

Complaint

87 F.T.C.

IN THE MATTER OF  
WARNER-LAMBERT COMPANY

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

*Docket 8850. Complaint, June 30, 1971—Order, April 27, 1976*

Opinion, Findings of Facts and Conclusions of Law that the acquisition by Warner-Lambert of Morris Plains, N.J., a major American industrial corporation and a leader in the drug business, of Parke, Davis & Company, has or may substantially lessen competition in the following five therapeutic submarkets of the overall drug manufacturing market: (1) thyroid preparations, (2) cough remedies, (3) cough drops and lozenges, (4) normal serum albumin, and (5) tetanus immune globulin. The order vacates the initial decision of the administrative law judge; adopts the Commission's own Findings of Facts and Conclusions of Law; and directs each party within 30 days to file with the Commission a proposed form of order appropriate to the decision, together with a supporting memorandum.

*Appearances*

For the Commission: *Paul R. Teetor, Thomas P. Athridge, Robert D. Jacobs and Sidney A. Shapiro.*

For the respondent: *Herbert A. Bergson, Howard Adler, Jr., Mary-Margaret Gillen and Michael D. Ridberg, Bergson, Borkland, Margolies & Adler, Washington, D.C. Mudge, Rose, Guthrie & Alexander, New York City.*

COMPLAINT

The Federal Trade Commission has reason to believe that Warner-Lambert Company (hereafter "Warner-Lambert"), a corporation and the respondent herein, has acquired Parke, Davis & Company (hereafter "Parke, Davis"), a corporation, in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. §18); therefore, pursuant to Section 11 of the Clayton Act, as amended (15 U.S.C. §21), it issues this complaint, stating its charges in that respect as follows:

1. DEFINITIONS

For purposes of the complaint the following definitions shall apply:

- (a) "Drugs" are medicines, both pharmaceutical and biological, in dosage form and are here restricted to those intended for human use.
- (b) "Ethical" drugs are those for which a prescription is required or which, although sold over the counter without a prescription, are primarily promoted to the medical profession.

(c) "Proprietary" drugs are those which are promoted primarily to the consuming public.

(d) Any reference herein to Warner-Lambert or to Parke, Davis shall be deemed to include all subsidiary corporations unless the context requires otherwise.

## 2. ACQUISITION

On November 13, 1970, pursuant to an Agreement and Plan of Merger dated August 25, 1970, Warner-Lambert, a Delaware corporation with its principal office at Morris Plains, New Jersey, through a wholly-owned subsidiary, Tabor Company, a Michigan corporation, acquired ownership of all or substantially all the stock of Parke, Davis, a Michigan corporation with its principal place of business at Detroit, Michigan. At the time of the acquisition both Warner-Lambert and Parke, Davis were engaged in interstate commerce within the meaning of Section 7 of the Clayton Act, as amended.

## 3. ACQUIRING COMPANY

At the time that it acquired Parke, Davis, Warner-Lambert was a major American industrial corporation and a leader in the drug business. In 1969 Warner-Lambert's total sales were \$808 million and total assets \$572 million, ranking it approximately 138th largest in sales and 165th largest in assets among American industrial corporations. Warner-Lambert has foreign operations, with some 70 owned or leased plants in 47 countries.

Warner-Lambert began business as William R. Warner & Co., later Warner-Hudnut, Inc., the product of a 1916 merger between a cosmetics company and a chemical company. Its total sales in 1954 were \$48 million. Thereafter, it embarked upon an extensive acquisition program, the most important being the acquisition of the Lambert Co. (Listerine mouthwash) in 1955. There followed acquisitions of the makers of such well-known proprietary drugs as Bromo-Seltzer (effervescent analgesic), Smith Brothers (cough drops), Sloan's (liniment) and others.

Warner-Lambert makes extensive use of advertising and other promotional programs in marketing its products. Its domestic advertising and promotion budget now approximates \$80 million yearly. Its products are advertised on nearly half of all TV network shows. In 1969, Warner-Lambert's consumer products divisions ranked fourth among all proprietary drug manufacturers in the country, with proprietary drug sales to U.S. drugstores and hospitals of \$57 million, representing 6.4 percent of total U.S. sales of about \$900 million.

By 1953 Warner-Lambert (then Warner-Hudnut) had also entered the manufacture of ethically promoted drugs through the acquisition of Chilcott Laboratories (formerly the Maltine Company). This business was gradually expanded by Warner-Lambert. Today about 300 "detail" men service the medical profession. During the decade of the 1960's Warner-Lambert's growth as an ethical pharmaceutical manufacturer was partly internal and partly by acquisitions, *e.g.*, in the dermatological field — Texas Pharmacal Co., in the biologicals field — Elizabeth Biochemical Laboratory, in the medical equipment and instrumentation field — American Optical Co., and in foreign drug manufacturing, notably the acquisition of the European firm, Vismara Terapeutici Sp. A.

In product research and development, Warner-Lambert employs approximately 500 persons and spends about \$30 million yearly. Its primary research and development efforts are on ethical pharmaceuticals and optics, including medical equipment and instrumentation.

Warner-Lambert has been and is now a rapidly growing firm. By 1969 (through its Warner-Chilcott division) it had become the 15th largest manufacturer of ethical drugs in the Nation, with sales to drugstores and hospitals of \$87 million, or 2.3 percent of the \$3.8 billion U.S. total for that year. In the overall hospitals-drugstores drug market, both ethical and proprietary, it ranked 12th among U.S. companies, with about 3.1 percent of \$4.7 billion total U.S. sales.

#### 4. ACQUIRED COMPANY

Prior to acquisition by Warner-Lambert, Parke, Davis was one of the nation's leading old-line pharmaceutical houses. Founded in 1866, it achieved its present market position largely by internal growth. In 1969 Parke, Davis' total sales were \$274 million and its total assets \$399 million. It was the 340th largest in sales and 218th largest in assets of all American industrial corporations. It also had extensive foreign operations in 43 countries, including manufacturing plants in 22 of them.

Over the years Parke, Davis built up one of the most extensive product lines in the business. Its pharmaceutical and biological manufacturing facilities are among the most diverse in the Nation. Its catalogue lists some thousand products. It is largely independent of the drug wholesalers on whom most manufacturers must depend by virtue of its unusual nationwide network of 23 warehouses and its sales force of about 1,000 "detail men" who promote its products directly to physicians and hospitals, one of the largest such detail forces in the industry. Its research and development laboratories are among the oldest, largest and best qualified in the industry, employing 700-800

persons. It spends nearly \$20 million yearly on product research and development. In 1969 Parke, Davis' domestic sales of \$110 million of ethically promoted drugs made it the 11th ranking domestic seller, with 2.9 percent of the \$3.8 billion hospitals-drugstores market for ethical drugs.

In 1969, Parke, Davis commenced the organization of a new Consumer Products Division. That Division had initial sales of about \$27 million. In 1970 Parke, Davis' articles of incorporation were amended to permit expansion of its activities throughout a broad "health" field, and it undertook a more aggressive promotional policy to expand its product line and to improve its existing market position, particularly in the hospitals-drugstores proprietary drug market where it ranked 44th among all sellers.

Among sellers of drugs of all kinds, both ethical and proprietary, to hospitals and drugstores, Parke, Davis ranked 14th, with 2.4 percent of \$4.7 billion sales in 1969.

#### 5. TRADE AND COMMERCE

The drug industry is a large and expanding one. The value of shipments by U.S. pharmaceuticals manufacturers rose steadily from about \$900 million in 1947 to \$4.7 billion in 1967 and the value of shipments by U.S. biologicals manufacturers during the same period rose from about \$40 million to about \$173 million. Pharmaceuticals shipments in 1967 totaled \$4.1 billion and were divided between ethical and proprietary drugs in a ratio of \$3.0 billion to \$1.1 billion. Long-run, the trend in the drug manufacturing industry has been toward gradual reduction in the number of firms engaged therein. The number of U.S. companies producing drugs decreased from 1,123 in 1947 to 791 in 1967.

