charles E. Frosst (U.K.)

32 //

1 Limited (hereinafter referred to as "Frosst"), an inactive,  
2 wholly-owned subsidiary of Merck, with no operating assets.

3 12. Merck was involved in Frosst's offer to purchase  
4 AIL in the following ways, among others: Merck secured  
5 irrevocable commitments on the majority of AIL's stock; Merck's  
6 assistance enabled Frosst to finance its offer to purchase AIL;  
7 the Boards of Directors of Merck and AIL agreed in advance to  
8 the terms of the tender offer; and Merck's Board of Directors  
9 formally approved the tender offer before it was made.

10 13. The British government initiated a proceeding to  
11 evaluate Merck's proposed acquisition of AIL. Because of  
12 the British proceeding, the tender offer has lapsed by its  
13 own terms. On July 25, 1979, the British government announced  
14 its approval of the proposed acquisition. Merck intends to  
15 acquire AIL at the earliest possible date.

16 VI

17 ALGINATE AND ITS PRODUCTION, USE, AND SALE

18 14. Alginate, a hydrocolloid, is extracted from seaweed.  
19 Hydrocolloids control water-based systems by thickening,  
20 stabilizing, suspending, film-forming, emulsifying, or gelling.  
21 There are a number of commercially significant types of  
22 alginate: alginic acid, its ester propylene glycol alginate,  
23 and its various salts such as sodium alginate and potassium  
24 alginate. Alginate has a variety of commercial uses.

25 15. Other producers of alginate are small compared to  
26 Kelco and AIL. The next two leading alginate producers are  
27 foreign corporations, which in 1978 accounted for approxi-  
28 mately 14 percent and 6 percent, respectively, of worldwide  
29 alginate supply. Other than Kelco, there is only one firm  
30 that produces alginate in the United States. In 1978, this  
31 company produced approximately 4 percent of worldwide alginate

32 //

1 supply and sold about \$2 million worth of alginate in the  
2 United States.

3 16. For a number of alginate uses, only propylene glycol  
4 alginate is suitable. Only a few companies in the world,  
5 including Kelco and AIL, produce propylene glycol alginate.  
6 Neither the next two leading alginate producers worldwide nor  
7 the only domestic alginate producer other than Kelco produce  
8 propylene glycol alginate.

9 COUNT ONE

10 17. Plaintiff here repeats and realleges the allegations  
11 of paragraphs 1 through 16 inclusive, with the same force and  
12 effect as though set forth in full.

13 VII

14 TRADE AND COMMERCE

15 18. Alginate is used as a stabilizer in pourable salad  
16 dressings. Pourable dressings are those dressings that can  
17 be poured from a bottle. Pourable dressings require a  
18 stabilizer to thicken, emulsify, and stabilize the dressing.  
19 At the present time, xanthan gum and propylene glycol alginate  
20 are the two principal pourable dressing stabilizers.

21 19. In the United States, few firms supply propylene  
22 glycol alginate or xanthan gum for use as pourable salad  
23 dressing stabilizers. In 1978, Kelco sold in the United  
24 States about \$3 million worth of propylene glycol alginate  
25 and about \$4.5 million worth of xanthan gum for this use,  
26 approximately 80 percent of the pourable dressing stabilizers  
27 sold. ICI sold in the United States about \$60 thousand worth  
28 of AIL's propylene glycol alginate for this use, approximately  
29 1 percent of the pourable dressing stabilizers sold.

30 //

31 //

32 //

1           20. Alginate is used as an antimigrant in some methods  
2 of dyeing textiles and as a print paste thickener in some  
3 methods of printing textiles. Many other substances can also  
4 be used as an antimigrant or as a print paste thickener. In  
5 these uses, alginate has distinct advantages over the other  
6 substances. Alginate is particularly advantageous for certain  
7 applications, including printing with disperse dyes and  
8 printing with fiber reactive dyes.

9           21. In the United States, few firms supply alginate for  
10 use as an antimigrant or print paste thickener. In 1978,  
11 Kelco sold in the United States about \$1.7 million worth of  
12 alginate for use as an antimigrant or print paste thickener,  
13 over 50 percent of the alginate sold for this use. ICI sold  
14 in the United States about \$1.4 million worth of AIL's alginate  
15 for use as an antimigrant or print paste thickener, over  
16 40 percent of the alginate sold for this use.

17           22. Alginate is used as a foam stabilizer to improve  
18 the head on beer. Although a few other substances are also  
19 used to stabilize beer foam, propylene glycol alginate is  
20 distinct in this use.

21           23. In the United States, two firms sell alginate for  
22 use as a beer foam stabilizer. In 1978, Kelco sold in the  
23 United States about \$2.4 million worth of propylene glycol  
24 alginate for use as a beer foam stabilizer, over 80 percent  
25 of all beer foam stabilizers sold. AIL is one of the two  
26 principal suppliers in the world of propylene glycol alginate  
27 as a beer foam stabilizer. AIL is the most likely potential  
28 source of competition in the sale in the United States of  
29 beer foam stabilizers.

