

Complaint

95 F.T.C.

IN THE MATTER OF
HARVEY GLASS, M.D.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3004. Complaint, Jan. 15, 1980—Decision, Jan. 15, 1980

This consent order requires, among other things, a Cherry Hill, N.J. dermatologist to cease, in connection with the endorsing, advertising or sale of products, representing that the use of "Acne Lotion 22," "Acne Masque," or any other acne product or regimen will cure acne; eliminate bacteria-caused skin blemishes and result in a blemish-free skin. The respondent is also prohibited from disseminating advertisements and/or permitting his endorsement to appear in advertisements which misrepresent or make unsubstantiated claims regarding a product's efficacy, use or performance; the extent to which a product has been tested and the results of such tests.

Appearances

For the Commission: *Mark A. Heller.*

For the respondent: *Barry Greenberger, Bricktown, N.J.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that Harvey Glass, M.D., an individual (hereafter "Glass"), at times referred to as respondent, having violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. "Glass" is a medical doctor, licensed to practice by the State of New Jersey, with a specialty in dermatology. "Glass's" business address is Old Orchard Professional Building, 1999 East Marlton Pike (Route 70), Cherry Hill, New Jersey.

PAR. 2. "Glass," in conjunction with San-Mar Laboratories, Inc., Maison Drug Company, Inc., and Marvin Berkrot, chief executive officer of both corporations, has been and now is engaged in the business of marketing and advertising health-related products, including but not limited to products known as Acne Lotion 22, or Special Lotion 22 (hereafter "Acne Lotion 22"); and Special Acne Protein Menthol Therapy Masque, or Protein Therapy Masque (hereafter "Acne Masque"). The aforesaid products were and are offered alone

and as part of a program for the treatment of acne known as the Special Home Acne Treatment Kit (hereafter "the Home Acne Kit"). In connection with the manufacture and marketing of said products, San-Mar Laboratories, Maison Drug Company, and Marvin Berkrot have disseminated, published, and distributed, and now disseminate, publish and distribute, advertisements and promotional material, which contain the respondent's endorsement, for the purpose of promoting the sale of said products for human use. These products, as advertised, are "drugs" within the meaning of Section 12 of the Federal Trade Commission Act.

PAR. 3. "Glass" for his part aided in the promotion of the aforementioned products by providing an endorsement as a medical expert which directly related to the efficacy and medical evaluation of the products. This endorsement appeared in every disseminated advertisement for "Acne Lotion 22," "Acne Masque" and "the Home Acne Kit." Respondent caused his endorsement to appear in advertisements concerning said products for the purpose of inducing, and which was and is likely to induce, directly or indirectly, the purchase of said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Advertisements containing respondent's aforementioned endorsement have been and are disseminated through the United States mail and by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to the insertion of advertisements for "Acne Lotion 22," "Acne Masque," and "the Home Acne Kit" in magazines and newspapers with national circulations, and advertisements in the form of a booklet authored by respondent and entitled "Acne: Its Control and Treatment," which was, and is, sent through the United States mail, for the purpose of inducing and which was likely to induce, directly or indirectly, the purchase of the products "Acne Lotion 22," "Acne Masque," and "the Home Acne Kit" in commerce.

PAR. 5. Typical of the statements and representations in said advertisements, disseminated as previously described, but not necessarily inclusive, are the following:

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AT LAST—NEW HOPE FOR ACNE SUFFERERS!

If You Have ACNE—Now A Doctor's Special Treatment For Lasting Help!

This new treatment is the result of years of experience by Dr. Harvey Glass, M.D., dermatologist and Medical Director of Phase IV Acne Clinics.

Let me tell you why you need a special treatment. The sun's rays, the pores of the skin are blocked by impurities, blackheads, whiteheads, pimples and acne. The pores of the skin are blocked by impurities, blackheads, whiteheads, pimples and acne. The pores of the skin are blocked by impurities, blackheads, whiteheads, pimples and acne.