In particular drug industry submarkets, such as those specified later in Paragraph 6, the top four or at least the top eight sellers in each such submarket commonly control 75 percent or more of the business. Moreover, the top 20 among all sellers of pharmaceutical drugs (SIC 2834) between 1947 and 1967 increased their aggregate market share from 64 percent to 73 percent. Within the top 20 pharmaceutical firms, the market position of the top eight after declining somewhat during the late 1950's has since held its ground and shows some tendency now to rise. It was at about the 40 percent level in 1967.

Research for and development of new or improved drugs is an important element for success in the drug industry. Generally such research, testing and related facilities are expensive and time-consuming. Such research, testing and related facilities, together with the control of patents; possession of heavily promoted and successful trade names, and of nationwide distribution facilities, including large and

established "detail" forces for ethical promotions and the ability to engage in expensive advertising programs for the promotion of proprietary drugs, tend to raise substantial barriers to entry into the drug industry, to limit competition within the industry and in submarkets thereof, and to make the existing drug firms, and particularly the larger drug firms, the most likely sources of new competition with regard to particular drug product submarkets in which they do not presently compete.

Parke, Davis and Warner-Lambert have each made substantial commitments to research and development, have operated substantial research and development programs in the past, and each stands among the leading U.S. firms in capacity and capability to conduct research and development. In addition, each was, prior to the merger complained of herein, possessed of patent rights, heavily promoted trade names, nationwide distribution facilities, large and established "detail" forces, substantial advertising budgets, and other competitive advantages which made each one of these firms among the most likely to enter or improve its competitive position in drug submarkets where it was not already a significant competitive factor.

#### 6. MARKETS ADVERSELY AFFECTED

The acquisition of Parke, Davis by Warner-Lambert tends substantially to lessen actual and potential competition in drug manufacturing generally, in the ethical segment thereof and in, among others, the following relevant product submarkets, all of which are nationwide in geographic scope and all of which are highly concentrated.

In some such submarkets substantial existing ("SE") competition between the parties and with others has been eliminated.

In other such submarkets where one party ranked among the top four or eight sellers, with a significant or at least not insignificant market share, the acquisition has ended all likelihood that existing, imminent or recent ("E/I/R") competition by the other, with that other firm's many competitive advantages, would have grown to more substantial proportions.

In other such submarkets where one party ranked among the top four or eight sellers, with a significant or at least not insignificant market share, the acquisition has eliminated the other party as a potential entrant ("PE") into competition. With respect to such submarkets, special circumstances such as marketing of the same product in a different geographic market or of an only slightly different product in the same market combined with the many competitive advantages of the other party served to make such other party one of the most likely entrants into competition.

Aggregate sales in these 55 submarkets in 1969 totaled about \$1,800 million.

#### A. *Hormones*

Drugs affecting the endocrine glandular system and related compounds constitute an important part of the pharmaceuticals industry. Sold ethically, domestic shipments thereof in 1969 were valued at \$497 million. The following constitute well-defined and significant hormone submarkets:

- (1) Thyroid Preparations (SE)
- (2) Anti-thyroid Preparations (PE)
- (3) Oral Contraceptives (E/I/R)
- (4) Progestogens, Except Oral Contraceptives (PE)
- (5) Anabolic Agents (E/I/R)
- (6) Adrenocortical Extract (PE)
- (7) ACTH (PE)
- (8) Chorionic Gonadotropins (PE)
- (9) Topical Corticoid with Anti-infective Combinations (E/I/R)

#### B. *Neuropharmacals*

Pharmaceutical preparations acting on man's central nervous system and sense-organs constitute the largest single segment of the pharmaceutical market. Shipments of such drugs by U.S. manufacturers in 1969 approximated \$1,373 million. Just over 70 percent were promoted ethically. The following constitute well-defined and significant neuropharmacal submarkets:

- (1) Effervescent Analgesics (PE)
- (2) Anorexiant (Non-amphetamine) (E/I/R)
- (3) Anti-Parkinsonism Drugs (E/I/R)

#### C. *Cardiovascular Drugs*

Preparations acting on the human cardiovascular system are an important segment of the pharmaceutical market. In 1969 shipments of cardiovascular drugs by U.S. manufacturers approximated \$267 million. Virtually all were promoted ethically. The following constitute well-defined and significant cardiovascular submarkets:

- (1) Anti-Anginal Drugs (E/I/R)
- (2) Anti-arrhythmics (PE)

#### D. *Respiratory Drugs*

Among the oldest kinds of pharmaceutical preparations are those drugs acting on the respiratory system. Manufacturers' shipments of

such drugs for human use in the United States were valued at \$490 million in 1969, of which about \$259 million were promoted ethically and \$222 were proprietaries. The following constitute well-defined and significant respiratory drug submarkets:

- (1) Cough Remedies (SE)
- (2) Cough Drops and Lozenges (SE)
- (3) Antitussives and Expectorants (E/I/R)
- (4) Cold Remedies (E/I/R)
- (5) Oral Decongestants (E/I/R)
- (6) Oral Decongestants (Ethical, OTC) (F/I/R)
- (7) Topical Decongestants (E/I/R)
- (8) Anti-histamines (PE)
- (9) Bronchial Dilators (E/I/R)

#### E. *Gastro-Intestinal Drugs*

Pharmaceutical preparations acting on the human digestive system make up another important part of the pharmaceutical industry. In 1969 shipments of all U.S. manufacturers of this kind approximated \$430 million. The following constitute well-defined and significant gastro-intestinal drug submarkets:

- (1) Antacids (E/I/R)
- (2) Gastric Secretory Inhibitors (E/I/R)
- (3) Irritant Laxatives (SE)
- (4) Irritant Laxatives (Ethical) (SE)
- (5) Digestive Enzymes (PE)
- (6) Lipotropics (PE)

#### F. *Skin Preparations*

Pharmaceutical preparations acting on the skin constitute a significant part of the drug market. Total shipments by manufacturers of such products in 1969 were valued at \$274 million, of which about 40 percent were ethical and 60 percent were for proprietary marketing. The following constitute well-defined and significant skin preparations submarkets:

- (1) Topical Proteolytic Enzymes (PE)
- (2) Anti-Hemorrhoidal Preparations (E/I/R)
- (3) Liniments (E/I/R)
- (4) Emollient/Protective Dermatological Preparations Promoted Ethically (PE)
- (5) Sunscreen Products (PE)
- (6) Hypo-allergenic Cosmetics (PE)

### G. *Vitamins*

Vitamin compounds constitute an important segment of the drug market. Total shipments by U.S. manufacturers of vitamins in 1969 amounted to \$253 million, of which about \$246 million were domestic shipments. Ethical sales exceeded proprietary sales about six to four. The following constitute well-defined and significant vitamin submarkets:

- (1) Prenatal Vitamins (E/I/R)
- (2) Therapeutic Vitamins (With Minerals) (E/I/R)
- (3) All Vitamins (Ethical) (E/I/R)

### H. *Anti-Infectives*

Pharmaceutical preparations affecting parasitic and infective diseases constitute a large and rapidly growing segment of the drug manufacturing industry. Total shipments by manufacturers of anti-infective agents, except corticoid-anti-infective combinations, in 1969 amounted to about \$876 million, of which about \$816 million were domestic shipments. The ethical-proprietary sales ratio was nearly four to one. The following constitute well-defined and significant anti-infective submarkets:

