THE COMPETITION TRIBUNAL

REPUBLIC OF SOUTH AFRICA

CASE NO: 68/IR/JUN 00

In the matter between:

National Association of Pharmaceutical Wholesalers **1st Claimant**

Natal Wholesale Chemists (Proprietary) Limited t/a Alpha Pharm Durban **2nd Claimant**

Midlands Wholesale Chemists (Proprietary) Limited t/a Alpha Pharm Pietermaritzburg **3rd Claimant**

East Cape Pharmaceuticals Limited t/a Alpha Pharm Eastern Cape **4th Claimant**

Free State Buying Association Limited **5th Claimant**

Pharmed Pharmaceuticals Limited **6th Claimant**

L'Etangs Wholesale Chemist CC t/a L'Etangs **7th Claimant**

Resepkor (Proprietary) Limited t/a Reskor **8th Claimant**

Pharmaceutical Wholesalers Mainstreet 2 (Proprietary) Limited t/a New United Pharmaceutical Distributors **9th Claimant**

AND

Glaxo Wellcome (Proprietary) Limited **1st Respondent**

Pfizer Laboratories (Proprietary) Limited **2nd Respondent**

Pharmacare Limited **3rd Respondent**

Smithkline Beecham Pharmaceuticals (Proprietary) Limited **4th Respondent**

Warner Lambert SA (Proprietary) Limited **5th Respondent**

Synergistic Alliance Investments (Proprietary) Limited **6th Respondent**

Druggists Distributors (Proprietary) Limited **7th Respondent**

DECISION AND ORDER

BACKGROUND

1. This is an application for interim relief by nine full-line wholesale distributors of pharmaceutical products against five pharmaceutical manufacturers and importers ("the manufacturers") who have established a joint exclusive distribution agency for their products. The sixth respondent is a company formed by the manufacturers to establish the distribution agency; the distribution agency is the seventh respondent.

2. The distribution of pharmaceutical products in South Africa has traditionally been the business of pharmaceutical wholesalers. The full-line wholesalers would buy the products from the manufacturers at a general discount of 17,5 percent and they would on-sell to pharmacists and other smaller buyers.

3. All this changed when a joint exclusive distribution agency, International Healthcare Distributors ("IHD"), was established by several manufacturers and commenced business on 1 November 1993. Wholesalers generally received a 17,5 percent discount from the pharmaceutical manufacturers before the formation of IHD; other discounts were negotiated between the parties concerned. After IHD was established wholesalers could no longer purchase pharmaceutical products directly from the manufacturers who were members of IHD and had to buy the products through IHD. The new distribution arrangement also meant that wholesalers stopped receiving the general discount of 17,5 percent on the products of IHD members. In July 1998 the claimants filed a complaint with the Competition Board alleging that IHD and its members had contravened the provisions of the old Competition Act in forming a joint exclusive distribution agency.

4. In 1997 the respondent manufacturers in this matter came together under the code name "Project Nasa" with the intention of establishing a similar joint exclusive distribution agency for their products. They formed a company called Synergistic Alliance Investment (SAI) to acquire Druggists Distributors ("DD"), a national full-line wholesaler, with the intention of converting it into a joint exclusive distribution agency. DD and the ninth claimant, United Pharmaceutical Distributors, were the only national full-line wholesalers. Presumably as a precautionary measure the respondents applied to the erstwhile Competition Board to have the project exempted from the provisions of

the old Maintenance and Promotion of Competition Act 96 of 1979 ("the old Competition Act") prohibiting horizontal collusion on conditions of supply.

5. In February 1999, the Board announced that it would conduct a formal investigation into exclusive distribution agencies in the pharmaceutical industry pursuant to the complaint against IHD and the application for exemption by the respondents. It had found that there was *prima facie* evidence that restrictive practices existed or could exist. SAI announced that it would not go ahead with its project until the Board had issued its final report.

6. The Board published its findings in May 1999. It found that a joint exclusive distribution agency for pharmaceutical products would constitute a horizontal restrictive practice prohibited by the old Act. The Board found that the formation of a joint exclusive distribution agency in this market would have the effect of limiting distribution facilities in the market, restricting entry into the pharmaceutical wholesale-distribution market, maintaining or enhancing the prices or other consideration for pharmaceutical products and preventing the distribution of pharmaceutical products in the most efficient and economical manner.