Discovered After Years of Treating Acne Patients

What I discovered in my Acne Clinics is that you can get rid of acne by using a special treatment. The pores of the skin are blocked by impurities, blackheads, whiteheads, pimples and acne. The pores of the skin are blocked by impurities, blackheads, whiteheads, pimples and acne.

Why This Special Offer Through The Mail?

Because all the Acne sufferers in the U.S.A. can possibly come to my clinics. I have developed this special treatment for acne. It is a special treatment for acne. It is a special treatment for acne.

THE 2 SIMPLE STEPS OF THE DOCTOR'S ACNE TREATMENT

1. Apply Special Acne Lotion 22 to the face. This lotion is a special treatment for acne. It is a special treatment for acne. It is a special treatment for acne.

2. Apply Special Acne Therapy Masque to the face. This masque is a special treatment for acne. It is a special treatment for acne. It is a special treatment for acne.

ACNE LOTION 22

ACNE THERAPY MASQUE

Dr. Harvey Glass, M.D.

Phase IV Acne Clinics

AT START OF TREATMENT

AT END OF TREATMENT

WHEN YOU ORDER RIGHT NOW, YOU WILL RECEIVE ABSOLUTELY FREE THIS VALUABLE \$3.00 BOOKLET, "ACNE, ITS CONTROL AND TREATMENT"

Mail Your Order Today To:

VANOWEN PRODUCTS, Dept. 192, 10635 Vanowen St., Burbank, CA 91505

☐ Please rush me... 30 Day Supply of Special Home Acne Treatment Kit containing Special Lotion 22 Protein Therapy Masque with Sulfur and FREE Acne Booklet. I enclose \$3.00 for the kit. My check is for \$3.00. My money order is for \$3.00. My credit card is for \$3.00.

NAME _____ **ADDRESS** _____ **CITY** _____ **STATE** _____ **ZIP** _____

MONEYBACK GUARANTEE If help you get does not completely satisfy you.

PAR. 6. Through his endorsement as contained in said advertisements and other advertisements referred to in Paragraphs Four and Five, respondent represented, and now represents, directly or by implication that:

a. Use of "Acne Lotion 22" and/or "Acne Masque," either alone or as part of the "Home Acne Kit," will cure acne regardless of the severity of the condition.

b. "Acne Lotion 22" and/or "Acne Masque," either alone or as part of the "Home Acne Kit," can penetrate the pores of the skin to eliminate the bacteria responsible for pimples, blackheads, whiteheads, and other acne blemishes.

c. Several minutes after use of "Acne Lotion 22" the bacteria responsible for acne are flushed out of the pores of the skin and can be easily eliminated from the skin surface.

d. "Acne Lotion 22" and "Acne Masque," either alone or as part of the "Home Acne Kit," have been medically and scientifically proven effective in the treatment of acne by clinical testing.

PAR. 7. In truth and in fact:

a. Use of "Acne Lotion 22" and/or "Acne Masque," either alone or as part of the "Home Acne Kit," will not cure acne.

b. "Acne Lotion 22" and/or "Acne Masque," either alone or as part of the "Home Acne Kit," cannot penetrate the pores of the skin to eliminate the bacteria contributively responsible for pimples, blackheads, whiteheads and other acne blemishes.

c. The bacteria contributively responsible for acne cannot be flushed out of the pores of the skin and easily eliminated from the skin surface.

d. "Acne Lotion 22" and "Acne Masque," either alone or as part of the "Home Acne Kit," are not medically or scientifically proven effective in the treatment of acne by clinical testing.

Therefore, the advertisements referred to in Paragraphs Four and Five were and are misleading in material respects and constituted, and now constitute, false advertisements, and respondent knew or should have known that the statements and representations set forth in Paragraph Six were and are false, misleading or deceptive.

PAR. 8. Furthermore, through his endorsement contained in the advertisements referred to in Paragraphs Four and Five, respondent represented, and now represents that:

a. Use of "Acne Lotion 22" and/or "Acne Masque," either alone or as part of the "Home Acne Kit," will result in skin free of pimples, blackheads, whiteheads, other blemishes associated with acne and scarring, regardless of the severity of the disease.

b. "Acne Lotion 22" and/or "Acne Masque," either alone or as part

of the "Home Acne Kit," are superior to all prescription and/or over-the-counter preparations in the treatment of acne.

c. "The Home Acne Kit" is superior in the treatment of acne to any other treatment, including but not limited to treatments offered by dermatologists other than the respondent.