- (1) Antibiotics For Gram Negative Bacterial Infections (SE)
- (2) Ampicillin (PE)
- (3) Anti-pseudomonas Drugs (PE)
- (4) Urinary Antibacterials (Non-Sulfa) (E/I/R)
- (5) Mouthwash (E/I/R)
- (6) Breath Fresheners (PE)

### I. *Biologicals*

Biological products prepared for therapeutic or diagnostic medical purposes include blood and blood derivatives, vaccines and antigens, antitoxins, toxoids and toxins for immunization, therapeutic immune serums and diagnostic products, including allergenic extracts, poison ivy and poison oak extract. Total shipments by U.S. manufacturers in 1967 approximated \$167 million. These are all ethical products. The following constitute well-defined and significant biologicals submarkets:

- (1) Normal Human Serum Albumin (PE)
- (2) Immune Serum Globulin (PE)
- (3) Tetanus Immune Globulin (PE)
- (4) Diagnostic Products (Blood Chemistry) (PE)
- (5) Diagnostic Products (Blood Coagulation) (PE)
- (6) Pregnancy Tests (E/I/R)

### J. *Medical Electronic Equipment*

The recent application of electronics to the practice of medicine has resulted in development of much new equipment for hospitals and physician's offices, much of it in the fields of cardiac disease diagnosis and patient monitoring. The value of all manufacturers' shipments of electronic medical equipment is now probably of a magnitude of \$300 million or more yearly. The following constitute well defined and significant submarkets for medical electronic equipment.

- (1) Electrocardiographs (E/I/R)
- (2) Patient Monitoring Equipment (PE)

### K. *Fine/Bulk Chemicals*

Fine or bulk chemicals are those suitable for use as pharmaceuticals, either mediately or immediately. Among the well-defined and significant fine/bulk chemicals sub-markets are those for:

- (1) Pyridine (PE)
- (2) Picoline (PE)
- (3) Niacinamide (PE)

## 7. COMPETITIVE EFFECTS OF THE ACQUISITION

Warner-Lambert's acquisition of Parke, Davis has at one stroke raised the former's rank among all American drug manufacturers serving the hospitals/drugstores market from 12th to 3rd place and from 15th to 5th place in the ethical sector thereof. It has increased its share of the \$4.7 billion U.S. hospitals-drugstores market from 3.1 percent to 5.5 percent and its share of the \$3.8 billion ethical segment thereof from 2.3 percent to 5.2 percent. Concentration of sales in the hands of the eight largest sellers in the hospitals-drugstores drug market has been increased as a result of this merger from about 40.0 percent to about 41.7 percent, and in the ethical segment thereof concentration has been increased from about 44.1 percent to about 45.1 percent.

As a result of said acquisition competition may be substantially lessened in the nationwide drug manufacturing market, in its ethical and proprietary segments, and in various submarkets thereof, all nationwide in geographic scope, including, among others, each of the submarkets set out in Paragraph 6 hereof, by increasing concentration as alleged above and also in the following ways, among others:

- (a) Actual and potential competition between Parke, Davis and Warner-Lambert has been eliminated and actual and potential competition with others has been eliminated or substantially lessened;
- (b) Parke, Davis, which has long been one of the most significant

firms in the drug industry, in terms of research, distributional and promotional resources and broad resource flexibility has now been completely and permanently eliminated as an actual or potential independent competitor in countless product lines throughout the drug industry;

(c) Entry or growth of new competition may be further inhibited;

(d) The acquisition is likely to encourage a tendency to additional acquisitions or mergers, and to thereby further increase concentration.

#### VIOLATION

By reason of all the foregoing, the acquisition of Parke, Davis' stock by Warner-Lambert constitutes a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. §18).

INITIAL DECISION BY ANDREW C. GOODHOPE, ADMINISTRATIVE  
LAW JUDGE

AUGUST 2, 1974

#### STATEMENT OF PROCEEDINGS

[1] On June 30, 1971, the Commission issued its complaint against respondent charging it with violation of Section 7 of the Clayton Act, as amended (15 U.S.C. §18). A copy of the complaint and notice of hearing were served upon respondent, and respondent thereafter appeared by its counsel and filed an answer admitting certain of the allegations of the complaint but denying that it had violated Section 7 of the Clayton Act.

[2] Extensive hearings were thereafter held, at which time testimony and documentary evidence were offered in support of and in opposition to the allegations of the complaint. At the close of all the evidence and pursuant to leave granted by the administrative law judge, proposed findings of fact, conclusions of law, briefs and proposed orders were filed by counsel supporting the complaint and counsel for the respondent.

Proposed findings not herein adopted either in the form or substance proposed are rejected as not supported by the evidence or as involving immaterial matters. Having reviewed the entire record in this proceeding, including the proposed findings and briefs, the administrative law judge, based upon the entire record, makes the following:

## FINDINGS OF FACT

JURISDICTIONAL FACTS<sup>1</sup>

1. Warner-Lambert Company (Warner-Lambert), respondent herein, is a corporation organized and existing under the laws of the State of Delaware with its principal office and place of business located at Morris Plains, New Jersey.

2. Prior to November 13, 1970, when it was acquired by Warner-Lambert, Parke, Davis & Company (Parke, Davis) was a corporation organized and existing under the laws of the State of Michigan with its principal office and place of business located at Detroit, Michigan.

3. At all times relevant to this proceeding, Warner-Lambert sold and shipped, and is now selling and shipping, products in interstate commerce throughout the United States and was and is engaged in commerce as "commerce" is defined in the Clayton Act.

[3] 4. At all times relevant to this proceeding, Parke, Davis sold and shipped products in interstate commerce throughout the United States and on November 13, 1970, and prior thereto, was engaged in commerce as "commerce" is defined in the Clayton Act.

5. On November 13, 1970, pursuant to an agreement and plan of merger dated August 25, 1970, Warner-Lambert acquired ownership of all or substantially all the stock of Parke, Davis in return for 6,600,000 shares of Warner-Lambert common stock.

## RELEVANT MARKET AND LINES OF COMMERCE

6. The relevant market within which to view the merger of Warner-Lambert and Parke, Davis is the entire United States (Complaint, para. 6; Answer, para. 6; Tr. 27).

7. There are a number of lines of relevant commerce to be considered in viewing this merger. They are as follows:

(a) The overall drug market. This market consists of medicines, both pharmaceutical and biological, in dosage form and are limited in this proceeding to those for human use. Included in this market are ethical drugs and so-called proprietary drugs. Proprietary drugs are not a separate line of commerce relevant for consideration in this case, other than as a part of the overall drug market, described above. These are products manufactured and sold by the drug industry and which are promoted principally to the consuming public. They may include products for which a prescription may often be written by a physician, but which may also be sold over-the-counter without a prescription.

<sup>1</sup> The complaint alleges and the answer admits the essential jurisdictional facts. Hereafter CPF refers to complaint counsel's proposed findings and RPF to respondent's.

(b) Ethical drugs. These drugs for which a prescription from a physician is required, or which, although sold over-the-counter (OTC) without a prescription, are primarily advertised and promoted by the drug industry to the medical, pharmacy and allied professions. These ethical drugs are a relevant line of commerce for consideration in this case.

[4] (c) In addition, counsel in support of the complaint assert that there are 20 separate submarkets of the overall drug market which are included as either ethical or proprietary drugs which constitute distinct lines of commerce and must be considered individually in considering this merger. It is urged that there was either actual or potential competition existing at the time of the merger which was directly affected or eliminated as a result of the merger.

Each of these relevant markets outlined above will be treated seriatim in this initial decision.

