July 30

OPENING STATEMENT

I. ALLEGATIONS

THIS IS AN ACTION FOR TREBLE DAMAGES AGAINST THE DEFENDANTS UNDER SECTION 4 OF THE CLAYTON ACT FOR VIOLATING SECTIONS 1 AND 2 OF THE SHERMAN ACT.

THE STATE OF NORTH CAROLINA WILL PROVE THAT:

(1) NO LATER THAN THE FIRST WEEK OF NOVEMBER 1953, DEFENDANTS PFIZER AND CYANIMID CONSPIRED AND ENTERED INTO A COMBINATION TO RESTRAIN TRADE AND COMMERCE IN PRODUCING, MARKETING AND SELLING THE BROAD SPECTRUM ANTIBIOTIC -- TETRACYCLINE. THEY DID THIS IN ORDER TO MAINTAIN THE EXISTING PRICE STRUCTURE OF TWO BROAD SPECTRUM ANTIBIOTICS THAT PFIZER AND CYANIMID WERE ALREADY SELLING - TERRAMYCIN AND AUREOMYCIN.

TERRAMYCIN WAS PFIZER'S "BREAD AND BUTTER" PRODUCT. IN 1952 AUREOMYCIN WAS CARRYING CYANIMID'S PHARMACEUTICAL Lederle OPERATION, WHICH WAS OPERATING UNDER THE NAME LEDERLE LABORATORIES. THE ELEMENTS OF THE ORIGINAL CYANIMID - PFIZER CONSPIRACY, WERE (A) TO FIX THE PRICE AT WHICH TETRACYCLINE WOULD BE SOLD, AND (B) TO KEEP OTHERS OUT OF THE TETRACYCLINE MARKET.

(2) IN ORDER FOR THIS CONSPIRACY AND COMBINATION TO BE SUCCESSFUL, EITHER PFIZER OR CYANIMID HAD TO PROCURE A PATENT ON TETRACYCLINE AND THUS ACQUIRE A LEGAL WEAPON TO KEEP OTHERS FROM ENTERING THE BROAD SPECTRUM MARKET. WE CHARGE, AND WILL

PROVE THAT FRAUD WAS PRACTICED ON THE UNITED STATES PATENT OFFICE IN THE PROSECUTION OF THEIR PATENT APPLICATIONS, AND AS A DIRECT RESULT OF THAT FRAUD, A PATENT ON THE DRUG TETRACYCLINE WAS ISSUED TO THE DEFENDANT PFIZER.

(3) DURING THE FALL OF 1954, WE CHARGE THAT DEFENDANTS BRISTOL, SQUIBB, AND UPJOHN ENTERED INTO A CONSPIRACY AND COMBINATION IN VIOLATION OF THE SHERMAN ACT. IT WAS THEIR PURPOSE TO ENTER INTO THE BROAD SPECTRUM ANTIBIOTIC MARKET AT THE PREVIOUSLY ESTABLISHED BROAD SPECTRUM ANTIBIOTIC PRICES AND TO JOIN THE EXISTING COMBINATION OF PFIZER AND CYANIMID.

(4) DURING THE WINTER OF 1955, BRISTOL, SQUIBB AND UPJOHN WERE ABLE TO FORCE THEIR WAY INTO THE PFIZER AND CYANIMID CONSPIRACY AND COMBINATION. THE COMMON DESIGN FOR PRICING AND MARKETING WAS UNDERSTOOD AT ALL TIME ALLEGED AND WAS PRACTICED BY ALL THE DEFENDANTS THEREAFTER.

II. BACKGROUND

A. DEVELOPMENT OF ANTIBIOTICS

"ANTIBIOTICS" REFERS TO CERTAIN CHEMICAL COMPOUNDS THAT COME FROM MICROBES USED TO COMBAT INJURIOUS MICRO-ORGANISMS THAT CAUSE INFECTIONS AND DISEASE IN BOTH MEN AND ANIMALS.

THE POTENTIAL FOR TREATING HUMAN ILLNESS WITH CHEMICALS WAS FIRST LAUNCHED WITH THE RE-DISCOVERY OF PENICILLIN. PENICILLIN WAS FIRST USED IN 1941 AND WAS JOINED BY STREPTOMYCIN IN 1944

FOR TREATING HUMAN ILLNESS. BOTH PENICILLIN AND STREPTOMYCIN ARE "MEDIUM SPECTRUM" ANTIBIOTICS. THAT IS, PENICILLIN AND STREPTOMYCIN HAVE A MEDIUM SCOPE OF ANTIBIOTIC ACTIVITY AS OPPOSED TO A BROAD SCOPE AS IS TRUE OF TETRACYCLINE.

THE FIRST BROAD SPECTRUM ANTIBIOTIC WAS CHLORTETRACYCLINE, MARKETED BY CYANIMID UNDER THE TRADE NAME AUREOMYCIN IN 1948. AUREOMYCIN, THE FIRST BROAD SPECTRUM ANTIBIOTIC, WAS CLOSELY FOLLOWED BY CHLORAMPHENICOL, MARKETED AS CHLOROMYCETIN BY PARKE, DAVIS IN 1949 AND OXYTETRACYCLINE MARKETED BY PFIZER AS TERRAMYCIN IN 1950. EACH COMPANY OWNED A PATENT ON ITS PRODUCT AND EACH MANUFACTURED AND SOLD ITS PRODUCT EXCLUSIVELY.