7. The Board recommended that the identified restrictive practice be cured by way of a section 11 arrangement between itself and the manufacturers. Failing a section 11 arrangement, the Board recommended that the Minister of Trade and Industry, acting in terms of section 14(1) of the old Competition Act, should declare the conduct of the manufacturers unlawful. In addition the Board recommended that the Minister request the Competition Commission to investigate the alleged horizontal restrictive practice between the manufacturers. The Commission was established in terms of the Competition Act 89 of 1998 ("the Act") as a successor of the Board, and came into existence on 1 September 1999. The Minister decided not to implement the recommendation of the Board to declare exclusive distribution agencies in the pharmaceutical industry unlawful. He felt that the new Competition Act could resolve the matter more effectively and that the complainants and other interested parties could, if they wanted to, pursue the complaint with the Competition Commission once it had been established.

8. In March 2000, SAI announced that it had acquired DD and that it would go ahead with its plan to convert DD into a joint exclusive distribution agency for its members' products. The manufacturers who are members of SAI would in future sell all their products through DD alone. Ownership of the products sold through DD would remain with the manufacturer until the sale to the relevant customer. DD would take all orders and collect payment on behalf of the manufacturers. A letter from DD to the manufacturers' customers advised them of the change

and attached a guide on how DD would operate in the future. Soon thereafter DD issued a single credit application form on behalf of all the manufacturers to be completed by businesses wanting to open accounts with DD to buy their products. At the same time DD issued a single set of terms and conditions for the supply of the manufacturers' products.

9. The application before us is a result of the above conduct of DD and was originally filed with the Tribunal on 28 April 2000. Due to procedural defects in the first application the claimants withdrew their complaint with the Competition Commission and the application with the Tribunal, filing both afresh on 08 June 2000. The parties agreed that the founding papers in the withdrawn application would be regarded as valid for the second application. The parties filed new answering and replying affidavits. By the time the respondents filed their answering affidavit each manufacturer had published its own new trading terms and conditions and credit application form. At the hearing the respondents placed in issue that DD was mandated to issue uniform terms and conditions for the supply of their products on their behalf.

10. Even though DD's name has subsequently been changed to Kinesis Logistics (Proprietary) Limited, for the sake of convenience we will continue to refer to it as DD in this decision.

11. Section 59(1) of the Act sets out the requirements for an interim relief application. The section reads as follows:

59. Interim Relief

(1) At any time, whether or nor a hearing has commenced into an alleged *prohibited practice,* a person referred to in section 44, may apply to the Competition Tribunal for an interim order in respect of that alleged practice, and the Tribunal may grant such an order if-

(a) there is evidence that a *prohibited practice* has occurred;

(b) an interim order is reasonably necessary to -

(i) prevent serious irreparable harm to that person; or

(ii) to prevent the purposes of *this Act* being frustrated.

(c) the *respondent* has been given a reasonable opportunity to be heard, having regard to the urgency of the proceedings; and

(d) the balance of convenience favours the granting of

the order."

12. Section 44 refers to a person who has lodged a complaint with the Commission and whose complaint the Commission has accepted.

13. The claimants allege that the respondents have engaged in prohibited practices in respect of Sections 4(1)(a), 4(1)(b)(i), 5(1), 8 and 9 of the Act.

FINDING

14. On the evidence before us, we find that there is sufficient evidence that the agreement between the first to fifth respondents to distribute their products through a joint exclusive distribution agency has the effect of substantially preventing or lessening competition in the market for the distribution of pharmaceutical products in certain significant therapeutic categories, in terms of Section 4(1)(a). Having found for the claimants under Section 4(1)(a) we did not consider their case under any of the other sections.

15. We also find that the other requirements for granting interim relief specified in Section 59(1) have been met. On the evidence before us, we find that the alleged pro-competitive gains resulting from the conversion of DD to a joint exclusive distribution agency do not outweigh the anti-competitive effects (see paragraph 44). We find that an interim order is necessary in this case to prevent the purposes of the Act from being frustrated (see paragraph 64). Finally it is our view that the balance of convenience favours the granting of the interim relief order given (see paragraph 68).