ACQUIRING CORPORATION: WARNER-LAMBERT

8. Warner-Lambert's history dates back to 1856, the year in which William R. Warner founded an ethical drug business in Philadelphia (CX 43), which was acquired by Pfeifer Chemical Co. in 1908. In 1916 the stock of Richard Hudnut, a New York cosmetics manufacturer, was acquired and from 1920 to 1955 the combined business was known as Warner-Hudnut, Inc. (CX 43). Following a merger with the Lambert Company of St. Louis in 1955, the firm name was changed to Warner-Lambert Pharmaceutical Company (CX 1(B)) and in 1970 simplified to Warner-Lambert Company (CX 1(B)).

9. Between 1952 and 1970, Warner-Lambert acquired or merged with the following companies, all of whom were engaged in the broad drug market or closely allied lines of products:

<i>Date</i>	<i>Company</i>
1952	Chilcott Laboratories, Inc.
1955	The Lambert Company
1956	Nepera Chemical Company
1962	American Chicle Company
1964	Smith Brothers
1966	Texas Pharmacal Company
1967	American Optical Company
1967	Vismara Terapeutical, Sp. A
1969	Elizabeth Biochemical Laboratory

[5] Warner-Lambert, over the years, had also consistently enjoyed internal growth and expansion of a substantial nature.

10. Warner-Lambert employs 40,000 persons worldwide (CX 1(T)). The major portion of Warner-Lambert's research facilities, ethical

pharmaceutical manufacturing facilities and the executive offices are located in Morris Plains, New Jersey (CX 1(W)). Proprietary pharmaceutical products are manufactured at plants in Lintz, Pennsylvania; Rockford, Illinois; and Anaheim, California. Dermatological and hypoallergenic products are manufactured in San Antonio, Texas, and cough drops are manufactured principally in Poughkeepsie, New York (CX 1(W)).

11. In 1969, prior to the acquisition of Parke, Davis, Warner-Lambert's sales were \$808 million and total assets were \$572 million. In 1969, its total domestic sales were \$540 million and its total domestic assets were \$366 million (Complaint, para. 3; Answer, para. 3). Its sales were divided about equally between professional and consumer products and products sold internationally. In 1969, professional products, all products promoted to the medical profession, accounted for 36.1 percent of total sales, while consumer products accounted for 35.9 percent, and international sales 28.0 percent of total sales (CX 1(T)). Approximately 10 percent of the total of all sales for 1969 were accounted for by ethical drug sales (RX 2029; Tr. 2638).

12. At all relevant times, Warner-Lambert has manufactured and sold: professional products, including ethical pharmaceuticals, dental specialties, ophthalmic lenses and frames, ophthalmic and scientific instruments, sunglasses, safety products, fine chemicals and biochemical specialties.

13. Warner-Lambert over the years has enjoyed substantial growth in the drug industry, both in the ethical and proprietary portions of the drug market. The primary reasons before this growth is Warner-Lambert's ability to engage in extensive promotion (detailing) to the medical profession, including the pharmacists and related professions of its ethical drugs and the substantial advertising which it puts behind its proprietary or over-the-counter drugs. [6] Its trade name products have become very familiar to the medical profession. The advertising behind such products as Listerine, Bromo Seltzer, Super Anahist, Smith Brothers Cough Drops, Roloids have made them household names and commonly are among the leading products in their markets (CX 157, CX 222, CX 2690). In addition, Warner-Lambert has been able to use these popular trade names to sell associated products, such as tooth paste, breath spray and throat lozenges (CX 251, CX 2698).

14. Warner-Lambert utilizes every conceivable type of print and electrical medium to promote its products. These include direct mail, billboard, shelf-talkers displays, television, radio, newspapers, magazines and professional journals. In 1968 Warner-Lambert spent approximately \$80 million for domestic advertising; in 1969 approximately \$93 million and in 1970 approximately \$126 million for domestic

advertising (CX 11-12, 21, 24). In 1970 Warner-Lambert was the largest drug and cosmetic advertiser in the country and the fifth largest advertiser among all companies (CX 24, CX 289-292).

15. Warner-Lambert engages in research and development programs. In 1969 it spent approximately \$11 million for ethical research and employed about 320 persons in this endeavor (Resp. Ans., para. 3; CX 29; Tr. 2685). Warner-Lambert likewise engages in research and development work with its foreign operations and derives benefits in this country from this overseas research and development. Warner-Lambert likewise engages in research and development work in support of its proprietary drug products which amounted to approximately \$2 million in 1970 (Resp. Ans., para. 3).

16. Warner-Lambert also employs a highly capable staff of 3,000 sales representatives in the United States serving various markets. It is a highly oriented marketing company with an able promotional staff, skilled packaging experts and market planners.

17. Warner-Lambert has been successful over the years in obtaining patents on many of its products which have been well accepted in the market. In addition, Warner-Lambert is regularly engaged in licensing drugs from other companies or individuals holding patents on such drugs and at present has approximately 18 products on the market which are licensed for manufacture or sale from such companies. [7]

#### ACQUIRED CORPORATION: PARKE, DAVIS

18. Parke, Davis is a famous ethical pharmaceutical company (Tr. 2724) and one of the most respected names in medicine (CX 276). Since the company was founded, its research and development has resulted in hundreds of major contributions to pharmacy and medicine (CX 419). The reputation of Parke, Davis research for breadth and quality is excellent (Tr. 1840, 1886-87, 2730).

19. Parke, Davis employs approximately 15,000 persons, of whom about 7,300 are located in the United States (CX 1 (CC)). Parke, Davis' executive offices and the largest of its ethical and proprietary facilities are located in Detroit, Michigan (CX 1 (BB)). Research facilities are centered in Ann Arbor, and Detroit, Michigan, while biological products are manufactured principally at Rochester, Michigan (CX 1 (BB)). Parke, Davis owns or leases distribution centers in 23 major cities in the United States (CX 1(BB)).

20. At all times relevant to this case, Parke, Davis has manufactured and sold pharmaceutical, biological, medical-surgical and related health care products in the United States and throughout the free world (CX 1(Y)). All of Parke, Davis' pharmaceutical products were

and are ethically promoted. It had and has no proprietary products (CX 1(Z)). Pharmaceutical and biological products accounted for 41.7 percent of total Parke, Davis' sales in 1969 (CX 1(Y)), while medical-surgical products were 13.8 percent and international sales were 42.0 percent of all sales (CX 1(Y)).

21. Parke, Davis is one of the country's two "broad line" pharmaceutical companies with a "standard" pharmaceutical line designed to meet most of a physician's needs for drugs (Tr. 3581). Parke, Davis, in addition to detailing specialty items to physicians, also sells generic drugs as commodities to hospital pharmacies and drug stores (Tr. 3376, 3571-72). In 1966, Parke, Davis supplied over 700 different products in over 100 different sizes and packages (CX 412), while in 1970, Parke, Davis carried more than 1200 items in its catalogue (CX 332).

[8] 22. In the years just before merger, Parke, Davis planned to expand into proprietary markets using its broad range of consumer products (CX 330, 332, 333, 339, 363). To this end a special Consumer Products Marketing Department was established in the latter half of 1969 (CX 334, 339). However, these plans did not materialize into any entry in the proprietary field.

23. Parke, Davis in 1960 had sales of \$200 million and net earnings (after taxes) of \$30 million (CX 3710). In 1961, sales were \$184 million and net earnings were \$22 million (CX 3710). There followed two years at about the same level as 1961 after which both sales and earnings recovered slowly, reaching new peaks in 1965 and 1966 (CX 3710). In 1966, sales were \$240 million and after-tax earnings were \$32 million (CX 3710). Sales in 1967, however, remained flat and net earnings fell from \$32 to \$21 million (CX 3709-3710). There followed two years of rising sales (\$274 million by 1969) with flat earnings (\$21 million in 1969) (CX 3709). From 1965 to mid-1970 Parke, Davis' net income fell approximately 50 percent from just under \$40 million to less than \$20 million with consequent substantial reductions in dividends from \$2.25 per share in 1965 to about \$1.00 per share in the twelve-month period ending June 30, 1970, and to 60 cents in 1970 (CX 1(I)). Parke, Davis' domestic operations were worse when earnings fell from \$26 million in 1965 or 1966 to a loss of \$3 million in pre-tax earnings in 1970 (CX 360).