TETRACYCLINE WAS FIRST INTRODUCED BY CYANIMID IN NOVEMBER 1953 UNDER THE BRAND NAME ACHROMYCIN. PFIZER WAS NEXT ON THE MARKET WITH TETRACYCLINE, COMING ON IN JANUARY 1954 UNDER THE BRAND NAME TETRACYN. TETRACYCLINE WAS PRODUCED BY REMOVING A CHLORINE ATOM FROM CHLORTETRACYCLINE OR BY DIRECT FERMENTATION. IT WAS ALSO MANUFACTURED AND SOLD IN 1954 BY BRISTOL, AS POLYCYCLINE. FURTHER, BRISTOL SUPPLIED BULK TETRACYCLINE TO SQUIBB AND UPJOHN FOR PROCESSING UNDER THEIR OWN RESPECTIVE BRAND NAMES, STECLIN AND PANMYCIN.

B. <u>MARKET STRUCTURE</u>

AROUND THE TIME TETRACYCLINE WAS FIRST MARKETED BY CYANIMID, THE PENICILLIN MARKET WAS VERY COMPETITIVE AND SOLD AT VERY LOW PRICES TO ALL CUSTOMERS. DURING 1953 BRISTOL LABORATORIES

BASICALLY PRODUCED ONE PRODUCT, PENICILLIN. IN 1953, BECAUSE OF ITS DEPENDENCE ON PENICILLIN, BRISTOL LOST ABOUT ONE MILLION DOLLARS, HAD TO LAY OFF APPROXIMATELY ONE-FOURTH OF ITS WORK FORCE, AND EVEN WENT SO FAR AS TO CLOSE ITS EXECUTIVE DINING ROOM. PENICILLIN HAD NEVER BEEN PATENTED, AND THUS NO LEGALLY PROTECTED MONOPOLY HAD ARISEN IN THAT MARKET.

ON THE OTHER HAND, THE CONTEMPORANEOUS EXPERIENCE FOR THE PATENTED BROAD SPECTRUM ANTIBIOTICS WAS QUITE DIFFERENT. PFIZER'S TERRAMYCIN SALES SURPASSED THIRTY-SIX AND A HALF MILLION DOLLARS, CONSTITUTING 29 PERCENT OF ITS TOTAL SALES FOR ALL PRODUCTS. IN 1953, CYANAMID'S SALES FOR ITS BROAD SPECTRUM ANTIBIOTIC, AUREOMYCIN, WERE THIRTY-TWO MILLION DOLLARS AND ACCOUNTED FOR 8 PERCENT OF ITS SALES ON ALL PRODUCTS. THE YEAR BEFORE, PROFITS BEFORE TAXES FOR CYANIMID'S DRUG DIVISION, ON ALL DRUGS, AMOUNTED TO 22.4 MILLION WHILE PROFITS ON BROAD SPECTRUM ANTIBIOTICS WERE 28.9 MILLION. THUS, CYANAMID'S LEDERLE DIVISION LOST SIX AND ONE-HALF MILLION DOLLARS ON OTHER DRUGS BUT MADE A HUGE PROFIT ON AUREOMYCIN. AT ABOUT THE SAME TIME, ADVERSE MEDICAL REPORTS APPEARED CONCERNING PARKE, DAVIS' CHLOROMYCETIN AND HAD REDUCED THE PARKE, DAVIS MARKET SHARE FROM 22.5 PERCENT IN 1952 TO 7.9 PERCENT IN 1953. THUS TERRAMYCIN AND AUREOMYCIN ACCOUNTED FOR MORE THAN 90 PERCENT OF THE BROAD SPECTRUM DRUG MARKET.

C. Price Behavior

Aureomycin was placed on the market by Cyanimid in December 1948 at a price to the retail pharmacist of $15.00 for a bottle of 16 capsules. This price was reduced to $10.00 in February 1949, after Chloromycetin had come onto the market at that price. There was a further reduction to $8.00 in February 1950 in anticipation of Pfizer's entry into the market with Terramycin. In March, Pfizer brought Terramycin into the market at $8.40 and in May, Parke, Davis reduced the price of Chloromycetin to $6.00 for 16 capsules. In September 1951, Pfizer reduced the price of Terramycin to $5.10 and that reduction, like the previous ones, was met by the other sellers of broad spectrum antibiotics at that time. Thus it appears that prior to the introduction of Tetracycline into the broad spectrum antibiotic market, whenever a new broad spectrum antibiotic entered the market, there were price drops.

However, the history for Tetracycline is quite different. Despite the fact that Tetracycline was introduced into the broad spectrum antibiotic market at different times by each defendant, it always came on at the same price as existing broad spectrum antibiotics. The prices remained at this level until July 1960, even though production costs for these products varied over the period, and even though production costs were different for each defendant.

III. VIOLATIONS OF THE SHERMAN ACT

A. PFIZER-CYANAMID AGREEMENTS

IN THE FALL OF 1953, BOTH PFIZER AND CYANAMID HAD APPLICATIONS FOR PATENTS ON TETRACYCLINE PENDING IN THE U. S. PATENT OFFICE. WHEN THE COMPANIES LEARNED THAT AN INTERFERENCE TO DETERMINE WHETHER CYANAMID'S BOOTHE-MORTON OR PFIZER'S CONOVER PATENT APPLICATION WAS PRIOR IN TIME, JOHN MCKEEN OF PFIZER AND WILBUR MALCOLM OF CYANAMID, REACHED AN AGREEMENT TO EXCHANGE PROOFS OF PRIORITY, WITH THE LOSER CONCEDING PRIORITY AND THE WINNER LICENSING THE LOSER UNDER ANY TETRACYCLINE PATENT.