PAR. 9. In truth and in fact, there existed at the time of the first dissemination of the representations in Paragraphs Six and Eight no reasonable basis for making them in that respondent lacked competent and reliable scientific evidence to support each such representation. Therefore, the making and dissemination of said representations as alleged constituted, and now constitute, unfair or deceptive acts or practices in or affecting commerce.

PAR. 10. In the course and conduct of his aforesaid business, and at all times mentioned herein, the respondent has been, and now is, in substantial competition in or affecting commerce with corporations, firms and individuals representing or engaged in the over-the-counter and prescription drug industries.

In addition to the above, respondent is in substantial competition with other corporations, firms and individuals in the business of providing endorsements for consumer products or services.

PAR. 11. The use by respondent of the aforesaid unfair or deceptive representations and the dissemination of the aforesaid false advertisements has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said representations were and are true.

PAR. 12. The aforesaid acts and practices of respondent, as herein alleged, including his endorsement as contained and disseminated in the aforesaid false advertisements, were and are all to the prejudice and injury of the public and of respondent's competitors, and constituted and now constitute, unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act.

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 proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Federal Trade Commission Act; and

The respondent 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 such 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 Act, 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 Harvey Glass, M.D. is a medical doctor, licensed to practice by the State of New Jersey, with a specialty in dermatology. His business address is Old Orchard Professional Building, 1999 East Marlton Pike (Route 70), Cherry Hill, 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

I

It is ordered, That respondent Harvey Glass, M.D., individually and through any corporate entity over which he now or hereafter exercises control, and his corporate successors and assigns, in connection with the endorsing, advertising, offering for sale, sale, or distribution of all products, forthwith cease and desist from:

A. Representing, directly or indirectly, through advertisements in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, that:

1. Use of "Acne Lotion 22" and/or "Acne Masque," either alone or as part of the "Home Acne Kit," or any other acne product or regimen, will cure acne or any skin condition associated with acne;

2. "Acne Lotion 22" and/or "Acne Masque," or any chemically similar formulations, either alone or as part of the "Home Acne Kit," can penetrate the pores of the skin to eliminate the bacteria

contributively responsible for acne, pimples, blackheads, whiteheads, and other acne blemishes;

3. The bacteria contributively responsible for acne can be flushed out of the pores of the skin and/or easily eliminated from the skin surface.

B. Representing directly or indirectly through advertisements in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, that:

1. Use of "Acne Lotion 22" and/or "Acne Masque," either alone or as part of the "Home Acne Kit," or any other acne product or regimen, will result in skin free of pimples, blackheads, whiteheads, other blemishes associated with acne and scarring, regardless of the severity of the disease;

2. "Acne Lotion 22" and/or "Acne Masque," either alone or as part of the "Home Acne Kit," or any other acne product or regimen are superior to all prescription and/or over-the-counter acne preparations in the treatment of acne;

3. The "Home Acne Kit" or any other acne product or regimen is superior in the treatment of acne to any other treatment, including but not limited to treatments offered by dermatologists other than the respondent;

4. "The Home Acne Kit" or any other acne product or regimen is efficacious in any manner in the treatment of acne,

Unless, at the time of each dissemination of such representation(s) respondent possesses and relies upon competent and reliable scientific or medical evidence as a reasonable basis for such representation(s). "Competent and reliable scientific or medical evidence" shall be defined as evidence in the form of at least two double-blind clinical studies which conform to accepted designs and protocols and are conducted by different persons, independently of each other. Such persons shall be dermatologists who are recognized as specialists in acne and its treatment and who are experienced in conducting such studies.

C. Disseminating or causing the dissemination of any advertisement by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, and/or permitting or otherwise causing his endorsement to appear in any such advertisement which directly or indirectly:

1. Misrepresents the efficacy, use or the mode of performance of any "drug," "cosmetic," "device," or "food," (as these terms are defined by Section 15 of the Federal Trade Commission Act, 15 U.S.C.