INDUSTRY CONCENTRATION AND MARKET SHARES IN THE OVERALL  
DRUG MARKET AND ETHICAL SECTOR

24. It is first asserted by counsel in support of the complaint that the statistical<sup>2</sup> and other relevant [9] evidence pertaining to the drug manufacturing industry as a whole and its ethical segment establish a market picture compelling a conclusion of substantial lessening of competition. It is argued that concentration among the top four and the top eight industry members show at least a loose obligarchic situation in the drug industry.

25. Set forth in the table below are the market ranks and shares in the ethical drug market and overall drug market for all firms which ranked among the top eight in any of the years 1957, 1965 or 1969. (See Appendix A attached hereto.)

ETHICAL MARKET

	1957		1965		1969	
	Rank	% Share	Rank	% Share	Rank	% Share
Lilly	1	8.54	1	6.57	1	7.37
American Cyanamid	2	6.99	7	4.34	12	2.89
American Home Products	3	6.88	2	5.82	3	6.31
Upjohn	4	6.66	5	5.24	7	4.17
Parke, Davis	5	5.96	10	4.04	11	2.90
Smith, Kline & French	6	5.74	3	5.62	8	4.17
Beechnut	7	4.94	9	4.11	9	3.66
Abbott	8	4.60	8	4.18	6	4.47
Merck & Co.	11	3.54	4	5.38	4	5.90
Roche	17	1.64	6	5.18	2	6.52
Bristol-Myers	*	*	21	1.66	5	5.10

OVERALL DRUG MARKET

Lilly	1	7.38	2	5.67	2	5.97
American Home Products	2	7.02	1	6.11	1	6.63
American Cyanamid	3	6.07	7	3.74	16	2.34
Upjohn	4	5.75	5	4.66	9	3.48
Parke, Davis	5	5.15	11	3.57	15	2.42

<sup>2</sup> The parties stipulated that Davee, Koehnlein and Keating (DKK) statistical data would "be used by both sides to establish the approximate dollar value of purchases of drugs and diagnostic materials, the break down of such purchases by product, by brand and by maker and the aggregate of all such purchases, direct or indirect, from each such maker during each of the years from 1957 through 1971, inclusive." (Stipulation Concerning Statistical Data, CC Phy. Ex. 2 at 1) They stipulated further that "such data shall be used to establish the approximate size of all product markets, both major markets and submarkets thereof, and the percentage market shares and ranks of each maker of products in such market (including Warner-Lambert and Parke, Davis)." Exceptions to this stipulation permitting the use of other data from Nielsen, U.S. Census and deHaen as well as objections to use of DKK data for certain purposes were all agreed to.

		Initial Decision				87 F.T.C.
Smith, Kline & French	6	4.96	3	5.39	6	3.92
Beechnut	7	4.27	9	3.74	11	3.17
Abbott	8	3.98	8	3.74	7	3.76
Merck & Co.	12	3.06	4	4.79	5	4.95
Roche	18	1.42	6	4.63	3	5.41
Bristol-Myers	20	1.14	15	2.18	4	5.25
Sterling	11	3.15	12	2.95	8	3.60

26. Four-firm and eight-firm concentration ratios are the ones typically examined in merger analysis. As the Commission has observed, “[E]conomists have analyzed numerous industries in terms of the four-firm and eight-firm concentration ratios.” (*Litton Industries*, Dkt. 8778, Slip Opinion, p. 46, note 34 [82 F.T.C. 793 at 1010]). Of the two ratios, the four-firm concentration ratio is probably the more significant. Thus, the Commission has held that “the traditional four-firm concentration analysis is well-suited for the purpose of merger law enforcement\* \* \*.” (*Id.*, pp. 45-46), noting that “Scherer refers to the four-firm sales concentration ratio as *the* concentration ratio” (*Id.*, p. 46, note 34, Scherer’s emphasis).

27. Based on stipulated DKK data, four-firm and eight-firm concentration in the ethical drug and all drug lines of commerce were as follows for the years 1957 through 1971:

	Ethical Drugs (RX1860)		All Drugs (RX1861)	
	CR4	CR8	CR4	CR8
1957	29.07	50.31	26.22	44.58
1958	27.82	49.17	25.43	43.78
1959	26.95	49.19	24.76	43.01
1960	25.52	46.86	23.24	41.31
1961	26.00	45.79	23.44	40.43
1962	25.35	44.14	23.38	39.77
1963	24.66	43.54	23.04	39.54
1964	23.81	42.34	22.46	38.95
1965	23.39	42.33	21.96	38.73
1966	24.35	42.75	22.74	39.23
1967	25.22	43.64	22.97	40.35
1968	25.44	43.75	22.58	38.93
1969	26.10	44.01	23.26	39.49
1970	26.29	44.43	23.80	41.38
1971	26.56	43.71	23.87	40.65

[11] 28. The record demonstrates that Parke, Davis was among the top eight manufacturers of ethical drugs until it dropped to tenth in 1964 and never recovered its position until the merger in 1970. Warner-Lambert was never among the top eight until the merger. This is also true of both companies in the overall drug market. (See Appendix A.)

Consequently, counsel in support of the complaint rely principally upon stipulated DKK statistical data for the top 20 firms in both markets for the year 1969, the year prior to the merger. This data shows the following:

Twenty Largest Suppliers of Ethical Drugs Purchased by U.S. Hospitals,  
Drug Stores, etc. in 1969 (CX 873)

	(\$000)	Ranks	%	App. rank as proprietary drug supplier
Eli Lilly & Co.	\$278.5	1	7.38	124
Hoffman-La Roche, Inc.	246.6	2	6.53	NA
American Home Products Corp.	238.6	3	6.32	2
Merck & Co., Inc.	223.0	4	5.91	24
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* Warner-Lambert-Parke, Davis Com- bined	196.8	5	5.21	5
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Bristol-Myers Co.	186.3	5	4.94	5
Abbott Labs.	169.7	6	4.50	43
Upjohn Co.	157.8	7	4.18	34
Smith, Kline & French Labs	157.7	8	4.18	10
Squibb Beech-Nut, Inc.	138.3	9	3.66	20
Pfizer, Inc.	126.7	10	3.36	11
Parke, Davis & Co.	109.5	11	2.90	44
American Cyanamid Co.	109.4	12	2.90	83
G.D. Searle & Co.	94.6	13	2.51	909
Schering Corp.	89.3	14	2.37	23
Warner-Lambert Pharmaceutical Co.	87.3	15	2.31	4
Johnson & Johnson	86.9	16	2.30	9
Sterling Drug, Inc.	85.5	17	2.26	1
A.H. Robins & Co., Inc.	79.3	18	2.10	22
Sandoz-Wander, Inc.	76.6	19	2.03	NA
Ciba	75.3	20	2.00	27
All other suppliers	956.8		25.36	
Total purchases of drugs— U.S. Hospi- tals, Drug Stores, etc.	3,773.7		100.00	

Twenty Largest Suppliers of all Drugs Purchased by U.S. Hospitals, Drug Stores,  
etc., in 1969 (CX 874)