IN ADDITION TO THE AGREEMENTS MADE WITH RESPECT TO THEIR PENDING PATENT APPLICATIONS AND LICENSES, THEY REACHED OTHER AGREEMENTS. PFIZER ALSO RECEIVED A LICENSE FROM CYANAMID TO PRODUCE AUREOMYCIN TO USE AS THE BASE IN THE PRODUCTION OF TETRACYCLINE, PLUS CYANAMID'S KNOW-HOW AND MOST EFFICIENT BACTERIA CULTURE FOR AUREOMYCIN PRODUCTION. IN ADDITION, CYANAMID AGREED TO SUPPLY PFIZER WITH BULK TETRACYCLINE, WHICH ENABLED PFIZER TO COUNTERACT THE VALUABLE "LEAD TIME" CYANAMID HAD BY VIRTUE OF BEING FIRST ON THE MARKET WITH TETRACYCLINE. THE TRANSACTION INVOLVED 10,000 KILOGRAMS, AN AMOUNT SUFFICIENT TO SUPPLY PFIZER WITH ITS REQUIREMENTS FOR 1954. THE TOTAL COST TO PFIZER WAS $3,875,000, AND WITH AN APPROXIMATE GROSS OF $10,000,000, PFIZER EARNED A RETURN OF APPROXIMATELY THREE TIMES ITS COST. WE CHARGE THAT THEY ALSO REACHED AN UNDERSTANDING AT THAT TIME TO THE EFFECT THAT NO PRICE COMPETITION WOULD DEVELOP BETWEEN THEM IN THE BROAD SPECTRUM MARKET.

B. The Second Interference

Bristol had previously applied for a patent on a salt form of Tetracycline, and a second interference was set up by the patent office between Bristol (Heinemann), Pfizer (Conover), and Cyanamid (Minieri). Although Cyanamid had conceded the priority of Pfizer's Conover application over its Boothe-Morton application, it convinced the Patent Examiner that its Minieri application should be included in the interference. The Minieri application had just been acquired by Cyanamid when it purchased the Heyden Chemical Corporation and its competing application for a patent on Tetracycline in November of 1953.

Once the parties were involved in the patent office proceedings, it became Pfizer and Cyanamid against Bristol. Bristol's motions to delay the proceedings were opposed by Pfizer and Cyanamid, who were united in their quest for the prompt issuance of a patent on Tetracycline for themselves.

When the patent route appeared too slow to "Stop Bristol", Cyanamid sued Bristol on September 29, 1954, for infringing its Aureomycin patent since Chlortetracycline was co-produced with Bristol's fermentation process for the production of Tetracycline in a quantity of up to 6 percent.

On October 14, 1954, the second interference was dissolved based on the examiner's speculation that strains of the mold used to produce Chlortetracycline also produced Tetracycline and thus the identification of Tetracycline was not inventive.

C. Fraud on the Patent Office

The day after the Examiner's decision to dissolve the interference, Murphy, a Pfizer patent attorney, instructed Tanner and Bogert, Pfizer research chemists, to test the strain of micro-organisms deposited by Cyanamid with the government under the Chlortetracycline patents for potency as to both Tetracycline and Chlortetracycline. The next day, the scientists were instructed not to perform the experiments, but they continued working, and Bogert recorded his findings, using an unusual code for his recording purposes. The fermentation broth contained up to 10 percent Tetracycline.

After the November 24, 1954 official rejection by the Patent Office of the Tetracycline product claims, Pfizer submitted the affidavits of Bogert and Tanner on December 8, 1954, along with "Remarks" that stated recoverable amounts of Tetracycline were NOT produced in "fermentation broths produced strictly in accordance with the Duggar and Niedercorn disclosures." The Patent Examiner was interested in whether any amount of Tetracycline was inherently coproduced with the production of Cyanamid's Chlortetracycline following the teachings of the Duggar and Niedercorn patents.

The affidavits also were based on experiments run by Tanner and Bogert during December of 1954, which were not in strict conformity with the Niedercorn patent and this fact was not disclosed to the Patent Examiner. Cyanamid's best culture

FOR PRODUCING AUREOMYCIN (WHICH PFIZER HAD SINCE FEBRUARY 1954) WAS NOT USED; INSTEAD, BOGERT AND TANNER WERE INSTRUCTED TO USE NRRL #2209, A STRAIN THAT WAS SO LOW IN ANTIBIOTIC ACTIVITY THAT AUREOMYCIN WAS NOT EVEN COMMERCIALLY RECOVERABLE. DURING THE FERMENTATION PROCESS OF THIS INFERIOR CULTURE, THE CONTROLS USED VARIED SIGNIFICANTLY FROM THE METHODS SUGGESTED BY NIEDERCORN FOR OPTIMUM ANTIBIOTIC GROWTH. THUS, A POOR PRODUCER OF ANTIBIOTIC ACTIVITY WAS DELIBERATELY CHOSEN BY PFIZER OVER CULTURES PRODUCING GREATER ANTIBIOTIC GROWTH, IT WAS THEN SUBJECTED TO FERMENTATION UNDER LESS THAN OPTIMUM CONDITIONS, AND YET THE RESULTS WERE UTILIZED BY PFIZER TO ASSURE THE PATENT EXAMINER THAT TETRACYCLINE WAS NOT PRODUCED IN SIGNIFICANT OR RECOVERABLE QUANTITIES IN THE PRODUCTION OF AUREOMYCIN. THE MOST APPROPRIATE TESTS FOR DETERMINING THE PRESENCE OF TETRACYCLINE IN THE CHLORTETRACYCLINE BROTHS WERE NOT EVEN USED.