16. We accordingly allow the application for interim relief. Our order appears at the end of this decision.

PROHIBITED PRACTICE UNDER SECTION 4(1)(a)

17. Section 4(1)(a) prohibits certain restrictive horizontal practices. We quote the section below:

4. Restrictive horizontal practices prohibited

"(1) An ***agreement*** **between, or** ***concerted practice*** **by** ***firms*****, or a decision by an association of** ***firms*****, is prohibited if -**

(a) it is between parties in a ***horizontal relationship*** **and it has the effect of substantially preventing or lessening competition in a market, unless a party to the** ***agreement*****, or concerted practice, or decision can prove that any technological, efficiency or other pro-competitive, gain from it outweighs that effect…"**

18. It is common cause that the agreement between the respondent manufacturers to convert DD from a full-line wholesaler into a joint exclusive distribution agency is an agreement between firms in a horizontal relationship as contemplated by the Section 4(1)(a) of the Act. The next consideration is whether the agreement between respondents to convert DD from a full-line wholesaler to a joint exclusive distribution agency has the effect of substantially lessening competition in a market.

The Relevant Market

19. The claimants identified two relevant product or services markets, the market for the wholesale and distribution of pharmaceutical products and the market determined with reference to the therapeutic categories of the products manufactured and/or imported by respondents and their competitors. The claimants employ the ATC 3 level classification to identify therapeutic categories for the purposes of the latter market. This classification divides medicines according to the illnesses that they cure to determine whether they are substitutes for each other. The claimants did not define the relevant geographic market for both the product/services markets identified.

20. The respondents identified three relevant product markets; the market for the manufacture of ethical pharmaceutical products; the market for the distribution of pharmaceutical products and the market for the retail sale of pharmaceutical products. The participants in the above markets are the manufacturers in the first identified market, wholesalers in the second market and in the third market are those businesses who supply medicines directly to patients (pharmacists, dispensing doctors, hospitals etc.). The respondents argued that the relevant geographic market for all three markets is the whole of South Africa.

21. The respondents point out that the claimants have not properly defined the market because the relevant geographic market was not given. Furthermore, the respondents argue that the ATC 3 level classification used by the claimants to divide the products into therapeutic categories, though commonly used by antitrust authorities around the world, is not always appropriate. According to them the present case is one where the ATC 3 level classification is not an appropriate classification. The respondents suggested that the market be defined at a lower level than ATC 3.

22. In response to the criticism of the ATC 3 level classification the claimants argue that going down to ATC 4 level would mean that fewer products are in each therapeutic category and therefore increase the

respondents' share in each market. The ATC 3 level is therefore a fair approximation of the respondents' market share in each therapeutic category.

23. Our view is that there are two relevant markets in this case, taking into account complexities introduced by the fact that the distribution service can be provided in several ways. There is the market for the manufacture and/or import of pharmaceutical products with reference to therapeutic categories ('manufacturing market') and the market for the distribution of these products ('the distribution market'). In each of these markets there are buyers and sellers. In the case of a wholesaler, it serves as a buyer in the manufacturing market and simultaneously as a seller in the distribution market. In the case of a distribution agency, it serves to link the manufacturers (sellers) and retail level buyers by supplying a distribution service to the manufacturers. (Including both types of distribution in the relevant market is consistent with the approach of the European Commission as stated in their Guidelines on Vertical Restraints.)

24. For purposes of classifying products into different therapeutic categories we accept, for the purposes of this application, that the ATC 3 level is the best instrument in this case. Antitrust authorities around the world use the ATC 3 level to classify products for purposes of the manufacturing market. Similarly, we accept that the geographic market for the manufacturing market is South Africa. The claimants also implicitly defined the geographic market in this way by calculating the market shares of the manufacturers in each therapeutic category on a national basis.

25. Defining the relevant geographic market for the purposes of the distribution market is more complex. The respondents argue that it is a national market because there are no economic barriers dividing the markets regionally and the transport of pharmaceutical products is relatively cheap. They conclude that competitive conditions should therefore be similar across all the regions in South Africa and, therefore, that the market is national. The claimants have not defined the geographic market at all.

26. It is, however, possible to define the geographic aspect of the distribution market as regional, because presumably a pharmacist wanting to buy a single item will compare prices between wholesalers/distributors in his/her region and not those in other regions. Conceivably transport costs and the inconvenience occasioned by the time it will take to get the product to his/her pharmacy would discourage a pharmacist from purchasing the products from afar. As no evidence was presented on this matter, we are unable to make a

finding in this regard.