	(\$000)	Rank	%
American Home Products Corp.	\$309.7	1	6.63
Eli Lilly & Co.	278.8	2	5.96
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* Warner-Lambert — Parke, Davis Combined (Assuming merger in 1969)	256.4	3	5.49
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	Initial Decision		87 F.T.C.
Hoffman-La Roche, Inc.	252.6	3	5.40
Bristol-Myers Co.	245.7	4	5.26
Merck & Co., Inc.	231.4	5	4.95
Smith, Kline & French Labs.	182.7	6	3.91
Abbott Labs.	176.3	7	3.77
Sterling Drug, Inc.	168.4	8	3.60
Upjohn Co.	162.6	9	3.48
Pfizer, Inc.	150.6	10	3.22
Squibb Beech-Nut, Inc.	148.0	11	3.17
<i>Warner-Lambert Pharmaceutical Co.</i>	143.5	12	3.07
Johnson & Johnson	118.2	13	2.53
<i>Parke, Davis &amp; Co.</i>	112.9	14	2.42
American Cyanamid Co.	110.1	15	2.36
Richardson-Merrell Inc.	108.6	16	2.32
Schering Corp.	97.8	17	2.09
G.D. Searle & Co.	94.6	18	2.02
A.H. Robins & Co., Inc.	87.9	19	1.88
Ciba	81.8	20	1.75
All other suppliers	1,411.8	—	30.21
Total purchases of drugs- U.S. Hospitals, Drug Stores, etc.	4,674.0	—	100.00

[13] 29. Based on stipulated DKK market data, the shares and ranks of Warner-Lambert and Parke, Davis in the two years preceding the merger were as follows:

ETHICAL					
	<i>Warner-Lambert</i>		<i>Parke, Davis</i>		
	<i>Share</i>	<i>Rank</i>	<i>Share</i>	<i>Rank</i>	
1968	2.41	14	2.93	12	(RX 1822)
1969	2.31	15	2.90	11	(RX 1824)
ALL DRUGS					
1968	3.08	12	2.43	14	(RX 1852)
1969	3.10	12	2.42	15	(RX 1854)

Based on the same industry source, the merged firm's post-merger shares and ranks in 1970 and 1971 were as follows:

	<i>Ethical Drugs</i>			<i>All Drugs</i>		
	<i>Share</i>	<i>Rank</i>		<i>Share</i>	<i>Rank</i>	
1970	5.05	5	(RX 1826)	5.47	4	(RX 1856)
1971	4.81	5	(RX 1828)	5.27	4	(RX 1858)

30. Counsel in support of the complaint gloss over all of the statistical data in the record as to the market structure and heavily emphasize the 20 submarkets and the concentration statistics involved in each of those submarkets. However, they do request findings that

there is substantial concentration both in ethical drugs and all drugs and that therefore the merger here involved furthered such concentration. The stipulated statistics of record will not support such findings. These tables show that there has not been a constant group of firms comprising the top four and top eight of either the ethical drug or all drug lines of commerce. In the ethical drug market, no less than eight firms have ranked within the top four, while 11 different firms have been within the top eight. Similarly, in the all drug market, nine firms have been in the top four, with 12 different firms having ranked eighth or higher. The change in composition of the leadership group reflects substantial risings and fallings of individual firms. For example, [14] in the ethical drug sector, two of the top four firms in 1969, Merck and Roche, had ranked 11th and 17th, respectively, as recently as 1957. Conversely, American Cyanamid and Upjohn, which ranked second and fourth, respectively, in 1957 had dropped to 12th and 7th positions by 1969.

31. The industry leaders have not been able to maintain or expand their market shares. With respect to the ethical line, the top four companies collectively accounted for 29.07 percent of sales in 1957. By 1969, the collective share of these former leaders had shrunk by nearly one-third to 20.74 percent. The same is true for the all drug line, with the 26.22 percent collective share of the four 1957 leaders having dropped to 18.42 percent by 1969. Moreover, without exception, each of the top eight ethical drug manufacturers in 1957 lost market share during the succeeding years. In some cases, such loss was very substantial. American Cyanamid, for example, dropped from 6.99 percent in 1957 to only 2.89 percent in 1969; Upjohn fell from 6.66 percent to 4.17 percent; and Smith, Kline & French dropped from 5.74 percent to 4.17 percent. Although the percentages differ, the universal loss in market share by the leading companies was also true in the all drug line of commerce.

32. Parke, Davis is a good example of a once leading firm that was unable to maintain its market share and rank. In 1950, Parke, Davis ranked second in the drug industry (Tr. 2294-98). Ten years later, in 1960, Parke, Davis was still an industry leader, ranking third in the ethical drug line with 6.02 percent of sales (RX 1806), and fourth in the all drug line with 5.08 percent of sales (RX 1836). By 1969, Parke, Davis had dropped to 11th position in ethical drugs and 15th in the all drug line, with a market share in each line well below 3 percent. In 1971, the year after the merger, the Warner-Lambert/Parke, Davis combined ethical drug share was 4.81 percent (RX 1863 Revised) which is less than Parke, Davis alone accounted for ten years earlier (*id.*).

[15] 33. These statistics in and of themselves establish that there is

no "interdependence" in the drug industry (Tr. 2184-85, 3790-92). In fact since the drug industry is characterized by important changes in market share and rank, it cannot be said to fit the oligopoly theory. Such changes indicate independent rather than interdependent market behavior (Tr. 3791-93).

34. Counsel in support of the complaint urge that there has been a marked trend towards concentration in the drug industry citing Bureau of Census data showing a gross decline in the number of firms from 1143 in 1947 to 791 in 1967. This Census information is somewhat dubious as a result of the manner in which the Census Bureau classifies companies within an industry according to their principal line of business. There are also stipulated DKK data in the record which show that there were more than 1400 companies in the overall drug market and 800 in the ethical sector alone in 1969 and 1970 (CX 727; RX 2028-44). Consequently, the record contains no credible evidence that a trend toward concentration has taken place in the industry.

35. The cases upon which counsel in support of the complaint rely are not in point,<sup>3</sup> particularly in view of the Commission's analysis of these cases in *Sterling Drug, Inc.*, 80 F.T.C. 477,597-98 (1972). In all of these cases there was a finding of a steady tendency toward concentration in the industry involved or that the acquisition noticeably increased the market share of the first or second top firm which already controlled more than 20 percent of the market. As the Commission pointed out, something more than mere "horizontalness" must be shown. Even the horizontalness of the merger here involved is minimal involving two companies which certainly are in the "drug" industry. However, Parke, Davis' sales are limited to sales in the ethical sector of the drug industry [16] and only about 10 percent of Warner-Lambert's sales fall into the ethical sector. Ninety percent of Warner-Lambert's sales are in the proprietary drug market and none of Parke, Davis' sales were made in this market. In addition, Parke, Davis concentrated on drugs sold to the ethical sector of the market on a generic basis while Warner-Lambert's sales in the ethical market were concentrated on specialty items promoted to that market. Even in the submarkets, hereafter discussed, in which it is claimed the substantial existing or potential competition has been eliminated, serious problems arise, not only as to proper market definition and the nature of the competition between the companies, but also as to the significance of the total sales of these products by the two companies. It is estimated that total sales by the two companies in these 20

<sup>3</sup> *United States v. Von's Grocery Co.*, 384 U.S. 270 (1960); *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966); *United States v. Aluminum Co. of America*, 377 U.S. 271 (1964); *United States v. Continental Can Co.*, 378 U.S. 441 (1964); *United States v. Philadelphia National Bank*, 374 U.S. 321, 363 (1963).

submarkets could amount to no more than 1 percent of total industry sales of all drugs (CX 902,3457, 1862,2042,2360).

36. Counsel in support of the complaint argue that this merger must be examined in the light of the "powerful" barriers to new entry in the drug industry. They urge that these barriers consist of the need to undertake substantial R&D activity; the burdens imposed by FDA regulation; the exclusionary effect of patents, and product differentiation arising from the use of trade names; the impact of anti-substitution laws, and the employment of various ethical and proprietary drug promotional techniques.