ALL OF THESE MISREPRESENTATIONS WERE MADE IN THE FACE OF THE FACT THAT SIMILAR EXPERIMENTS HAD BEEN RUN BY TANNER AND BOGERT IN OCTOBER OF 1954, AND AS MENTIONED PREVIOUSLY, TETRACYCLINE WAS PRESENT IN THE FERMENTATION BROTH OF CHLORTETRACYCLINE WHEN STRAINS WITH SUBSTANTIAL ANTIBIOTIC POTENCY WERE USED.

IN FEBRUARY OF 1954, A MEMORANDUM WAS WRITTEN FROM THE DEPARTMENT HEAD OF LEDERLE'S MYCOLOGY RESEARCH TO SEVERAL CYANAMID OFFICIALS, INCLUDING HARVEY EDELBLUTE, CYANAMID'S PATENT ATTORNEY,

THAT CERTAIN SAMPLES OF AUREOMYCIN SOLD IN COMMERCIAL FORM, CONTAINED 1-6 PERCENT TETRACYCLINE. ALTHOUGH MR. EDELBLUTE HAD INFORMED THE PATENT EXAMINER IN DECEMBER 1953 THAT THE PRESENCE OF TETRACYCLINE IN AUREOMYCIN FERMENTATION LIQUOR OR AUREOMYCIN PRODUCTS HAD NOT BEEN DEMONSTRATED IN CYANAMID'S LABORATORIES, HE DID NOT CORRECT THIS REPRESENTATION. IN ADDITION, AS LATE AS AUGUST 1954, HE TOLD THE PATENT EXAMINER THAT TETRACYCLINE WAS NOT PRODUCED BY THE FERMENTATION PROCESSES DESCRIBED IN DUGGAR AND NIEDERCORN.

CYANAMID'S FAILURE TO INFORM THE PATENT EXAMINER THAT TETRACYCLINE WAS CO-PRODUCED WITH AUREOMYCIN AND PFIZER'S FALSE STATEMENTS TO THE EXAMINER CONCERNING THE ABSENCE OF CO-PRODUCTION CAUSED THE EXAMINER TO CHANGE HIS POSITION AND DETERMINE THAT A PATENT SHOULD ISSUE.

PFIZER WAS INFORMED ON DECEMBER 9, 1954 THAT A PATENT WOULD ISSUE ON THE PRODUCT TETRACYCLINE. THE VERY NEXT WEEK, CYANAMID AGREED TO SETTLE ITS PENDING LAWSUIT AGAINST BRISTOL AND TO LICENSE BRISTOL TO PRODUCE THE AUREOMYCIN PRODUCED IN ITS DIRECT FERMENTATION OF TETRACYCLINE. THE TETRACYCLINE PATENT WAS OFFICIALLY ISSUED BY THE PATENT OFFICE ON JANUARY 11, 1955, AND THE SAME DAY, PFIZER SUED BRISTOL, SQUIBB AND UPJOHN FOR THE INFRINGEMENT OF ITS PATENT.

FOR SOME STRANGE REASON, THE VERY NEXT MONTH, HARRY EDELBLUTE SAW SOME COPIES OF LETTERS THAT INDICATED TETRACYCLINE

WAS CO-PRODUCED WITH COMMERCIAL AUREOMYCIN AND CYANAMID "PROMPTLY" NOTIFIED THE PATENT OFFICE OF THIS FACT IN MAY OF 1955.

D. THE BRISTOL, SQUIBB, AND UPJOHN CONSPIRACY

BRISTOL'S FINANCIAL CONDITION, PRIOR TO ITS PRODUCTION OF TETRACYCLINE, WAS SHAKY AT BEST. IN FACT, THE MARKETING OF TETRACYCLINE WAS ESSENTIAL TO ITS SURVIVAL. ITS FREQUENT ATTEMPTS TO SECURE CROSS-LICENSING AGREEMENTS FROM PFIZER AND CYANAMID WERE UNSUCCESSFUL. BRISTOL SOUGHT THE RIGHT TO MANUFACTURE AND SELL IN BULK SINCE IT HAD ONLY A SMALL SALES FORCE. OPERATING UNDER THESE STRICTURES, BRISTOL LIMITED ITSELF TO TWO BULK CUSTOMERS. IT SELECTED SQUIBB AND UPJOHN.

IN SEPTEMBER 1954, PRIOR TO THE ISSUANCE OF A PATENT TO PFIZER, SQUIBB AND UPJOHN EACH AGREED TO PURCHASE 1,000 KILOGRAMS OF BULK TETRACYCLINE AT $1,000 PER KILOGRAM. AT THIS PRICE, SQUIBB AND UPJOHN WERE NOT MAKING ANY MONEY. THEREAFTER, ANOTHER AGREEMENT WAS REACHED WHERE EACH PURCHASED 1,500 KILOGRAMS AT $500 PER KILOGRAM. BRISTOL THEN PROMISED TO REDUCE THE PRICE TO $350 PER KILOGRAM AS QUICKLY AS POSSIBLE IN ORDER TO ASSURE SQUIBB AND UPJOHN A GROSS PROFIT OF 65%, WHICH WAS THE NORM IN THE PHARMACEUTICAL INDUSTRY.