30           24. Alginate is used as a gelling agent in one type of  
31 dental impression compound. Dental impression compounds are  
32 used to replicate a portion of a patient's mouth. Alginate-

1 based compounds are distinct from other types of dental  
2 impression compounds.

3 25. In the United States, few firms supply alginate for  
4 use in alginate-based dental impression compounds. In 1978,  
5 Kelco sold in the United States about \$960 thousand worth of  
6 alginate for use in alginate-based compounds, approximately  
7 80 percent of the alginate sold for this use. ICI sold in  
8 the United States about \$40 thousand worth of AIL's alginate  
9 for use in alginate-based compounds, approximately 3 percent  
10 of the alginate sold for this use.

11 26. Alginate is an ingredient in a type of drug. One  
12 drug of that type is sold by Marion Laboratories, Inc., under  
13 the trademark Gaviscon. Gaviscon and other drugs of that type  
14 (hereinafter collectively referred to as "Gaviscon") operate  
15 in a similar manner to treat reflux esophagitis. Reflux  
16 esophagitis is a condition where the stomach's contents,  
17 which are highly acidic, flow into the esophagus, with result-  
18 ing uncomfortable symptoms. Gaviscon operates in a manner  
19 distinct from that of other treatments for reflux esophagitis.

20 27. In the United States, only two firms, Kelco and ICI,  
21 sell alginate for use in Gaviscon. In 1978, Kelco sold in  
22 the United States about \$1 million worth of alginate for use  
23 in Gaviscon, approximately 91 percent of the alginate sold  
24 for this use. ICI sold in the United States about \$100 thousand  
25 worth of AIL's alginate for use in Gaviscon, approximately  
26 9 percent of the alginate sold for this use.

27 28. Alginate is used as an emulsifier in buttered syrup.  
28 Buttered syrup is distinct from other table syrups. By federal  
29 regulation, it must contain at least 2 percent butter. An  
30 emulsifier is needed to keep the butter dispersed uniformly  
31 throughout the syrup. Although a number of substances can  
32

1 emulsify buttered syrup, only propylene glycol alginate is  
2 being used in the United States as a buttered syrup emulsifier.

3 29. In the United States, only two firms, Kelco and ICI,  
4 sell propylene glycol alginate for use as a buttered syrup  
5 emulsifier. In 1978, Kelco sold in the United States about  
6 \$900 thousand worth of propylene glycol alginate for use as an  
7 emulsifier in buttered syrups, approximately 93 percent of  
8 the buttered syrup emulsifiers sold. ICI sold in the United  
9 States about \$70 thousand worth of AIL's propylene glycol  
10 alginate for use as an emulsifier in buttered syrups, approxi-  
11 mately 7 percent of the buttered syrup emulsifiers sold.

12 VIII

13 VIOLATION ALLEGED

14 30. The effect of the proposed acquisition may be  
15 substantially to lessen competition or to tend to create a  
16 monopoly in violation of Section 7 of the Clayton Act in the  
17 following lines of commerce, individually and collectively,  
18 in the United States: sales of pourable salad dressing  
19 stabilizers, a gelling agent in alginate-based dental impres-  
20 sion compounds, a foaming agent in Gaviscon, emulsifiers in  
21 buttered syrup, foam stabilizers in beer, and alginate for  
22 use as an antimigrant in dyeing textiles and as a print paste  
23 thickener in printing textiles, in the following ways, among  
24 others:

25 (a) AIL will be eliminated as a significant  
26 competitor in the manufacture of alginate for sale in the  
27 United States;

28 (b) concentration will be substantially increased  
29 and the potential for deconcentration will be substantially  
30 decreased; and

31 (c) actual and potential competition may be  
32



1 substantially lessened.

2 COUNT TWO

3 31. Plaintiff here repeats and realleges the allegations  
4 of paragraphs 1 through 16 inclusive, with the same force and  
5 effect as though set forth in full.

6 IX

7 TRADE AND COMMERCE

8 32. Plaintiff here repeats and realleges the allegations  
9 of paragraphs 18 through 29 inclusive, with the same force and  
10 effect as though set forth in full.

11 X

12 CO-CONSPIRATORS

13 33. Various corporations and individuals, not made  
14 defendants in this complaint, participated as co-conspirators  
15 in the violation alleged herein, and performed acts and made  
16 statements in furtherance thereof.