37. R&D activity and the necessity for meeting the FDA regulation burdens are closely related since the R&D expenditures and activities are all directed toward an attempt to obtain FDA approval of new drugs. Both Warner-Lambert and Parke, Davis recognize the importance of R&D and both expend substantial amounts of money for ethical drug research and development. In 1970, Parke, Davis expended \$21 million and Warner-Lambert \$14 million on ethical drug research for a worldwide total of \$35 million. Based upon a survey in 1970 by the Pharmaceutical Manufacturers Association (PMA), \$611 million was spent by that Association worldwide. This gives Parke, Davis a 3.4 percent share in 1970 and Warner-Lambert a 2.3 percent share for a combined share of 5.7 percent. Counsel in support of the complaint urge that R&D is highly concentrated in the drug industry. For example, based upon Commission Exhibit 3187, they urge that the first four companies account for 42 percent of total R&D expenditures in 1970; the first eight, 61 percent, and the first 20, 91 percent. The [17] difficulty with these figures is that there is nothing in the record which will provide a basis for a finding that the combination of Parke, Davis and Warner-Lambert had any significant effect upon these figures in 1970. New chemical entities (NCE's) are recognized in the industry as one of the indicators of successful R&D effort (Tr. 2321). During the period 1965 to 1972, Parke, Davis is credited with three NCE's and Warner-Lambert with two (RX 419, 420, 442). However, both the NCE's of Warner-Lambert were developed by other companies (RX 434) and one credited to Parke, Davis was developed by Schering (RX 450). It can only be concluded that Warner-Lambert's and Parke, Davis' combined share would be insignificant at approximately 3.9 percent. There is nothing in the record from which to conclude that the combination of Parke, Davis and Warner-Lambert in any way heightened the barriers to entry into the drug industry or any of its product submarkets because of the necessity to undertake substantial research and development work in that industry.

38. Prior to the Food and Drug Act amendments of 1962 only the

safety of a drug had to be proven before marketing and this was done without FDA supervision. The amendments of 1962 required that both the safety and efficacy of a drug be proven by tests, supervised by FDA, on humans as well as animals (Tr. 2395-96,2752-54). Now it is necessary to obtain a claimed investigational new drug exemption, or IND, which allows a firm to proceed with human studies. Detailed disclosures about the drug and the manner in which the drug is being tested are required. Studies of the drug in animals must be made and studies in humans are subject to strict regulations and close FDA supervision. All of the information gathered in these studies is submitted to the FDA in the form of a new drug application (NDA) (Tr. 2822). A substantial amount of information is required by the FDA and is very carefully, even stringently, checked by the FDA before a new drug application will be granted. All of this effort is a part of R&D expenditures discussed above. The FDA has established a different method of approval of drugs which have the same chemical composition of drugs which were on the market between 1938 and 1962. This is called an Abbreviated New Drug Application (ANDA). [18] Under this procedure, a new manufacturer of drugs of established efficacy has only to demonstrate the adequacy of his manufacturing facilities, his methods for determining that the proper amount of drug is in the dosage form, and the bioavailability of the drug. This procedure has greatly reduced the cost of obtaining approval for marketing of new drugs, particularly generic drugs. This abbreviated procedure has been widely employed by many companies and hundreds of ANDAs for numerous products have been awarded (RX 393-414; Tr. 2766-70, 3581-84). While the new procedures and regulations required by the 1962 amendments to the Food and Drug Act have substantially increased the work and cost of marketing new drugs, there is nothing in the record which will permit a finding that the additional cost and effort was in any way heightened as a result of the merger here involved or that the merger in any way heightened the barriers to entry into the drug industry or any of its product submarkets. Nor is it possible to conclude that the new Warner-Lambert, Parke, Davis R&D combination will be in a position to adversely affect any other drug company's R&D programs.

39. Patents play an important competitive role in the drug industry since the holder of a patent on a drug or process for making a drug has an exclusive 17-year right to make and sell or to license whomever they wish to make or sell the drug. A patentholder usually attaches a trade name to any drug on which he may have a patent in addition to the generic name for such drug. Thereafter, the drug is promoted and detailed to the physicians and pharmacists using the trade name and

an attempt is made, often successful, to differentiate this drug in the mind of the prescribing physician from any other firm's drug. In this area anti-substitution laws also play a part since virtually every state by law or Pharmacy Board regulation requires the pharmacist to fill a prescription exactly as written by the physician. Consequently, these laws attach a peculiar value to trade names in the business (Tr. 2234-35, 3471). This is particularly true in the ethical drug market. While all this is true, there is nothing in the record to establish that the existence of these facts were in any way enhanced or changed as a result of the merger here involved. Neither Parke, Davis nor Warner-Lambert can be held responsible for the existence [19] of the patent laws and nothing in the record will permit a conclusion that the combination of the two has in any way enhanced the effect of the patent laws or product differentiation in the ethical drug market. In addition, as a result of recent pressures more and more drugs are being prescribed or purchased under their generic names which permits a pharmacist to fill the prescription with whatever company's drug he has on hand (CX 3688). Parke, Davis had a patent on the drug chloramphenicol which it sold under the trade name chloromycetin. This patent expired in 1966 and other companies are now selling chloramphenicol. However, Parke, Davis still maintains the leadership in chloramphenicol with 94 percent of total sales (CX 4008). This drug accounted for more than 20 percent of Parke, Davis' total sales as recently as 1967 (CX 1 (Z)). However, this drug had developed serious and oftentimes fatal side effects resulting in adverse publicity and its sales had declined substantially accounting at least in part for the difficulties that Parke, Davis found itself in prior to the merger. There is no other evidence that Parke, Davis or Warner-Lambert had any significant patent control of any drug which could be enhanced by this merger.

40. In the 20 submarkets upon which counsel in support of the complaint rely and which are discussed hereafter, patents do not appear to play any significant role. Product differentiation is more a product of drug promotion, particularly detailing and there is nothing in the record which will support a finding that product differentiation was in any way affected by the merger here involved. Anti-substitution laws appear to serve the function of protecting the physician and his patient and are in no way enhanced as a result of the merger here involved. In any event the policy of patent protection for a discoverer of a new drug with the resulting lack of competitive ability by others is clearly an exception to the antitrust laws if the patent is legally obtained.

41. Counsel in support of the complaint urge that the merger has eliminated Parke, Davis as one of the leading drug companies because

of its ability to promote products ethically to the medical profession. Promotion to the medical profession which includes physicians, pharmacists and all types of hospitals, is done by means of detail [20] calls by drug company salesmen, advertising in various medical journals and direct mail to the medical profession. Counsel in support of the complaint emphasize that Parke, Davis had 900 men in its detail force and that detailing, journal advertising and direct mail circulation was highly concentrated among the top 20 firms in the industry. The evidence as to the rank and share of the various members of the industry are contained in the *in camera* file and are Commission Exhibits CX 3601-24. This evidence shows that Warner-Lambert and Parke, Davis were each very small in their percentage rank in all types of ethical promotions even when combined. Their ethical promotions, however measured, account for a smaller percentage share in each category than it does of their combined ethical sales with one exception. There is no evidence that any one or two firms had a percentage in ethical drug promotional activity anywhere approaching 20 percent or that this type of activity was highly concentrated at the four firm or eight firm level. Counsel in support of the complaint again emphasize that the 20 firm level of concentration is quite highly concentrated but there is no firm in any sort of a dominant position. This evidence will not permit a finding that the combination of Warner-Lambert and Parke, Davis will adversely affect the competitive situation in the drug industry insofar as it pertains to promotional activity in the ethical sector. In the proprietary sector, Warner-Lambert is a major consumer advertiser of both proprietary drugs and nondrug products (CX 11-12, 70). In 1970, it ranked fifth among the top 100 advertisers according to *Advertising Age* data (CX 287-288). Parke, Davis engaged in no proprietary advertising and there is no credible evidence that it would ever become a significant proprietary drug marketer (CX 1 (Z)). Consequently, the merger will have no effect upon promotional activities for proprietary drug products.