AT THESE PRICES, BRISTOL WAS ABLE TO REVERSE ITS FINANCIAL POSITION IN LESS THAN A YEAR. AFTER SINKING TO A PRECARIOUS FINANCIAL SITUATION IN EARLY 1954, BY EARLY 1955 BRISTOL HAD TO DECIDE WHAT TO DO WITH THE EXCESSIVE PROFITS IT WAS EARNING.

FINALLY DECIDING TO PLOW THE MONEY INTO ADVERTISING. AFTER PFIZER BROUGHT ITS INFRINGEMENT SUIT, BRISTOL, SQUIBB, AND UPJOHN FILED ACTIONS ALLEGING THE INVALIDITY OF PFIZER'S TETRACYCLINE PATENT ON THE GROUNDS OF LACK OF INVENTION AND MISLEADING THE PATENT OFFICE. SUBSEQUENTLY, BRISTOL ENTERED AGREEMENTS WITH SQUIBB AND UPJOHN WHEREBY THEY AGREED TO PURCHASE THEIR TETRACYCLINE REQUIREMENTS FROM BRISTOL FOR THE DURATION OF THE INFRINGEMENT LITIGATION PLUS THREE YEARS, WITH BRISTOL ASSUMING ALL LIABILITY FOR INFRINGEMENT. SQUIBB AND UPJOHN AGREED NOT TO SETTLE OR NEGOTIATE DIRECTLY WITH PFIZER, AND BRISTOL AGREED TO OBTAIN A LICENSE FOR THEM, WITH THE PROVISO THAT IT MIGHT BE LIMITED TO THE PURCHASE AND SALE, RATHER THAN THE MANUFACTURE, OF TETRACYCLINE IF BRISTOL COULD SETTLE THE LITIGATION WITHIN SIX MONTHS.

ALTHOUGH BRISTOL HAD WANTED TO SETTLE THE SUITS EARLIER, IT WAS NOT UNTIL A COMPLETE REVERSAL WAS MADE BY PFIZER, IN DECEMBER 1955, THAT THE SUITS WERE SETTLED. THIS REVERSAL IS CLAIMED BY PFIZER TO HAVE BEEN OCCASIONED BY THE CONVICTION OF A PRIVATE DETECTIVE NAMED BROADY FOR TAPPING THE TELEPHONE WIRES OF BRISTOL AND SQUIBB. BROADY HAD BEEN HIRED BY PFIZER'S GENERAL COUNSEL.

THUS, THE SITUATION WAS PRESENTED WHEREIN PFIZER, WHICH HAD SPURNED REPEATED REQUESTS BY BRISTOL FOR A LICENSE TO MANUFACTURE AND SELL TETRACYCLINE, ACTUALLY INITIATED DISCUSSIONS

WITH BRISTOL, WHO ALSO ACTED ON BEHALF OF SQUIBB AND UPJOHN AND TO GRANT LICENSES UNDER ITS CONOVER PATENT. BRISTOL, WHICH HAD CONSUMMATED AGREEMENTS WITH SQUIBB AND UPJOHN A MONTH EARLIER TO HANDLE NEGOTIATIONS WITH PFIZER FOR THEM, REACHED AN ACCORD WITH PFIZER THAT BOTH ENABLED IT TO MANUFACTURE, USE AND SELL TETRACYCLINE AND LIMITED THE LICENSES FOR SQUIBB AND UPJOHN TO AUTHORITY ONLY TO PURCHASE, USE AND SELL TETRACYCLINE. THIS ENABLED BRISTOL TO KEEP SQUIBB AND UPJOHN AS CUSTOMERS SINCE THEY WERE NOT AUTHORIZED TO MANUFACTURE TETRACYCLINE. THE AGREEMENTS WERE FORMALIZED AND LICENSES WERE TAKEN BY BRISTOL, SQUIBB AND UPJOHN UNDER A PATENT THAT THEY HAD ALLEGED WAS INVALID AND PROCURED BY MISREPRESENTATIONS MADE TO THE PATENT OFFICE, AND WHICH THE UNITED STATES COURT OF APPEALS HAS SINCE HELD THAT PFIZER OBTAINED THE PATENT BY MAKING "... MISREPRESENTATIONS OF MATERIAL FACTS AND WITHHOLDING PERTINENT INFORMATION, THEREBY OBTAINING A PATENT ON TETRACYCLINE WHICH OTHERWISE WOULD NEVER HAVE BEEN ISSUED."