55) where the use or reasonably foreseeable misuse of the product may adversely affect the health or safety of the user.

2. Misrepresents the extent to which any product has been tested or the results of any such tests.

Provided, however, that respondent shall have an affirmative defense to a compliance suit for violation of this order paragraph where respondent acted only as an endorser and neither knew nor should have known that the advertisement(s) violated the order paragraph.

D. Disseminating or causing the dissemination of any advertisement by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, and/or permitting or causing his endorsement to appear in any such advertisement, which directly or indirectly makes representations referring or relating to the performance or efficacy of any health-related product or refers or relates to any characteristic, property or result of the use of any such product, unless, at the time of each dissemination of such representation(s) respondent possesses and relies upon a reasonable basis for such representation(s).

II

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in his business status, such as incorporation, or any other change which may affect compliance obligations arising out of this order.

It is further ordered, That respondent shall, within sixty (60) days after this order becomes final, and annually thereafter for three (3) years, file with the Commission a report, in writing, signed by respondent, setting forth in detail the manner and form of his compliance with this order.

It is further ordered, That respondent shall maintain files and records of all substantiation related to the requirements of Parts IB and ID of this order for a period of three (3) years after the dissemination of any advertisement which relates to that portion of the order. Additionally, such materials shall be made available to the Federal Trade Commission or its staff within fifteen (15) days of a written request for such materials.

FEDERAL TRADE COMMISSION DECISIONS

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IN THE MATTER OF

BAYER AG, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE
COMMISSION ACT

Docket C-3007. Complaint, Jan. 15, 1980—Decision, Jan. 15, 1980

This consent order requires, among other things, a diversified chemical company, located in Leverkusen, Germany, and its two American subsidiaries to divest, within one year to a Commission-approved buyer, all United States assets gained through their acquisition or sale in the United States of allergenic extracts. Additionally, for specified time periods, the firms would be barred from acquiring, without prior Commission approval, any concern engaged in the manufacture, distribution or sale in the United States of allergenic extracts or chemically treated diagnostic reagent strips used for *in vitro* quantitative urinalysis.

Appearances

For the Commission: Geoffrey Walker, Richard Collier and Michelle Crown.

For the respondents: John Henry Davis, Cravath, Swaine & Moore, New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents, each subject to the jurisdiction of the Commission, have acquired Miles Laboratories, 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 having found 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:

"Allergenic extracts" are biological products that are administered to man for the diagnosis or treatment of allergies.

II. RESPONDENTS

2. Bayer AG (Bayer) is a corporation organized, existing and doing business under and by virtue of the laws of the Federal Republic of Germany with its principal office and place of business located in Leverkusen, Federal Republic of Germany.

3. In 1976, Bayer, including its German and non-German subsidiaries (Bayer World), had consolidated revenues of approximately \$9 billion and consolidated assets of approximately \$8.6 billion.

4. Bayer is a diversified chemical company whose principal business, conducted directly and through subsidiaries and affiliates throughout the world, consists of the manufacture and sale of dyestuffs, organic and inorganic chemicals, plastics and surface coatings, agricultural chemicals, pharmaceuticals, polyurethanes, rubber and man-made fibers. In 1976, pharmaceuticals accounted for 13% of Bayer's worldwide sales.

5. Bayer has been engaged in the manufacture and sale of pharmaceuticals and chemicals in the United States since 1895 through a combination of de novo operations, joint ventures and acquisitions. Since 1973, Bayer has acquired, directly or indirectly, the following assets or companies in the United States: Cutter Laboratories, Inc. (1974); the remaining 50% of Helena Chemical Co. from Vertac, Inc. (1977); the Harman Colors business of Allied Chemical Corporation (1977); and Miles Laboratories, Inc. (1978). Total consolidated sales of Bayer in the United States in 1976 amounted to \$1.1 billion.

6. Rhinechem Corporation (Rhinechem) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 425 Park Ave., New York, New York. Rhinechem is a wholly-owned subsidiary of Bayer International Finance N.V. which in turn is a wholly-owned subsidiary of respondent Bayer.