27. However, based on the evidence before us, we are of the view that the geographic aspect of the distribution market is not crucial in the assessment of the effect of DD on competition. The impact on competition in respect of the respondent manufacturers' products is the same both nationally and regionally, because other distributors simply cannot compete for the distribution of these products. For the same reason we find that the claimants' failure to define the relevant geographic market here is not fatal to their case for interim relief.

Effect on competition

28. The claimants argue that the agreement between manufacturers to convert DD from a full-line wholesaler to a joint exclusive distribution agency reduces competition in the distribution market. Firstly, they claim that this agreement reduces competition between wholesalers operating at a national level because only the ninth claimant remains in this market since the conversion of DD. Secondly, they argue that the exclusive distribution agency agreement shields DD from competition with other wholesalers in the distribution of the manufacturers' products.

29. The claimants also allege that the agreement between the respondents substantially lessens competition in the manufacturing market by facilitating collusion between them with regard to price, trading terms and conditions, and eliminates inter-brand and intra-brand competition in respect of the respondents' products.

30. The respondents deny that the agreement between them to convert DD into a joint exclusive distribution agency leads to a substantial reduction of intra-brand competition in respect of their products in the distribution market. They argue that if DD had not been converted from being a full-line wholesaler it would in all probability have gone out of business and there would only be one national full-line wholesaler left, the ninth claimant. That consequence, the respondents argue, would have substantially reduced intra-brand competition at a national level.

31. The respondents argue that the conversion of DD into a joint exclusive distribution agency will not reduce inter-brand competition at the manufacturing market. They contend that the manufacturers will always try to outdo each other to increase their market share. They do this by developing new drugs and setting pricing structures that will attract their competitors' customers. In their view there is no evidence that the agreement between them will change this because the manufacturers are not collaborating on drug development and colluding on pricing

structures or trading terms and conditions.

32. In considering intra-brand competition, we recognize that intra-brand competition cannot exist at the manufacturing level. It occurs at markets further down the supply chain.

33. The manufacturers' agreement to exclusively distribute their products through a jointly owned distribution agency reduces competition primarily in the distribution market in respect of those pharmaceutical products where these manufacturers play a significant role. The adverse effect on competition in this market arises because the joint exclusive distribution initiative excludes all other distributors and potential entrants into the distribution market from competing for the distribution of these products. This effectively shields the joint exclusive distribution agency from the discipline of a competitive market. Moreover, because the arrangement isolates a substantial segment of the distribution market, it serves as a barrier to potential entry into the distribution market.

34. The reduced competition in distribution resulting from this exclusive distribution arrangement has both an intra-brand and inter-brand component.

35. The reduction in inter-brand competition arises from the manufacturers' joint elimination of competition in the distribution of those products that they produce in competition with each other, i.e., substitute products in the same therapeutic categories. Wholesalers previously distributed individual manufacturers' products in each therapeutic category in competition with one another. The agreement between the manufacturers to form a joint exclusive distribution agency has removed the competition in the distribution of their products.

36. The respondents deny that their distribution arrangement precludes the access of other distributors to the market for the distribution of their products. However, the various agreements between the respondents clearly show that the manufacturers are precluded from using means other than DD to distribute their products for seven years. No other distribution agency or wholesaler can perform this function, regardless of whether it can provide a more efficient and cheaper service to the benefit of the consumer, or indeed to the manufacturers themselves.

37. Intra-brand competition in respect of the respondent manufacturers' products is prevented or substantially lessened in the distribution market because the products are committed for distribution by DD for the lengthy period of seven years.

38. The anti-competitive effects of this type of distribution arrangement derive from three important features of the arrangement: firstly, it is a joint exclusive initiative between competing manufacturers; secondly, the manufacturers jointly control the agency and thirdly, the manufacturers play a significant role in a number of therapeutic product categories in which they currently compete.