E. Post-Conspiracy Price Behavior

THE PATENT DAM USED FOR PRICE CONTROL IN THE BROAD SPECTRUM ANTIBIOTIC MARKET HAS ALREADY BEEN DESCRIBED. THAT DAM DID NOT BREAK COMPLETELY UNTIL THE UNITED STATES SUPREME COURT DENIED CERTIORARI ON AN FTC ORDER FINDING AN ILLEGAL COMBINATION IN RESTRAINT OF TRADE PERPETRATED BY PFIZER AND CYANAMID ON THE DRUG TETRACYCLINE. THE FTC ORDER BECAME FINAL IN 1969. AFTER THAT,

THE DRUGS IN THIS LAW SUIT BECAME COMPETITIVE. ONCE THE MARKET WAS FREED FROM FORECLOSURE BY A FRAUDULENTLY PROCURED PATENT AND IDENTICAL PRICING PRACTICES BY LICENSEES WHO WILFULLY SOUGHT LICENSES UNDER THAT INVALID PATENT, THE FORCES OF COMPETITION OVERTOOK THE FORCES OF COLLUSION. A PRICE OF SEVEN CENTS PER CAPSULE, TO THE CONSUMER, IS NOW IN EFFECT - A FAR CRY FROM THE CONSPIRATORIAL PRICE OF 50 CENTS PER CAPSULE TO THE CONSUMER.

THESE FACTS POINT UNALTERABLY TO THE MATURING AND ESTABLISHMENT OF A CONSPIRACY BY THE DEFENDANTS TO FIX PRICES AND EXCLUDE COMPETITION FROM THE BOARD SPECTRUM ANTIBIOTIC MARKET. PAINFULLY MINDFUL OF THE INDUSTRY'S EXPERIENCE WITH PENICILLIN, THE COMPANIES THAT DEVELOPED THE NEW "WONDER DRUGS" TETRACYCLINE KNEW THAT ITS PRODUCTION AND DISTRIBUTION HAD TO BE CONTROLLED IN ORDER TO MAINTAIN THE PRICE AND THEIR EXCESSIVE AND EXORBITENT PROFITS. THIS WAS THE PRESCRIPTION TO CURE THEIR FINANCIAL ILLS AND TO INSURE THEIR FISCAL HEALTH.

THE KEY INGREDIENT IN THE PRESCRIPTION WAS A PATENT THAT WOULD BRING A LAWFUL MONOPOLY AND PRICE FIXING POWER. UNFORTUNATELY FOR THESE "BENEFACTORS OF MANKING", THIS PRESCRIPTION, LIKE ANY OTHER, MUST BE OBTAINED LAWFULLY. LIKE A NARCOTIC DRUG, THE PATENTS ON AUTEOMYCIN AND TERRAMYCIN CAUSED AN ADDICTION IN PFIZER AND CYANAMID WITH THE QUEST FOR NEWER AND MORE EFFECTIVE PATENTS. AND JUST AS AN ADDICTION TO NARCOTICS CAN LEAD TO THE COMMISSION OF CRIMES TO FEED THE HABIT, THE DEFENDANT'S

ADDICTION FOR PATENT PROTECTION LED TO THE COMMISSION OF A FRAUD ON THE PATENT OFFICE AND TO A VIOLATION OF THE ANTITRUST LAWS OF THIS COUNTRY.

THE STATE OF NORTH CAROLINA ACKNOWLEDGES THAT THE BROAD SPECTRUM ANTIBIOTICS, INCLUDING TETRACYCLINE, HAVE BEEN A BOON TO MANKING. THEY OFTEN RESTORE ONE OF A MAN'S MOST PRECIOUS GIFTS, HIS HEALTH. WE HAVE NO QUARREL WITH THAT. WHAT WE DO CONTEND AGAINST, VIGOROUSLY, WAS THE WAY IN WHICH THIS BOON WAS MANIPULATED AND CONTROLLED TO THE EXTENT THAT IT BECAME THE BANE OF UNLAWFUL MONOPOLY. UNLAWFUL MONOPOLY POWER WILL QUICKLY SICKEN AND DRAIN ANY HEALTHY ECONOMY IN BOTH ITS HIGH COST AND WASTEFUL EFFECT, AS WE WILL DEMONSTRATE IN THIS CASE. AS ADAM SMITH OBSERVED, AN UNCONTROLLED MONOPOLY IN AN ESSENTIAL SERVICE OR PRODUCT LEADS, NORMALLY AND NATURALLY, TO EXHORBITANT CHARGES.

F. DAMAGES

WHAT DID THESE VIOLATIONS OF THE ANTITRUST LAWS MEAN FOR NORTH CAROLINIANS? IT MEANT THAT THEY WERE PAYING 50 CENTS PER CAPSULE IN THE 1950'S FOR A PRODUCT THAT WOULD HAVE COST 7 CENTS ABSENT THE CONSPIRACY TO FIX PRICES AND EXCLUDE COMPETITORS. THAT MIGHT NOT SOUND LIKE A SIGNIFICANT AMOUNT UNTIL WE LOOK AT IT ANOTHER WAY.

BETWEEN THE YEARS 1954 AND 1966, THE SALES OF PRESCRIPTION DRUGS IN NORTH CAROLINA AMOUNTED TO ALMOST 3/4 OF A BILLION DOLLARS. SINCE PRESCRIPTION DRUGS WERE EXEMPT FROM THE SALES TAX DURING THIS PERIOD, PHARMACISTS KEPT DETAILED RECORDS OF THEIR EXEMPT SALES. IN ORDER TO DETERMINE WHAT PORTION OF THIS TOTAL AMOUNT CONSISTED OF THE SALE OF DEFENDANT'S BROAD SPECTRUM ANTIBIOTICS, DR. CHARLES PROCTOR, A STATISTICIAN FROM NORTH CAROLINA STATE UNIVERSITY, DEVISED A SAMPLING TECHNIQUE FOR THE COMPILATION OF REPRESENTATIVE QUANTITIES OF THE DRUGS IN SUIT. THE SAMPLE REVEALED THAT THE TOTAL PROPORTION OF THE SALES OF DRUGS IN SUIT TO THE TOTAL SALES OF ALL PRESCRIPTION DRUGS IS 6.6% (FIGURE ABSENT DECLOMYCIN). THUS, THE TOTAL SALES TO THE STATE AND TO CONSUMERS WHO PURCHASED THESE ANTIBIOTIC DRUGS WAS JUST UNDER $50 MILLION. DURING THE SAME PERIOD, SALES TO CITY, COUNTY AND STATE HOSPITALS AMOUNTED TO $1,600,000.