17 XI

18 VIOLATION ALLEGED

19 34. Beginning at least as early as December 1978,  
20 defendant embarked upon a course of action to acquire AIL as  
21 defendant's wholly-owned subsidiary. This course of action  
22 includes entering into agreements, either directly or through  
23 its agents or both, and engaging in a combination and  
24 conspiracy. By acquiring AIL, defendant will, in violation  
25 of Section 1 of the Sherman Act, unreasonably restrain trade  
26 and commerce in the following product markets, individually  
27 and collectively, in the United States: sales of pourable  
28 salad dressing stabilizers, a gelling agent in alginate-based  
29 dental impression compounds, a foaming agent in Gaviscon,  
30 emulsifiers in buttered syrup, foam stabilizers in beer, and

31 //

32 //

1 alginate for use as an antimigrant in dyeing textiles and as  
2 a print paste thickener in printing textiles.

3 XII

4 EFFECTS

5 35. The unreasonable restraint of trade and commerce in  
6 the aforementioned markets, individually and collectively,  
7 will occur in the following ways, among others:

8 (a) AIL will be eliminated as a significant  
9 competitor in the manufacture of alginate for sale in the  
10 United States;

11 (b) concentration will be substantially increased  
12 and the potential for deconcentration will be substantially  
13 decreased; and

14 (c) actual and potential competition will be  
15 substantially lessened.

16 COUNT THREE

17 36. Plaintiff here repeats and realleges the allegations  
18 of paragraphs 1 through 16 inclusive, with the same force and  
19 effect as though set forth in full.

20 XIII

21 TRADE AND COMMERCE

22 37. Plaintiff here repeats and realleges the allegations  
23 of paragraphs 18 through 29 inclusive, with the same force and  
24 effect as though set forth in full.

25 XIV

26 VIOLATION ALLEGED

27 38. Beginning at least as early as December 1978,  
28 defendant embarked upon a course of action to acquire AIL as  
29 defendant's wholly-owned subsidiary. By acquiring AIL,  
30 defendant will, in violation of Section 2 of the Sherman Act,  
31 monopolize the following product markets, individually and  
32

1 collectively, in the United States: sales of pourable salad  
2 dressing stabilizers, a gelling agent in alginate-based  
3 dental impression compounds, a foaming agent in Gaviscon,  
4 emulsifiers in buttered syrup, foam stabilizers in beer, and  
5 alginate for use as an antimigrant in dyeing textiles and as  
6 a print paste thickener in printing textiles.

7 XV

8 EFFECTS

9 39. The monopolization of the aforementioned markets,  
10 individually and collectively, will occur in the following  
11 ways, among others:

12 (a) AIL will be eliminated as a significant competitor  
13 in the manufacture of alginate for sale in the United States;

14 (b) concentration will be substantially increased  
15 and the potential for deconcentration will be substantially  
16 decreased;

17 (c) defendant's monopoly power will be substantially  
18 increased and the potential for it to be lessened will be  
19 substantially decreased; and

20 (d) actual and potential competition will be  
21 substantially lessened.

22 PRAYER

23 WHEREFORE, plaintiff prays:

24 1. That the aforesaid proposed acquisition of AIL by  
25 defendant be adjudged to be in violation of Section 7 of the  
26 Clayton Act and Sections 1 and 2 of the Sherman Act.

27 2. That defendant and all persons acting on its behalf  
28 be permanently enjoined from acquiring, directly or indirectly,  
29 stock or assets of AIL.

30 3. That defendant and all persons acting on its behalf  
31 be permanently enjoined from retaining any interest in AIL  
32 directly or indirectly acquired by any of them.


1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32

4. That plaintiff have such other and additional relief as the Court deems just and proper.

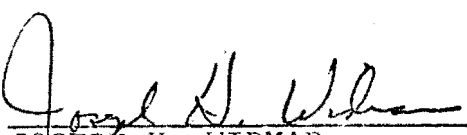
Dated:

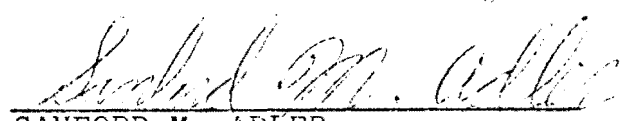
RESPECTFULLY SUBMITTED,

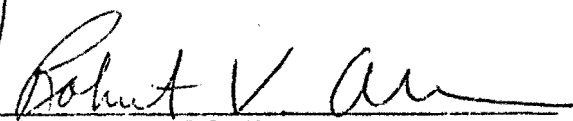
  
JOHN H. SHENEFIELD  
Assistant Attorney General

  
P. TERRY LUBECK

  
ANDREW L. PRINGLE

  
JOSEPH H. WIDMAR

  
SANFORD M. ADLER

  
ROBERT V. ALLEN

Attorneys  
Antitrust Division (SAFE-704)  
Department of Justice  
Washington, DC 20530  
202/724-7974

Attorneys, Department of Justice

//  
//  
//  
//  
//  
//  
//  
//  
//  
//  
//  
//  
//  
//  
//  
//  
//  
//  
//  
//  
//