7. Through Rhinechem, Bayer conducts its principal operations in the United States through two subsidiaries, Mobay Chemical Corporation and Cutter Laboratories, Inc. Mobay Chemical Corporation is a manufacturer of chemical products with sales in 1976 of \$544 million. Cutter Laboratories, Inc. is a manufacturer of biological products, hospital and pharmaceutical supplies with sales in 1976 of \$175 million. In 1976, Bayer, through Cutter Laboratories, Inc. was the second largest manufacturer of biological products in the United States with sales of \$65 million.

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8. Cutter Laboratories, Inc. (Cutter), through its Hollister-Stier Laboratories division, is the largest manufacturer of allergenic extracts in the United States, with 1976 sales in the United States of approximately \$7 million.

9. Since 1960, Cutter has grown in the allergenic extracts market through internal expansion and acquisitions, including the acquisitions of Hollister-Stier Co.; Arlington, Inc.; assets of Abbott Laboratories, Inc.; assets of the Lederle Laboratories division of American Cyanamid Co.; and assets of Endo Laboratories, Inc., a subsidiary of E.I. duPont de Nemours & Co.

10. Miles Laboratories, Inc. (Miles Labs) is a corporation existing under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 1127 Myrtle St., Elkhart, Indiana. Miles Labs was organized originally under the name of Rhinechem Laboratories, Inc. for the purpose of acquiring Miles Laboratories, Inc. On February 8, 1979, the acquired company, Miles Laboratories, Inc., merged into its nominal acquirer Rhinechem Laboratories, Inc., and the successor corporation has been named Miles Laboratories, Inc. Miles Labs is a wholly owned subsidiary corporation of respondent Rhinechem.

11. At all times relevant herein, respondents have been and are 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

12. As of January 5, 1978, respondents acquired over 90% of the outstanding common shares of Miles Laboratories, Inc. for consideration of approximately \$250 million.

IV. ACQUIRED CORPORATION

13. Miles Laboratories, Inc. (Miles) was a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its principal office and place of business located at 1127 Myrtle St., Elkhart, Indiana.

14. At the time of the aforesaid acquisition, Miles was engaged principally in the manufacture and sale of pharmaceutical preparations, biological products, diagnostic chemical reagent and microbiological test systems, surgical and medical instruments, abrasive products, chemical products and specialty foods.

15. In 1976, Miles had consolidated worldwide revenues of approximately \$450 million and assets of approximately \$382 million.

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16. Miles is the third largest manufacturer of allergenic extracts in the United States, with 1976 sales in the United States of approximately \$2.6 million.

17. At all times relevant herein, Miles 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

18. For purposes of this complaint, the relevant product market is the manufacture and sale of allergenic extracts and the relevant geographic market is the United States.

19. Allergenic extracts are used primarily in the diagnosis and immuno-therapeutic treatment of allergies.

20. Sales of allergenic extracts in the United States are substantial. Sales are estimated to be \$18 million in 1976.

21. Prior to the aforesaid acquisition, Miles and respondents were substantial and actual competitors in the manufacture and sale of allergenic extracts.

22. At the time of the aforesaid acquisition, respondents through Cutter, and Miles ranked approximately first and third respectively in total sales of all allergenic extracts manufacturers. Of total sales in the allergenic extracts industry at the time of the acquisition, respondents accounted for an estimated 35-40 percent and Miles accounted for an estimated 12 percent.

23. The allergenic extracts market is concentrated. It is estimated that in 1976, the four top ranking firms accounted for more than 70 percent of domestic sales.

24. In 1976, there were seventeen companies licensed by the Bureau of Biologics, Food and Drug Administration, that were engaged in the manufacture and sale of allergenic extracts. Of those, three companies sold allergenic extracts nationwide, including respondents and Miles. The remaining companies were either local or regional sellers.

25. Concentration is high in the allergenic extracts industry, notwithstanding a growing market and the existence of small companies.

