

IN THE MATTER OF
SCHERING-PLOUGH CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND CLAYTON ACTS

Docket C-2986. Complaint, Aug. 10, 1979 — Decision, Aug. 10, 1979

This consent order, among other things, requires a Kenilworth, N.J. manufacturer of various drugs, including athlete's foot products, to divest, within one year, the assets acquired as a result of its acquisition of Scholl, Inc. and utilized by Scholl primarily for the manufacture, distribution or sale in the United States of Solvex athlete's foot products. Additionally, the order requires the company to furnish the acquirer with specified assistance, and prohibits the firm, for ten years, from acquiring any business engaged in the manufacture, sale or distribution of athlete's foot products.

Appearances

For the Commission: *Geoffrey Walker.*

For the respondent: *Edward Wolfe, White & Case, New York City.*

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondent, subject to the jurisdiction of the Commission, has acquired Scholl, Inc., a corporation, in violation of Section 7 of the Clayton Act, as amended, (15 U.S.C. 18) and Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45), and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

I. DEFINITION

1. For purposes of this complaint, the following definition shall apply:

1. "Athlete's foot products" means nonprescription fungicidal or fungistatic pharmaceutical products manufactured, distributed or sold primarily for the treatment of athlete's foot (*tinea pedis*).

II. RESPONDENT

2. Schering-Plough Corporation (Schering-Plough) is a corporation organized, existing and doing business under and by virtue of the laws

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of the State of New Jersey with its principal office and place of business at 2000 Galloping Hill Road, Kenilworth, New Jersey.

3. In 1977, Schering-Plough had consolidated sales which amounted to \$940.8 million.

4. Schering-Plough is a diversified company which manufactures and markets, on a worldwide basis, principally, ethical pharmaceuticals and proprietary medicines, cosmetics, toiletries and household products. In 1977, Schering-Plough sold approximately \$212.9 million worth of drugs through pharmacies and was the eighth largest supplier to pharmacies of ethical and proprietary drugs.

5. Schering-Plough is the largest manufacturer of athlete's foot products in the United States, with 1977 sales in the United States of approximately \$12.8 million.

6. At all times relevant herein, respondent has been and is now engaged in commerce within the meaning of the Clayton Act, as amended, and engaged in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

III. ACQUISITION AGREEMENT

7. On August 9, 1978, Schering-Plough entered into a letter agreement with Scholl, Inc. providing for Schering-Plough to acquire Scholl, Inc. and to merge Scholl, Inc. into a subsidiary of Schering-Plough. The merger was consummated on April 2, 1979. The transaction is valued at more than \$127.4 million.

IV. TARGET CORPORATION

8. Scholl, Inc., (Scholl) is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business at 213 West Schiller St., Chicago, Illinois. At the time of acquisition, Scholl was engaged primarily in the manufacture and sale of foot and leg care products, shoes and footwear and adhesive products.

9. In 1977, Scholl had net sales of \$216.4 million. Scholl is the fourth largest manufacturer of athlete's foot products in the United States, with 1977 sales of approximately \$1.5 million.

10. At all times relevant herein, Scholl has been and is now engaged in commerce within the meaning of the Clayton Act, as amended, and engaged in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

V. TRADE AND COMMERCE

11. For the purposes of this complaint, the relevant product market

is the manufacture and sale of athlete's foot products and the relevant geographic market is the United States.

12. Athlete's foot products are used primarily to treat dermatophytosis of the foot, tinea pedis.

13. Sales of athlete's foot products in the United States are substantial, in 1977, amounting to \$30 million.

14. Schering-Plough and Scholl are and have been for many years substantial and actual competitors in the manufacture and sale of athlete's foot products.

15. At the time of the acquisition agreement, Schering-Plough and Scholl ranked approximately first and fourth respectively, in total sales of athlete's foot products; Schering-Plough accounted for more than 40 percent and Scholl accounted for an estimated 5 percent of total sales of such products.

16. The athlete's foot products market is concentrated. In 1977, the four top firms accounted for more than 80 percent of sales in the United States.

17. Entry into the manufacture and sale of athlete's foot products is difficult, requiring significant financial resources, sophisticated technological skills, quality control and effective marketing and distribution.

