

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

PERRIGO COMPANY, et al.,

Defendants.

Civil Action No. 1:04CV01397 (RMC)

STATE OF MARYLAND, et al.,

Plaintiffs,

v.

PERRIGO COMPANY, et al.,

Defendants.

Civil Action No. 1:04CV01389 (RMC)

**CONSENT MOTION FOR MODIFICATION OF FINAL
ORDERS AND STIPULATED PERMANENT INJUNCTIONS**

Perrigo Co. (“Perrigo”), Alpharma, Inc. (“Alpharma”), the Federal Trade Commission (the “Commission”), and the Plaintiff States jointly move the Court for orders modifying the Final Orders and Stipulated Permanent Injunctions in the above captioned cases (the “Orders”). Attached are proposed orders modifying the Orders.

The grounds for this motion, which are set forth more fully in the attached memorandum of points and authorities, are that each defendant is in violation of the current Orders the instant it acquires, or merges with, a company that is a party to any

agreement proscribed by Paragraph IV of the Orders. This has the effect of impeding the ability of Perrigo and Alpharma to engage in certain mergers and acquisitions. The parties neither anticipated nor intended the Orders to have this effect, and they respectfully submit that the proposed modifications are appropriate in this case.

WHEREFORE, the parties respectfully request the Court to enter orders modifying the Orders to provide for a thirty (30) day “grace period” during which Perrigo and Alpharma can bring into compliance with the terms of the Orders any agreements to which they succeed as the result of a merger or acquisition, and to require that Perrigo and Alpharma report, within ten (10) days after each such merger or acquisition, to the Commission and the Plaintiff States any such agreements that, unless modified before the end of such “grace period,” would violate an Order.

Dated: May 26, 2006

Respectfully submitted,

Scott A. Stempel (D.C. Bar No. 367284)
Willard K. Tom (D.C. Bar No. 297564)
J. Clayton Everett, Jr.
(D.C. Bar No. 469652)
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave., NW
Washington, DC 20004
(202) 739-3000 (Tel.)
(202) 739-3001 (Fax)

Counsel for Defendant Perrigo Co.

Marimichael O. Skubel
(D.C. Bar No. 294934)
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW, Suite 1200
Washington, DC 20005
(202) 879-5034 (Tel.)
(202) 879-5200 (Fax)

Counsel for Defendant Alpharma, Inc.

Roberta S. Baruch (D.C. Bar No. 269266)
FEDERAL TRADE COMMISSION
601 Pennsylvania Ave., NW
Washington, DC 20004
(202) 326-2861 (Tel.)
(202) 326-3396 (Fax)

*Counsel for Plaintiff Federal Trade
Commission*

Meredyth Smith Andrus
Office of the Attorney General
State of Maryland
Antitrust Division
200 St. Paul Place
Baltimore, MD 21202
410-576-6477 (Tel.)
410-576-7830 (Fax)

*Counsel for the State of Maryland,
on behalf of All Plaintiff States*

**UNITED STATES DISTRICT COURT
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**MEMORANDUM IN SUPPORT OF CONSENT MOTION FOR MODIFICATION
OF FINAL ORDERS AND STIPULATED PERMANENT INJUNCTIONS**

Perrigo Co. (“Perrigo”), Alharma, Inc. (“Alharma”), the Federal Trade Commission (the “Commission”), and the Plaintiff States respectfully request that the Court modify the Final Orders and Stipulated Permanent Injunctions (the “Orders”) (attached as Exhibit B) in the above captioned cases to reverse an unintended and unanticipated consequence of the Orders. Specifically, as the Orders now read, a defendant would violate the Orders the instant it acquires, or merges with, a company that is a party to any agreement proscribed by Paragraph IV of the Orders. This has the effect of impeding the ability of Perrigo and Alharma to acquire, or merge with,

companies that are parties to agreements proscribed by the Orders. The parties neither anticipated nor intended the Orders to have this effect. This problem can be solved by allowing Perrigo and Alparma a short “grace period” following a merger or acquisition during which any acquired agreements may be brought into compliance with the terms of the Orders.