42. Counsel in support of the complaint urge that the evidence showing the high level of profitability in the drug industry is indicative that there are substantial barriers into entry into the drug industry. The evidence upon which counsel in support of the complaint rely consists of a number of the Commission's Quarterly Financial Reports (QFR's) and the testimony of their economic expert (Tr. 2194-97, 2207). These annual rates of return on stockholders' equity in the drug industry range from 16.8 percent to 20.3 percent for the drug industry as compared with 8.6 percent [21] to 12.3 percent for all manufacturing on the average (Tr. 2197-98). From this, it is argued that entry barriers in the drug manufacturing business must be formidable (Tr.

2200). The problem with the Commission's QFR's is that they fail to deal adequately with advertising and R&D costs that are "expensed" rather than "capitalized" as a part of the stockholders' equity in the drug industry. The Commission itself has pointed out these deficiencies in its Statement of Purpose accompanying Annual Line of Business Report Program Proposal, August 1972, p. 6:

[E]xpensing [of advertising costs] usually results in a measurement of the rate of return on capital which is higher than if such costs were capitalized. \* \* \* As with sales promotion costs, the expensing of R&D costs usually leads to an overstatement of profitability, with the overstatement increasing with the intensity of R&D effort.

As a result the argument of counsel in support of the complaint is based upon evidence which is quite unreliable and possibly meaningless, particularly for an industry with large R&D expenditures and sales promotion costs such as the drug industry. Consequently, the proposed findings of counsel in support of the complaint in this regard are rejected.

43. Contrary to the contentions of counsel in support of the complaint, there have been a number of successful new entrants into the drug industry both by domestic and foreign companies, many of these entries have been subsequent to the enactment of the 1962 amendments to the Food and Drug Act. Among these are Marion Laboratories (Tr. 3663-73; RX 1827, 1862 Rev. A, 2387-88), S.J. Tutag Company (Tr. 3684-3703), Rachele Laboratories (Tr. 1747-49, 1669-76). Other examples are Reid Provident Laboratories (Tr. 3699-3700), Rucker Pharmaceutical (Tr. 3679, 3699), McKesson Laboratories (Tr. 1851-1861, 1863), Rorer (Tr. 3884-85; CX 3365-69), Syntex (Tr. 3385, 3665-69), Flint (Tr. 3386). In addition, E.I. du Pont has entered the drug industry with the purchase of Endo in 1969. Minnesota, Mining and Manufacturing Company has entered the ethical drug business by acquiring the Riker Company in 1970 (Physical Exh. 2, Appendix A; CX 3367). A number of foreign pharmaceutical [22] companies have entered the United States drug market and four presently rank among the top 20 U.S. ethical drug manufacturers, Roche, Ciba-Geigy, Sandoz and Burroughs-Wellcome (RX 1862 Rev. A). There are likewise a considerable number of foreign firms who have entered the United States market recently generally by acquisition of a small American drug firm (Tr. 3377-79, 2992-93, 3380-81, 3442, 2829, 3382-83).

44. Counsel in support of the complaint have submitted a large amount of testimony and exhibits attempting to establish that the acquisition has had substantial adverse effects in 20 submarkets of the drug industry. These are as follows:

1. Thyroid Preparations

2. Anti-Anginal Drugs
3. Cough Remedies
4. Cough Drops and Lozenges
5. Cold Remedies
6. Oral Decongestants
7. Antihistamines
8. Bronchial Dilators
9. Antacids
10. Irritant Laxatives (Ethical)
11. Emollient/Protective Dermatological Preparations
12. Prenatal Vitamins
13. Antibiotics Useful Against Gram-Negative Bacilli
14. Ampicillin
15. Anti-Pseudomonas Drugs
16. Urinary Antibacterials (non-sulfa)
17. Mouthwash
18. Normal Serum Albumin
19. Immune Serum Globulin
20. Tetanus Immune Globulin

These drugs purport to be defined in terms of therapeutic end use and correspond approximately to 7-digit Standard Industrial Classification (SIC) categories (Tr. 2357-59). Counsel in support of the complaint assert that either Warner-Lambert or Parke, Davis was a potential entrant into these product markets or was an existing manufacturer in these markets and was eliminated as either a potential or existing competitor and consequently there has been a substantial lessening of competition in each market as a result of the merger.

[23] 45. In five of these submarkets; namely, anti-anginal drugs, emollient/protective dermatological preparations promoted ethically, bronchial dilators, urinary antibacterials (non-sulfa) and antacids (ethical), the share of the market represented by drugs sold by Parke, Davis in each instance accounted for less than one percent (RX 1766,1664,1758; CX 2620,1879) of the products sold in that submarket. As a result, it is concluded that Parke, Davis' market share in each of these alleged submarkets is so small that the elimination of Parke, Davis as a potential future competitor of any significance must be rejected. Parke, Davis had been in these markets for a number of years and had never improved its market position and the record contains no credible evidence that such might occur in the future. In addition, the record contains substantial evidence that there are a large number of companies both large and small in each of these five submarkets who

are at least as capable as Parke, Davis of increasing their share of these markets despite the fact that their shares remained small (RX 1665,1760, 1768,1778,1719,1716).

46. Three of these submarkets relied upon by counsel in support of the complaint; namely, antacids, cough drops and lozenges and mouthwash, are essentially proprietary drugs since their principal sales are directed to the consumer and require, for effective selling, expertise in media advertising and a developed system of distribution to all classes of trade (Tr. 3208,3215,3637,3522). Parke, Davis had none of these qualifications essential to be an effective proprietary drug marketer in the foreseeable future. As found above, the Parke, Davis market share in antacids was about 0.1 percent. In cough drops and lozenges, Warner-Lambert was among the leading companies with about a 26.8 percent share (CX 1463-64). Parke, Davis had less than 3 percent of the market with outmoded products and consequently lacked any significant competitive potential. In mouthwash products, Warner-Lambert is the clear leader with about 50 percent of the mouthwash market, accounted for principally by its Listerine antiseptic mouthwash (CX 2688). Parke, Davis had four mouthwash products which in 1970 had *de minimis* total sales of \$29,000 (CX 2688). Again mouthwash sales are primarily a proprietary item and there is nothing in the record to indicate that Parke, Davis could have become any sort of a significant competitor in [24] this market in the foreseeable future. As pointed out above, the Commission's decision in the *Sterling Drug, Inc.* case will not permit a finding of substantial lessening of competition upon a mere showing of horizontality between the two firms involved in the merger as is contended by counsel in support of the complaint. The market shares of Parke, Davis here involved are so insignificant that they will not permit the mechanical application of a horizontality rule. Something more must be shown and the record is lacking in this respect. The contentions of counsel in support of the complaint that there could be any substantial lessening of competition in the seven submarkets discussed above are rejected.

#### PRODUCT SUBMARKETS

47. *Thyroid Preparations.* Parke, Davis markets only unbranded thyroid: thyroid USP, marketed in several grainage doses (Tr. 645; CX 923), and a variation thereof, thyroid strong, which contains 50 percent more iodine per grain than USP (Tr. 646; CX 924). Warner-Lambert markets only branded thyroid: the nonsynthetic, purified product Proloid (Tr. 646; CX 913-14), and a synthetic T-4/T-3 combination, Euthroid (Tr. 646; CX 915-16). All of these products are used for the treatment of "Hypothyroidism," which is the condition resulting from