PLAINTIFF CONTENDS AND WILL PROVE, THAT IT IS A GENERAL PRACTICE IN THE PHARMACEUTICAL INDUSTRY, ADHERED TO BY THESE DEFENDANTS, TO SET PRICES TO THE RETAIL PHARMACIES AT A MARGIN OF ABOUT THREE TIMES THEIR STANDARD MANUFACTURING COSTS, WHICH HAS PROVED SUFFICIENT TO COVER THE REASONABLE COSTS OF DOING BUSINESS, TO PROVIDE A SUFFICIENT RETURN ON A NET INVESTMENT TO SATISFY INVESTORS, AND STILL REMAIN COMPETITIVE. ABSENT THE VIOLATIONS DISCUSSED ABOVE, IF DEFENDANTS HAD FOLLOWED THEIR 3 TO L NORMAL RATIO MEANS THAT PLAINTIFF AND ITS CLASS OF CONSUMERS WOULD HAVE PAID ON 25% OF THE PRICE ACTUALLY PAID FOR THE BROAD SPECTRUM ANTIBIOTICS IN SUIT. THEREFORE, THE CONSUMERS

OF THIS STATE CLAIM THAT THE ILLEGAL ACTIVITIES OF DEFENDANTS RESULTED IN UNLAWFUL OVERCHARGES TOTALING $37,002,000. THE OVERCHARGE TO THE STATE AND ITS INSTITUTIONS WAS $1,200,000.

F. CONCLUSION

YOUR HONOR, WE HAVE BEEN CHASING THESE DEFENDANTS FOR A LONG TIME. WE FILED OUR COMPLAINT IN THIS COURT IN 1969. WE WERE IN CONSOLIDATED PRETRIAL PROCEEDINGS IN NEW YORK UNTIL 1971. WE WERE IN CONSOLIDATED PRETRIAL PROCEEDINGS IN MINNEAPOLIS UNTIL MARCH OF THIS YEAR. WE ARE PREPARED TO LITIGATE OUR CLAIMS TO THE FULLEST IN THIS COURT.

IT HAS LONG BEEN MY BELIEF THAT EFFECTIVE ANTITRUST ENFORCEMENT PROVICES THE ULTIMATE PROTECTION FOR THE CONSUMING PUBLIC. THE ANTITRUST LAWS ARE DESIGNED TO PROVIDE A MEANS FOR COMBATTING THE ABUSES THAT CAN THREATEN A FREE ECONOMY, AS WELL AS TO REWARD THE VICTIMS WHO SUCCEED IN EXPOSING THE UNLAWFUL ACTS OF THE VIOLATORS.

WE FEEL STRONGLY THAT WE HAVE BROUGHT THIS ACTION AGAINST FIVE TRANSGRESSORS OF THOSE LAWS; WE WILL ENDEAVOR TO UPHOLD THE PUBLIC TRUST AND TO SECURE RESTITUTION FOR THEIR VICTIMS.

PRESCRIPTION TO CURE THEIR FINANCIAL ILLS AND TO INSURE THEIR FISCAL HEALTH.

THE KEY INGREDIENT IN THE PRESCRIPTION WAS A PATENT THAT WOULD BRING A LAWFUL MONOPOLY AND PRICE FIXING POWER. UNFORTUNATELY FOR THESE "BENEFACTORS OF MANKIND", THIS PRESCRIPTION, LIKE ANY OTHER, MUST BE OBTAINED LAWFULLY. LIKE A NARCOTIC DRUG, THE PATENTS ON AUREOMYCIN AND TERRAMYCIN CAUSED AN ADDICTION IN PFIZER AND CYANAMID WITH THE QUEST FOR NEWER AND MORE EFFECTIVE PATENTS. AND JUST AS AN ADDICTION TO NARCOTICS CAN LEAD TO THE COMMISSION OF CRIMES TO FEED THE HABIT, THE DEFENDANT'S ADDICTION FOR PATENT PROTECTION LED TO THE COMMISSION OF A FRAUD ON THE PATENT OFFICE AND TO A VIOLATION OF THE ANTI-TRUST LAWS OF THIS COUNTRY.

THE STATE OF NORTH CAROLINA ACKNOWLEDGES THAT THE BROAD SPECTRUM ANTIBIOTICS, INCLUDING TETRACYCLINE, HAVE BEEN A BOON TO MANKIND. THEY OFTEN RESTORE ONE OF MAN'S MOST PRECIOUS GIFTS, HIS HEALTH. WE HAVE NO QUARREL WITH THAT. WHAT WE DO CONTEND AGAINST VIGOROUSLY WAS THE WAY IN WHICH THIS BOON WAS MANIPULATED AND CONTROLLED TO THE EXTENT THAT IT BECAME THE BANE OF UNLAWFUL MONOPOLY. UNLAWFUL MONOPOLY POWER WILL QUICKLY SICKEN AND DRAIN ANY HEALTHY ECONOMY IN BOTH ITS HIGH COST AND WASTEFUL EFFECT, AS WE WILL DEMONSTRATE

IN THIS CASE.