39. Without the first feature, the arrangement would essentially be a vertical agency agreement of the type that would not raise competition concerns in terms of, for example, the EC's Guidelines on Vertical Restraints. In terms of these guidelines an agency agreement is considered not to be anti-competitive if the agent does not bear any risk in relation to the business it conducts on behalf of the principal. It is not material whether the agent acts for one or several principals or if the agreement prevents the principal from appointing other agents in competition with the contracted agent (i.e. an exclusive agency agreement). Such an agency agreement, however, becomes problematic where it facilitates collusion between the principals. In the present case, the relevant characteristics of the distribution agent (DD) are that it is an exclusive agent; it acts for several manufacturers; and it bears no risk in relation to the manufacturers' businesses. As such, in terms of the EC guidelines, the individual bilateral agency agreements between each of the manufacturers and DD are not in themselves problematic from a competition perspective. The distribution arrangement that these individual agreements establish is nevertheless anti-competitive because it arises from a concerted initiative by competing manufacturers.

40. The second feature allows the manufacturers to benefit from the anti-competitive arrangement. The manufacturers' joint control of the distribution agency ensures that rents that derive from the reduced competition for the distribution of their products accrue to them and not to some independent third party. It thus effectively ensures a transfer of these rents from the wholesalers to the manufacturers.

41. In the absence of the third feature, the anti-competitive effects of the arrangement are unlikely to arise. Typically a significant collective market share of the manufacturers in a particular therapeutic category is necessary for anti-competitive effects to arise in the distribution market. Greater competition in these upstream markets would hamper the ability of manufacturers to achieve an anti-competitive outcome in the distribution of their products. In a competitive upstream market, whatever anti-competitive distribution strategies they would have attempted would have simply placed their products at a competitive disadvantage in relation to their competitors' products.

42. The agreement between the respondents to form a jointly owned exclusive distribution agency also affects competition in the upstream manufacturing market. This is an indirect effect that follows from the reduction of competition in the downstream distribution market. Less competition downstream reduces the distribution choices of manufacturers, which could serve as a barrier to entry to new manufacturers wishing to enter the South African market.

Technology, Efficiency and Other Pro-Competitive Gains

43. Next we consider whether there are any technological, efficiency or other pro-competitive gains resulting from the agreement between the respondents to convert DD from a full-line wholesaler into a joint exclusive distribution agency. The respondents submitted to us a number of efficiency gains that they argued would outweigh any alleged anti-competitive effects of the various agreements between them.

44. On the evidence before us, we find that the alleged pro-competitive gains resulting from the conversion of DD to a joint exclusive distribution agency do not outweigh the anti-competitive effects referred to above. The respondents, through their expert witnesses, argued how the new distribution agency was going to improve various aspects of the pharmaceutical distribution system. In our opinion most of the pro-competitive gains submitted to us are speculative or do not necessarily require this particular arrangement to be realized. There are two possible reasons for this; either there are no gains or there is not enough information to support the respondents' contentions because DD is still a new venture. Whatever the reason, on the basis of evidence put before us, we are not convinced that the alleged pro-competitive gains outweigh the anti-competitive effects we have found above.

45. The respondents offer IHD statistics as proof of pro-competitive gains of an exclusive joint distribution agency in this market. However, the respondents themselves several times make the point that there are structural differences between it and DD.

46. The respondents claim that the formation of DD will result in the highest quality distribution service; cost efficiencies; increased security of distribution, improved information to manufacturers and promotion of inter-brand competition.

47. Mr Glynn, the respondents' expert witness, suggested to us that the quality of the distribution service in the country would improve as result of the conversion of DD into an joint exclusive distribution agency. He

claimed that the higher level of vertical integration resulting from the conversion of DD will provide manufacturers with an incentive to invest in the distribution and marketing of their products. He also referred to DD's aim to provide the best quality service and that customers seem to be satisfied with the service IHD is providing.

48. The argument that there will be cost efficiencies from distributing from DD is based on varying estimates by the manufacturers. The manufacturers estimate a general increase in profit margins because distribution through DD will be more cost effective than through wholesalers. No figures were provided to support this contention (except a comparison by Mr Glynn of the distribution cost through a wholesaler and the estimated cost through DD, and figures of one of IHD's principals).

49. The validity of the allegations on efficiency gains due to the new agency structure were largely undercut by changes urgently made by the respondents to the structure of DD after this application had commenced. Consolidation of the terms of payment and invoicing, for example, were the main efficiencies the manufacturers alleged would result from DD when they applied for an exemption to the Competition Board in 1998. As appears above each manufacturer has now issued its own credit terms for the sale of its products. Furthermore, in their papers the respondents state that DD will be providing separate invoices for each manufacturers' products. With this new structure the alleged efficiencies resulting from common payment terms and consolidated invoicing have disappeared.