VI. EFFECTS OF ACQUISITION: VIOLATIONS CHARGED

18. The effect of the acquisition of Scholl by respondent may be substantially to lessen competition or tend to create a monopoly in the manufacture and sale of athlete's foot products in the United States in violation of the Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, in the following ways, among others:

a. Actual and potential competition between respondent and Scholl in the manufacture and sale of athlete's foot products has been eliminated;

b. Actual competition between competitors generally in the manufacture and sale of athlete's foot products may be lessened;

c. Scholl as a substantial, independent competitive factor in the manufacture and sale of athlete's foot products has been eliminated;

d. The leading position of respondent in the manufacture and sale of athlete's foot products may be further entrenched;

e. Concentration in the manufacture and sale of athlete's foot products will be maintained or increased, and the possibility of deconcentration may be diminished;

f. Existing barriers to new entry may be increased substantially;

g. Additional acquisitions and mergers in the industry may be encouraged;

h. Independent manufacturers and sellers of athlete's foot products may be deprived of a fair opportunity to compete with the combined resources and market position of respondent and Scholl;

i. Members of the consuming public may be deprived of the benefits of free and unrestricted competition in the manufacture and sale of athlete's foot products.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Clayton and Federal Trade Commission Acts; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Schering-Plough Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 2000 Galloping Hill Road, in the town of Kenilworth, State of New Jersey.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

For the purpose of this order, the following definitions shall apply:

A. "Solvex" means the *Solvex* trademark registered under the Lanham Act or any predecessor federal statute. The term "Solvex" does not include any rights, title or interest in the name or trademark *Dr. Scholl's* or Scholl or in any distinctive packaging associated with the name Scholl or with any Scholl product.

B. "Athlete's foot products" means nonprescription fungicidal or fungistatic pharmaceutical products manufactured, distributed or sold primarily for the treatment of athlete's foot (*tinea pedis*).

I

It is ordered, That, subject to the prior approval of the Federal Trade Commission, respondent Schering-Plough, through its officers, directors, agents, representatives, employees, subsidiaries, affiliates, divisions, successors and assigns, shall, within one (1) year from either the date Schering-Plough acquires Scholl or service of this order, whichever occurs later, divest the assets, tangible and intangible, acquired, improved or added by respondent as a result of its acquisition of Scholl and utilized by Scholl primarily for the manufacture, distribution or sale in the United States of Solvex athlete's foot products. Such assets shall include all raw material reserves, inventory, machinery, equipment, trade names, trademarks, patents, licenses, research and development projects, good will and other property of whatever description.

II

It is further ordered, That, at the option of the acquirer (the option to be exercised at the time of the contract), Schering-Plough shall assist the acquirer in the manufacture, distribution or sale of athlete's foot products so that they are comparable in quality to the Solvex products manufactured by Scholl at the time of the acquisition by respondent, in one or more of the following ways:

A. Schering-Plough shall provide acquirer with Scholl's formulations, specifications and manufacturing procedures, including Scholl's quality control standards and methods, relating to such Solvex products;

B. Schering-Plough shall provide the acquirer with all of Scholl's written know-how and scientific research data relating to athlete's foot products;

C. For no longer than three (3) years from the date of the contract

with the acquirer, Schering-Plough shall provide the acquirer, at reasonable cost, with the assistance of such technical and production personnel as may be necessary in establishing or expanding the acquirer's facility for the production of such Solvex products; and

D. Schering-Plough shall use its best efforts to assist the acquirer in obtaining raw materials required to manufacture such Solvex products; *provided, however*, that nothing in this provision shall require Schering-Plough (1) to participate in, to guarantee or to stand behind any financial arrangement between the acquirer and the suppliers of raw materials, or (2) to furnish any such materials except as specifically provided elsewhere herein.

E. Schering-Plough shall provide the acquirer with all Scholl's Solvex customer lists, sales and promotional materials, proprietary market research materials (except for materials from A.C. Nielsen Co. and Towne-Oller and Associates, Inc. that are subject to a contractual agreement not to disclose) and sales training materials and devices relating thereto.

F. As an interim measure, pending the establishment or expansion of the acquirer's manufacturing capability and for no longer than three (3) years from the date of the contract with the acquirer, Schering-Plough shall agree to supply the acquirer, at reasonable cost, with its bulk requirements of products the same or similar to those manufactured by Scholl in the United States under the Solvex trademark at the time of the acquisition by respondent.

III

It is further ordered, That, until all the requirements of Paragraph I of this order have been accomplished, Schering-Plough, its subsidiaries, affiliates, divisions, successors and assigns, shall not take any action which diminishes the value of the products or other assets, tangible or intangible, that are subject to this order or which in any way impairs Schering-Plough's ability to comply with the requirements of this order; *provided, however*, that nothing in this provision shall prohibit or prevent Schering-Plough, its subsidiaries, affiliates, divisions, successors or assigns, from competing in the manufacture, distribution or sale of athlete's foot products.