BACKGROUND

In August 2004, the parties jointly sought entry of the four Orders. The parties’ purpose in seeking the Orders was to resolve antitrust claims brought by the Commission and the Plaintiff States against Perrigo and Alparma. The complaints alleged that Perrigo and Alparma, two competitors in the store brand children’s ibuprofen oral suspension market, agreed to refrain from competing with one another for a period of seven years.

The Orders require, among other things, that Perrigo and Alparma refrain from entering into or maintaining certain types of agreements. Specifically, Paragraph IV of each Order prohibits each defendant from entering or maintaining any agreement in which:

- A. a party to the Agreement agrees to refrain from, or to limit, for any period of time, the research, development, manufacture, marketing, distribution or sale of an ANDA Drug Product that it Controls and that is Of the Same Kind as another ANDA Drug Product Controlled by another party to the Agreement, and
- B. a party to the agreement is the First Filer of an ANDA with respect to:

1. any ANDA Drug Product that is a subject of such Agreement, or
2. any ANDA Drug Product that is Of the Same Kind as any ANDA Drug Product that is a subject of such Agreement unless one of the specifically defined exceptions in Paragraph IV of the Order is satisfied.

Under the prohibition against “maintain[ing]” such agreements, each defendant would be in violation of an Order the instant it acquires or mergers with a company that is a party to an agreement prohibited by Paragraph IV.

The parties did not anticipate that problem when they negotiated the Orders and submitted them to the Court in August 2004, and they did not intend the Orders to have that effect. The problem did not become apparent to the parties until 2005, when Perrigo acquired another pharmaceutical company. Although, in that instance, Perrigo was able to avoid violating the Order because the particular agreement at issue was covered by the Second Proviso to Paragraph IV, the defendants will not necessarily be so fortunate the next time.

PROPOSED ORDERS

The parties propose to solve the problem identified above by adding an additional proviso to Paragraph IV of each Order.

Subpart (1) of each proviso would require that Perrigo and Alparma report any agreements that would violate the Order but for the proviso to the Commission and the Plaintiff States within ten (10) days after any merger or acquisition. This provision would enable the Commission and the Plaintiff States to monitor, on a timely basis, the

efforts of Perrigo and Alharma to bring such agreements into compliance with the Orders.

Subpart (2) of the proviso would give Perrigo and Alharma a thirty day period following a merger or acquisition to bring into compliance with the Orders any agreements to which Perrigo or Alharma has succeeded as a result of the merger or acquisition.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO MODIFY THE ORDERS.

Pursuant to Fed. R. Civ. P. 60(b)(6), the Court has jurisdiction to modify the Orders for “any other reason justifying relief from the operation of the judgment.” The Court also has such jurisdiction under “principles inherent in the jurisdiction of the chancery.” *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932); *see also In re Grand Jury Proceedings*, 827 F. 2d 868, 873 (2d Cir. 1987) (“The district court's power to modify its own final judgments is rooted in equity and is considered ‘inherent.’”) (*citing Sierra Club v. United States Army Corps of Engineers*, 732 F.2d 253 (2d Cir.1984), and *United States v. Swift*).

II. MODIFICATION OF THE ORDERS IS IN THE PUBLIC INTEREST.

The benefits to the public of modifying the Orders outweigh the costs. Absent the requested modification, defendants could find it difficult, if not impossible, to engage in certain mergers and acquisitions that could prove beneficial to the public. Although defendants might sometimes be able to avoid violating the Orders by bringing proscribed

agreements into compliance with the Orders prior to the consummation of a merger or acquisition, there are circumstances when this is not possible. For example,

1. if a merger or acquisition were hostile, there would be no reason for the other party to the merger to cooperate with Perrigo or Alharma in effecting a cure; and
2. an agreement that, by its terms, would violate Paragraph IV if “maintained” by Perrigo or Alharma would ordinarily involve a third party not participating in the merger or acquisition. If, by refusing to renegotiate that agreement, the third party could block the merger or acquisition, then the third party might do so in order to extract concessions.