26. Entry into the manufacture and sale of allergenic extracts is difficult, requiring significant financial resources, sophisticated technological skills, quality control and effective marketing, distribution and servicing.

VI. EFFECTS OF ACQUISITION; VIOLATIONS CHARGED

27. The effects of the acquisition of Miles by respondents may be substantially to lessen competition or tend to create a monopoly in the manufacture and sale of allergenic extracts in the United States in violation of 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 respondents and Miles in the manufacture and sale of allergenic extracts has been or may be eliminated;
- b. Miles as a substantial, independent competitive factor in the manufacture and sale of allergenic extracts has been eliminated;
- c. The leading position of respondents in the manufacture and sale of allergenic extracts may be further entrenched;
- d. Concentration in the manufacture and sale of allergenic extracts will be maintained or increased, and the possibility of deconcentration may be diminished;
- e. Existing barriers to new entry may be increased substantially;
- f. Additional acquisitions and mergers in the industry may be encouraged;
- g. Independent manufacturers and sellers of allergenic extracts may be deprived of a fair opportunity to compete with the combined resources and market position of respondents and Miles;
- h. Members of the consuming public may be deprived of the benefits of free and unrestricted competition in the manufacture and sale of allergenic extracts.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents 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 respondents with violation of the Clayton and Federal Trade Commission Acts; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents 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 respondents 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 respondents have 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, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, 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 Bayer AG is a corporation organized, existing and doing business under and by virtue of the laws of the Federal Republic of Germany, with its office and principal place of business located in the City of Leverkusen, Federal Republic of Germany.

Respondent Rhinechem Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 425 Park Ave., in the City of New York, State of New York.

Respondent Miles Laboratories, Inc. (formerly Rhinechem Laboratories, Inc.) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 1127 Myrtle St., in the City of Elkhart, State of Indiana.

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

ORDER

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

"Allergenic Extracts" are biological products that are administered to man primarily for the diagnosis or treatment of allergies.

I

It is ordered, That, subject to the prior approval of the Federal Trade Commission, respondents, through their officers, directors, employees, subsidiaries, affiliates, divisions, successors and assigns, whether direct or indirect, shall within one (1) year from the date on which this order becomes final divest absolutely and in good faith all United States

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assets (other than items which cannot be moved without substantial injury to the premises), of whatever description acquired by respondents as a result of their acquisition of Miles Laboratories, Inc. (Miles), as well as subsequent additions and improvements thereto, and primarily utilized by Miles in the manufacture, distribution or sale in the United States of Allergenic Extracts. Such assets shall include equipment, machinery, raw material reserves, inventory, a list of customers, product trade names, product trademarks, patents, assignable licenses (non-assignable licenses shall be relinquished), manufacturing specifications and procedures, market research materials, sales training materials, research and development projects (including licenses, license applications and Notices of Claimed Investigational Exemption for a New Drug (IND's)), and such other property of whatever description relating primarily to Miles Allergenic Extracts. Such divestiture shall be made to a third party which represents that it intends to use such assets in the manufacture, distribution or sale of Allergenic Extracts in the United States.

II

It is further ordered, That, upon the written request of the acquirer of the divested property, respondents shall, for no longer than three (3) years from the date of the agreement with a third party to transfer the assets referred to in Paragraph I, furnish such technical, market and quality control information as may be necessary to enable such personnel and technical assistance as may be necessary to enable such acquirer to manufacture and market those Allergenic Extracts manufactured in the United States by Miles at the time of its acquisition by respondents.

III

It is further ordered, That, pending the divestiture required by this order, respondents shall not cause, and shall use their best efforts to prevent, any diminution of the value of the Miles Allergenic Extracts products or assets.

IV

It is further ordered, That, pursuant to the requirements of Paragraph I above, none of the Miles Allergenic Extracts assets 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, respondents or any of respondents.

subsidiaries or affiliated corporations, whether direct or indirect, or who owns or controls more than one (1) percent of the outstanding shares of the capital stock of any respondent.