50. According to the respondents, DD will improve the security of distribution of their products by preventing theft because it provides an incentive for manufacturers to invest in improved security systems for the distribution of their products. This should reduce the risk of unsafe products being available through the grey market. No evidence was provided to us, except for a statement from a company specializing in the detection of fraud and theft in the pharmaceutical industry that IHD's distribution was more secure than most other companies.

51. The respondents claim that DD will provide improved sales information for the manufacturers. This will assist them to determine marketing strategies and better incentives in the remuneration of sales staff. There is no evidence that such information cannot be obtained except through a jointly owned exclusive distribution agency.

52. The respondents argue that DD will result in the promotion of intra-brand competition because it will encourage alternative distribution channels to the wholesalers. Our view is that intra-brand competition requires distribution channels that allow free access to the distribution

of the manufacturers' products.

53. In his report Mr Glynn argues that prices of the manufacturers' products are unlikely to rise because of the conversion of DD. The more efficient service provided by DD will enable the manufacturers to compete more effectively and thereby drive prices down. Improved efficiency will also lessen the inflationary impact of a depreciation of the rand on the price of multinational companies' medicines sold in this country. The example of one of IHD's principals is once more used to support this contention; no other figures are provided.

54. As stated above, in the evidence at this hearing, the respondents have not satisfied us that the alleged pro-competitive gains outweigh the anti-competitive effects we have found. Furthermore, there is no proof that the claimed pro-competitive efficiencies cannot be achieved through any other means other than a jointly owned exclusive distribution agency.

SERIOUS, IRREPARABLE DAMAGE OR FRUSTRATION OF THE PURPOSES OF THE ACT

55. We now consider whether the claimants have demonstrated that it is necessary for us to give the interim relief order to prevent serious, irreparable damage to them or to prevent the purposes of the Act being frustrated.

56. The claimants argue that wholesalers in South Africa have an insecure future because of the anti-competitive practices of IHD, and more recently, DD as well. They claim that IHD removed approximately 35 percent of the product range from the distribution market; this has led to the demise of a number of full-line wholesalers (Hippocrates, Adcock Ingram and Docmed are given as examples) and left most regional wholesalers in a precarious position. The claimants quote a press statement released by respondents wherein respondents state that the wholesalers face an uncertain future because of the development of alternative distribution methods.

57. The claimants argue that they will not be able to compete with DD for customers because DD will sell to their customers and to them at the same prices. This means that the customers will get the respondent manufacturers' products cheaper from DD than from the wholesalers. The claimants claim that in effect DD will remove an additional 21,5 percent of the products from the distribution market as the wholesalers will no longer be able to trade profitably in the respondent manufacturers' products. This, they claim, will lead to the demise of most of the remaining regional full-line wholesalers. The claimants

provided us with figures showing that since the advent of DD their sales of the respondent manufacturers' products have dropped substantially.

58. In turn the respondents deny that the formation of IHD and DD is causing claimants to suffer serious irreparable damage. The respondents argue that the claimants should still be able to trade profitably in the respondent manufacturers' products because they will be able to buy the products in bulk (albeit via DD) and on-sell to smaller buyers at cheaper prices than the manufacturers who generally do not provide discounts to single item buyers. In their view, the wholesalers will still be able to compete with DD in the distribution of the respondent manufacturers' products by providing a service not provided by DD, e.g. the convenience of a one-stop shop and multiple deliveries per day. On the last day of the hearing the respondents presented us with a price list of one of the claimants. The price list indicated that the claimant concerned was indeed selling single items to pharmacies at a lower price than the manufacturer from whom the products were purchased through DD.

59. The respondents also pointed out that the claimants and other wholesalers would have benefited from DD's exit from the market for the distribution of products of manufacturers not part of DD. DD's previous share of that market would have increased the wholesalers' share and made up for any loss of sales in the respondent manufacturers' products.

60. Finally, the respondents submit that to the extent that the claimants and other wholesalers are suffering any harm, this is a result of their failure to adapt to changes in the market, and not of any anti-competitive behaviour by the manufacturers. The wholesalers are unable or unwilling to adapt to the changing needs of the market and therefore add no value to the respondent manufacturers' supply chain, in their view.