F. DAMAGES

WHAT DID THESE VIOLATIONS OF THE ANTITRUST LAWS MEAN FOR NORTH CAROLINIANS. IT MEANT THAT THEY WERE PAYING 50 CENTS PER CAPSULE IN THE 1950'S FOR A PRODUCT THAT WOULD HAVE COST 7 CENTS ABSENT THE CONSPIRACY TO FIX PRICES AND EXCLUDE COMPETITORS. THAT MIGHT NOT SOUND LIKE A SIGNIFICANT AMOUNT UNTIL WE LOOK AT IT ANOTHER WAY.

BETWEEN THE YEARS 1954 AND 1966, THE SALES OF PRESCRIPTION DRUGS IN NORTH CAROLINA AMOUNTED TO ALMOST 3/4 OF A BILLION DOLLARS. SINCE PRESCRIPTION DRUGS WERE EXEMPT FROM THE SALES TAX DURING THIS PERIOD, PHARMACISTS KEPT DETAILED RECORDS OF THEIR EXEMPT SALES. IN ORDER TO DETERMINE WHAT PORTION OF THIS TOTAL AMOUNT CONSISTED OF THE SALE OF DEFENDANT'S BROAD SPECTRUM ANTIBIOTICS, DR. CHARLES PROCTOR, A STATISTICIAN FROM NORTH CAROLINA STATE UNIVERSITY DEVISED A SAMPLING TECHNIQUE FOR THE COMPILATION OF REPRESENTATIVE QUANTITIES OF THE DRUGS IN SUIT. THE SAMPLE REVEALED THAT THE TOTAL PORTION OF THE SALES OF DRUGS IN SUIT TO THE TOTAL SALES OF ALL PRESCRIPTION DRUGS IS 6.74%. THUS, THE TOTAL SALES TO THE STATE AND TO CONSUMERS WHO PURCHASED THESE ANTIBIOTIC DRUGS WAS JUST UNDER $50 MILLION. DURING THE SAME PERIOD,

SALES TO CITY, COUNTY AND STATE HOSPITALS AMOUNTED TO $1,600,000.

PLAINTIFF CONTENDS AND WE WILL PROVE, THAT IT IS A GENERAL PRACTICE IN THE PHARMACEUTICAL INDUSTRY, ADHERED TO BY THESE DEFENDANTS, TO SET PRICES TO THE RETAIL PHARMACIES AT A MARGIN OF ABOUT THREE TIMES THEIR STANDARD MANUFACTURING COSTS, WHICH HAS PROVED SUFFICIENT TO COVER THE REASONABLE COSTS OF DOING BUSINESS, TO PROVIDE A SUFFICIENT RETURN ON A NET INVESTMENT TO SATISFY INVESTORS, AND STILL REMAIN COMPETITIVE. ABSENT THE VIOLATIONS DISCUSSED ABOVE, THE 3-1 RATIO MEANS THAT PLAINTIFF AND ITS CLASS OF CONSUMERS WOULD HAVE PAID ONLY 25% OF THE PRICE ACTUALLY PAID FOR THE BROAD SPECTRUM ANTIBIOTICS IN SUIT. THEREFORE, THE CONSUMERS OF THIS STATE CLAIM THAT THE ILLEGAL ACTIVITIES OF DEFENDANTS RESULTED IN UNLAWFUL OVERCHARGES TOTALING $37,002,000. THE OVER-CHARGE TO THE STATE AND ITS INSTITUTIONS WAS $1,200,000.

F. CONCLUSION

YOUR HONOR, WE HAVE BEEN CHASING THESE DEFENDANTS FOR A LONG TIME. WE FILED OUR COMPLAINT IN THIS COURT IN 1969. WE WERE IN CONSOLIDATED PRETRIAL PROCEEDINGS IN NEW YORK UNTIL 1971. WE WERE IN CONSOLIDATED PRETRIAL PROCEEDINGS IN MINNEAPOLIS UNTIL MARCH OF THIS YEAR. WE ARE PREPARED TO LITIGATE OUR CLAIMS TO THE FULLEST IN

THIS COURT.

IT HAS LONG BEEN MY BELIEF THAT EFFECTIVE ANTI-TRUST ENFORCEMENT PROVIDES THE ULTIMATE PROTECTION FOR THE CONSUMING PUBLIC. THE ANTITRUST LAWS ARE DESIGNED TO PROVIDE A MEANS FOR COMBATTING THE ABUSES THAT CAN TREATEN A FREE ECONOMY, AS WELL AS TO REWARD THE VICTIMS WHO SUCCEED IN EXPOSING THE UNLAWFUL ACTS OF THE VIOLATORS.

WE FEEL STRONGLY THAT WE HAVE BROUGHT THIS ACTION AGAINST FIVE TRANSGRESSORS OF THOSE LAWS; WE WILL ENDEAVOR TO UPHOLD THE PUBLIC TRUST AND TO SECURE RESTITUTION FOR THEIR VICTIMS.