V

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, no respondent, its subsidiaries, affiliates, divisions, successors or assigns, shall, without the prior approval of the Federal Trade Commission, directly or indirectly acquire any stock, share capital, or equity interest in any concern, corporate or noncorporate, engaged in, or the assets of such concern relating to, the manufacture, distribution or sale in the United States of Allergenic Extracts; *provided, however*, that the foregoing provision shall not prohibit, with respect to Allergenic Extracts, (1) the taking by respondents from such concerns of non-exclusive licenses that contain no restrictions with respect to limiting other market entrants, and (2) purchases in the ordinary course of business which do not result in the elimination of a competitor.

VI

It is further ordered, That, for a period of five (5) years from the date this order becomes final, no respondent, its subsidiaries, affiliates, divisions, successors or assigns, shall, without the prior approval of the Federal Trade Commission, directly or indirectly acquire any stock, share capital or equity interest in any concern, corporate or noncorporate, engaged in, or the assets of such concern relating to, the manufacture, distribution or sale in the United States of chemically treated diagnostic reagent strips used for in vitro quantitative urinalysis; *provided, however*, that the foregoing provision shall not prohibit, with respect to such strips, (1) the taking by respondents from such concerns of non-exclusive licenses that contain no restrictions with respect to limiting other market entrants, and (2) purchases in the ordinary course of business which do not result in the elimination of a competitor.

VII

It is further ordered, That respondents shall, within sixty (60) days after the date of service of this order, and every sixty (60) days thereafter until respondents have fully complied with the divestiture provision of this order, and annually thereafter, on the anniversary date of service of this order, 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 each or every respondent intends to comply, is complying or has complied with this order. Until divestiture is accomplished, 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 disposition of the assets specified in Paragraph I of this order, the identity of all such persons and copies of all written communications between such persons and any respondent.

VIII

It is further ordered, That respondents notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the corporate respondents 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.

IN THE MATTER OF

BRISTOL-MYERS COMPANY, ET AL.

*Docket 8917. Interlocutory Order, Jan. 17, 1980*ORDER DENYING RESPONDENT BRISTOL-MYERS' MOTION FOR ADDITION
OF PORTION OF APPENDICES TO BRIEF ON APPEAL

By motion dated January 7, 1980, respondent Bristol-Myers Company ("Bristol-Myers") requests that the Commission accept 18 pages of appendices as part of its appeal brief in this proceeding. The 18 pages concerned here represent the amount by which Bristol-Myers' 77 page main appeal brief and 31 page booklet of appendices exceed the 90 page limit on appeal briefs set by the Commission in its Order Granting Leave to File Briefs in Excess of Sixty Pages, dated November 9, 1979.

Bristol-Myers has already asked the Commission to reconsider its 90 page limit and to permit lengthier briefs. The Commission denied that request by order dated November 29, 1979. Thus, Bristol-Myers has long been on notice that the 90 page limit is firm. However, in its latest motion, Bristol-Myers provides no reason for exceeding that limit other than the difficulty of paring down its discussion of the case to the required length. Bristol-Myers' motion is therefore denied.

The Commission is nevertheless willing to grant Bristol-Myers an additional period within which to edit its appendices or main appeal brief, or both, in such a manner that the combined filing does not exceed ninety pages. If Bristol-Myers fails to submit a revised brief or revised appendices within that period, the Commission shall accept the first 13 pages of Appendix A to Bristol-Myers' appeal brief and shall reject the remainder of Appendix A and the entirety of Appendix B.

To assure complaint counsel adequate opportunity to respond to any such revisions as Bristol-Myers may make, the remainder of the briefing schedule must be readjusted. Accordingly,

It is ordered, That:

- (1) Bristol-Myers' motion to have the final 18 pages of Appendices A and B accepted as part of its appeal brief is denied;
- (2) Bristol-Myers is granted leave until and including January 28, 1980, in order to withdraw its main appeal brief and appendices and to revise them such that they total no more than 90 pages;
- (3) If no such revisions are submitted before January 28, 1980, the Secretary shall remove pages A-14 through B-11 of Appendices A and B to Bristol-Myers' main appeal brief before placing such appendices on the public record and transmitting them to the Commission; and
- (4) The briefing schedule shall be revised as follows: all answer