At least some of the mergers and acquisitions prevented by the current orders could increase the efficiency of the consolidated companies, which could prove beneficial to the public. Any countervailing costs from postponing defendants’ compliance with Paragraph IV for thirty (30) days after a merger or acquisition are likely to be very small in comparison to the likely benefits.

CONCLUSION

For the reasons described above, the parties respectfully request that the Orders be modified as described above. Proposed orders are attached as Exhibit A.

Dated: May 26, 2006

Respectfully submitted,

Scott A. Stempel (D.C. Bar No. 367284)
Willard K. Tom (D.C. Bar No. 297564)
J. Clayton Everett, Jr. (D.C. Bar No. 469652)
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave., NW
Washington, DC 20004
(202) 739-3000 (Tel.)
(202) 739-3001 (Fax)

Counsel for Defendant Perrigo Company

Marimichael O. Skubel (D.C. Bar No. 294934)
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW, Suite 1200
Washington, DC 20005
(202) 879-5034 (Tel.)
(202) 879-5200 (Fax)

Counsel for Defendant Alpharma, Inc.

Roberta S. Baruch (D.C. Bar No. 269266)
FEDERAL TRADE COMMISSION
601 Pennsylvania Ave., NW
Washington, DC 20004
(202) 326-2861 (Tel.)
(202) 326-3396 (Fax)

*Counsel for Plaintiff Federal Trade
Commission*

Meredyth Smith Andrus
Office of the Attorney General
STATE OF MARYLAND
Antitrust Division
200 St. Paul Place
Baltimore, MD 21202
410-576-6477 (Tel.)
410-576-7830 (Fax)

*Counsel for the State of Maryland,
on behalf of All Plaintiff States*

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FEDERAL TRADE COMMISSION,

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v.

PERRIGO COMPANY

and

ALPHARMA, INC.,

Defendants.

Civil Action No. 1:04CV01397 (RMC)

**[PROPOSED] ORDER MODIFYING FINAL ORDER
AND STIPULATED PERMANENT INJUNCTION**

Upon consideration of the joint motion of Perrigo Company, Alpharma, Inc., and the Federal Trade Commission to Modify the Final Order and Stipulated Permanent Injunction, and any Opposition thereto, it is this _____ day of _____, 2006,

ORDERED that the Motion is granted.

As to Perrigo Company, the Final Order and Stipulated Permanent Injunction entered by this Court on August 24, 2004, with respect to Perrigo Company is amended to insert the following language at the end of Paragraph IV:

“PROVIDED FURTHER THAT, if Perrigo acquires, or merges with, all or part of another company, then:

*(1) within ten (10) days of the closing of such merger or acquisition,
Perrigo*

- (a) shall determine whether, as a result of the merger or acquisition, it has succeeded to any agreement that, but for this proviso, would be prohibited by Paragraph IV of this Final Order (hereafter “Prohibited Successor Agreement”), and
 - (b) shall notify the Commission of each Prohibited Successor Agreement to which Perrigo has succeeded as a result of such merger or acquisition by filing a verified written report with the Commission that includes a copy of each such agreement; and
- (2) nothing in Paragraph IV shall prohibit Perrigo from succeeding to a Prohibited Successor Agreement through such merger or acquisition if, within thirty (30) days of the closing of the merger or acquisition through which Perrigo first succeeded to such agreement, Perrigo brings the agreement into conformity with the terms of this Final Order.”