61. On the evidence before us it is not clear whether not granting the interim relief order will lead to the claimants suffering serious, irreparable damage. While there is evidence of damage, there was insufficient evidence to establish the severity thereof. The respondents cast doubt on the claims of the claimants by asserting that there still are opportunities to trade in the respondent manufacturers' products on their sales to single smaller buyers; furthermore, they also have access to the product ranges shed by DD upon its conversion to a joint exclusive distribution agency.

62. Where the claimant cannot show serious irreparable harm it is enough for it to show that the interim relief order is necessary to prevent the

purposes of the Act from being frustrated. Section 2 sets out the purposes of the Act as follows:

"2. Purposes of Act

The purpose of *this Act* is to promote and maintain competition in the Republic in order –

(a) to promote the efficiency, adaptability and development of the economy;

- **to provide consumers with competitive prices and product choices;**
- **to promote employment and advance the social and economic welfare of South Africans;**
- **to expand opportunities for South African participation in world markets and recognize the role of foreign competition in the Republic;**

- **to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and,**

(f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons."

- The claimants argued that the behaviour of the respondents has frustrated all the purposes of the Act and if we do not grant the interim relief order, the purposes of the Act will be frustrated even further. The respondents denied that their agreement to convert DD into an exclusive jointly owned distribution agency frustrates any of the purposes of the Act.

64. We find that an interim order is necessary in this case to prevent the purposes of the Act from being frustrated. The main purpose of the Act is to promote and maintain competition. The effect of the prohibited practice found in this case is to lessen competition in the distribution of pharmaceutical products. It is our view that it is reasonably necessary for us to give the interim relief order as failure to do so will be allow the continuous frustration of the purposes of the Act. If we do not grant the interim order and the claimants subsequently get a favourable final order the competitive process and structure for the distribution of the respondent manufacturers' products will have been so skewed in

favour of DD and the respondents, that a final order may not be able to adequately address the effects of DD's conversion on the nature of competition in the distribution market.

OPPORTUNITY TO BE HEARD

65. Section 59(1)(c) of the Act requires that the respondent be given a reasonable opportunity to be heard, having regard to the urgency of the matter. The respondents have had ample opportunity to be heard in this case. The circumstances of this case were such that they had an opportunity to answer twice to the claimants' notice of motion and wisely used that opportunity to change some of DD's structures that we probably would have found in violation of the Act.

BALANCE OF CONVENIENCE

66. Finally, we are enjoined by Section 59(1)(d) of the Act to consider whether the balance of convenience favours the granting of the order. Here we are required to weigh up the effect of granting the interim order against letting the prohibited practice continue pending a final hearing where more comprehensive evidence will be lead.

67. The order we have issued compels the respondents to supply the claimants and other wholesalers on the same terms and conditions as before the advent of DD. We have not ordered them to close DD down or convert it back into a wholesaler since that, in our opinion, would seriously disrupt and inconvenience the operations of DD. (If practical considerations require it, the manufacturers can supply the wholesalers using DD's infrastructure and facilities, as long as they do so on commercial terms and conditions similar to those that applied before DD was converted to a joint exclusive distribution agency.) At the same time DD may continue to provide distribution agency services to the manufacturers.

- It is our view that the balance of convenience favours the granting of the interim relief order given. Any potential harm to the respondents resulting from this order is less than the harm facing wholesalers as a result of the respondent's conduct that is the subject of this application. The respondents will still be able to use the infrastructure of DD to distribute their products and if they get a favourable order at the end of the final hearing they will simply continue trading through DD as an exclusive distribution agency.

ORDER

69. We accordingly make the following order:

- The claimants' application for interim relief in terms of Section 59 of the Competition Act, 89 of 1998 is granted in respect of the respondents' alleged contravention of Section 4(1)(a) of the said Act.

- That the respondents supply their products directly to the claimants and other wholesalers on terms and conditions similar to those that applied to transactions between them and the claimants and other wholesalers immediately before the conversion of DD to a joint exclusive distribution agency for their products.

- That this order remains in force until the earlier of -

  - the conclusion of the hearing into the prohibited practices alleged by the claimants to have been committed by the respondents; or

- the date that is six months after the date of the issue of this order;

- The respondents are ordered to pay the claimants' costs in the application on the scale as between party and party, including the costs of two counsel and one attorney.

28 August 2000

D.R. Terblanche **Date**

Concurring: M.G. Holden; F.C. Fourie