IV

It is further ordered, That, pursuant to the requirements of Paragraph I of this order, none of the assets, property, rights or privileges, tangible or intangible, acquired or added by respondent shall be divested, directly or indirectly, to anyone who is at the time of

divestiture an officer, director, employee or agent of, or under the control, direction or influence of, respondent or its subsidiaries or affiliated corporations, or who owns or controls more than one (1) percent of the outstanding shares of the capital stock of the respondent.

V

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, or until June 30, 1989, whichever occurs first, Schering-Plough, its subsidiaries, affiliates, divisions, successors and assigns, shall not acquire directly or indirectly, without prior approval of the Federal Trade Commission, any stock, share capital, actual or potential equity interest or right of participation in the earnings of any concern, corporate or non-corporate, engaged in, or the assets of any concern relating to, the manufacture, distribution or sale in the United States of athlete's foot products; *provided, however*, that nothing in this paragraph shall require prior approval of the merger of Scholl into any subsidiary of Schering-Plough or other reorganization of Schering-Plough or its subsidiaries, affiliates and divisions.

VI

It is further ordered, That Schering-Plough shall, within sixty (60) days after the date of service upon it of this order, and every sixty (60) days thereafter until Schering-Plough has fully complied with Paragraph I of this order, and annually thereafter for the duration of this order, submit in writing to the Federal Trade Commission a verified report setting forth in detail the manner and form in which Schering-Plough intends to comply, is complying or has complied with this order. All compliance reports shall include, among other things that are from time to time required, a summary of contacts or negotiations with anyone for the assets, property, rights and privileges specified in Paragraph I of this order, the identity of all such persons, and copies of all written communications between such persons and Schering-Plough.

VII

It is further ordered, That Schering-Plough shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the corporate identity of Schering-Plough, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other

change in the corporation, which may affect compliance obligations arising out of the order.

Modifying Order

IN THE MATTER OF

UNION CARBIDE CORPORATION — DOCKET C-2557
 HERCULES INCORPORATED — DOCKET C-2558
 FMC CORPORATION — DOCKET 8961

MODIFYING ORDERS IN REGARD TO ALLEGED VIOLATION OF THE
 FEDERAL TRADE COMMISSION ACT

Modifying Orders, Aug. 13, 1979

This order reopens proceedings and modifies the 1975 consent orders entered against Union Carbide Corporation, (86 F.T.C. 1231, Dec. 2, 1975); Hercules Incorporated, (86 F.T.C. 1236, Dec. 2, 1975); and FMC Corporation, (86 F.T.C. 897, Oct. 8, 1975), by deleting provisions requiring companies to include in their advertising a general warning statement apprising users that pesticides can be harmful unless used as directed.

ORDER REOPENING AND MODIFYING CEASE AND DESIST ORDERS

In petitions filed during March, April, and May 1978, and supplementary papers filed in June 1978, the Union Carbide Corporation (Union Carbide), Hercules Incorporated (Hercules), and FMC Corporation (FMC) requested the Commission, pursuant to Section 3.72(b)(2) of its Rules of Practice, to reopen the proceedings and modify orders entered in Dkt. Nos. C-2557, C-2558, and 8961. Respondents seek relief from provisions in those orders which require specified warning statements to be included in subject advertising. The provisions at issue read as follows:¹

It is further ordered, That respondent. . ., its successors and assigns and respondent's officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, or sale or distribution of such products do forthwith cease and desist from disseminating or causing the dissemination of:

A. Any print advertising or print promotional material which contains any use or efficacy claim or any environmental or safety claim for any such products unless it clearly and conspicuously includes in such print advertising or print promotional material the following statement:

STOP! ALL PESTICIDES CAN BE HARMFUL TO HEALTH AND THE ENVIRONMENT IF MISUSED. READ THE LABEL CAREFULLY AND USE ONLY AS DIRECTED.

B. Any broadcast advertisement more than 30 seconds in length which contains any

¹ The contested provisions appear as Section IV of the modified Union Carbide order (86 F.T.C. 1231, 1233-34 (1975)), Section III of the modified Hercules order (86 F.T.C. 1236, 1238-39 (1975)), and Section III of the FMC order (86 F.T.C. 897, 903-04 (1975)). Hercules also seeks deletion of the last full paragraph of Section IV of its order and Union Carbide urges the excision of the reference to Section IV which appears in Section III of its order.