As to Alharma, Inc., the Final Order and Stipulated Permanent Injunction entered by this Court on August 24, 2004, with respect to Alharma, Inc. is amended to insert the following language at the end of Paragraph IV:

“PROVIDED FURTHER THAT, if Alharma acquires, or merges with, all or part of another company, then:

- (1) within ten (10) days of the closing of such merger or acquisition, Alharma
 - (a) shall determine whether, as a result of the merger or acquisition, it has succeeded to any agreement that, but for this proviso, would be prohibited by Paragraph IV of this Final Order (hereafter “Prohibited Successor Agreement”), and
 - (b) shall notify the Commission of each Prohibited Successor Agreement to which Alharma has succeeded as a result of such

merger or acquisition by filing a verified written report with the Commission that includes a copy of each such agreement; and

(2) nothing in Paragraph IV shall prohibit Alpharma from succeeding to a Prohibited Successor Agreement through such merger or acquisition if, within thirty (30) days of the closing of the merger or acquisition through which Alpharma first succeeded to such agreement, Alpharma brings the agreement into conformity with the terms of this Final Order.”

SO ORDERED.

Rosemary M. Collyer
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF MARYLAND, et al.
by Attorney General J. Joseph Curran, Jr.,

Plaintiffs,

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PERRIGO COMPANY

and

ALPHARMA, INC.,

Defendants.

Civil Action No. 1:04CV01389 (RMC)

**[PROPOSED] ORDER MODIFYING FINAL ORDER
AND STIPULATED PERMANENT INJUNCTION**

Upon consideration of the joint motion of Perrigo Company, Alpharma Inc., and the Plaintiff States to Modify the Final Order and Stipulated Permanent Injunction, and any Opposition thereto, it is this _____ day of _____, 2006,

ORDERED that the Motion is granted.

As to Perrigo Company, the Final Order and Stipulated Permanent Injunction entered by this Court on August 25, 2004, with respect to Perrigo Company is amended to insert the following language at the end of Paragraph IV:

“PROVIDED FURTHER THAT, if Perrigo acquires, or merges with, all or part of another company, then:

- (1) *within ten (10) days of the closing of such merger or acquisition, Perrigo*
 - (a) *shall determine whether, as a result of the merger or acquisition, it has succeeded to any agreement that, but for this proviso, would be prohibited by Paragraph IV of this Final Order (hereafter “Prohibited Successor Agreement”), and*
 - (b) *shall notify the Plaintiff States of each Prohibited Successor Agreement to which Perrigo has succeeded as a result of such merger or acquisition by sending a verified written report to the Plaintiff States at the addresses identified in Paragraph VI.D that includes a copy of each such agreement; and*
- (2) *nothing in Paragraph IV shall prohibit Perrigo from succeeding to a Prohibited Successor Agreement through such merger or acquisition if, within thirty (30) days of the closing of the merger or acquisition through which Perrigo first succeeded to such agreement, Perrigo brings the agreement into conformity with the terms of this Final Order.”*

As to Alpharma Inc., the Final Order and Stipulated Permanent Injunction entered by this Court on August 25, 2004, with respect to Alpharma, Inc. is amended to insert the following language at the end of Paragraph IV:

“PROVIDED FURTHER THAT, if Alpharma acquires, or merges with, all or part of another company, then:

- (1) *within ten (10) days of the closing of such merger or acquisition, Alpharma*
 - (a) *shall determine whether, as a result of the merger or acquisition, it has succeeded to any agreement that, but for this proviso,*

would be prohibited by Paragraph IV of this Final Order (hereafter “Prohibited Successor Agreement”), and

(b) shall notify the Plaintiff States of each Prohibited Successor Agreement to which Alpharma has succeeded as a result of such merger or acquisition by sending a verified written report to the Plaintiff States at the addresses identified in Paragraph VI.D that includes a copy of each such agreement; and

(2) nothing in Paragraph IV shall prohibit Alpharma from succeeding to a Prohibited Successor Agreement through such merger or acquisition if, within thirty (30) days of the closing of the merger or acquisition through which Alpharma first succeeded to such agreement, Alpharma brings the agreement into conformity with the terms of this Final Order.”

SO ORDERED.

Rosemary M. Collyer
United States District Judge