

IN THE MATTER OF
RHONE-POULENC S.A., ET AL.

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

Docket C-3287. Complaint, May 1, 1990—Decision, May 1, 1990

This consent order requires, among other things, a U.S. subsidiary of the French corporation, for a period of five years, to grant licenses to duplicate and sell, on a royalty free basis, the dairy cultures products of Marschall Dairy Products to any entity except Chris Hansen Laboratories and Dairyland Food Laboratories. In addition, respondents are prohibited, for a period of ten years, from acquiring any interest, with certain exceptions, in any company that manufactures or sells dairy cultures in the U.S., without prior Commission approval.

Appearances

For the Commission: *Robert Doyle* and *Steven Newborn*.

For the respondents: *Paul W. Bartel, Davis, Polk & Wardwell*,
New York, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that the respondents, Rhone-Poulenc S.A. and Rhone-Poulenc Inc. (collectively "Rhone-Poulenc"), corporations subject to the jurisdiction of the Commission, have entered into an agreement that violates Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45); that through this agreement Rhone-Poulenc has agreed to acquire the Marschall Dairy Products ("Marschall") division of Miles Inc. and that such acquisition of Marschall, if consummated, would constitute a 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 it appearing that a proceeding in respect thereof would be in the public interest, the Commission 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. RHONE-POULENC S.A.

1. Rhone-Poulenc S.A. is a corporation organized and doing business under the laws of France, with its principal place of business at 25 Quai Paul Doumer, 92408 Courbevoie, Cedex, France.

2. In fiscal year 1988, Rhone-Poulenc S.A. had total sales of approximately \$9.8 billion.

II. RHONE-POULENC INC.

3. Rhone-Poulenc Inc. is a corporation organized and doing business under the laws of New York, with its principal place of business at 125 Black Horse Lane, Monmouth Junction, New Jersey. Rhone-Poulenc Inc. is a wholly owned subsidiary of Rhone-Poulenc S.A.

4. In fiscal year 1988, Rhone-Poulenc Inc. had total sales of approximately \$1.4 billion.

III. JURISDICTION

5. At all times relevant herein, respondents have been, and are now, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and are corporations whose businesses are in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

IV. THE PROPOSED ACQUISITION

6. Pursuant to an Asset Purchase Agreement ("Agreement") executed by Rhone-Poulenc Inc. on September 29, 1989, Rhone-Poulenc agreed to purchase substantially all of the assets of Marschall from Miles, Inc., an Indiana corporation and wholly owned subsidiary of Bayer USA, Inc. Bayer USA is a Delaware corporation and a wholly owned subsidiary of Bayer AG, a German company with its principal offices in Bayerwerk, Federal Republic of Germany. The total transaction is valued at approximately \$41.5 million.

V. NATURE OF TRADE AND COMMERCE

7. The relevant product market is the manufacture and sale of dairy cultures. Dairy cultures are used in the manufacture of cheese and other dairy products, such as cottage cheese, yogurt, sour cream and buttermilk.

8. The relevant geographic market is the United States as a whole.

VI. MARKET STRUCTURE

9. The relevant market is highly concentrated whether measured by the Herfindahl-Hirschmann Index ("HHI") or by four-firm and eight-firm concentration ratios.

VII. BARRIERS TO ENTRY

10. The barriers to entry into the manufacture and sale of the relevant product are significant.

VIII. ACTUAL AND POTENTIAL COMPETITION

11. Rhone-Poulenc and Marschall are actual and potential competitors in the relevant market.

IX. EFFECTS

12. The effects of the aforesaid agreement and the aforesaid acquisition, if consummated, may be substantially to lessen competition in the relevant market 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, in the following ways, among others:

(a) It will eliminate actual and potential competition between Rhone-Poulenc and Marschall and between Marschall and others in the relevant market;

(b) It will significantly increase the already high levels of concentration in the relevant market;

(d) It will eliminate Marschall as a substantial independent competitive force in the relevant market; and

(e) It will enhance the possibility of collusion or interdependent coordination by the remaining firms in the relevant market.

X. VIOLATIONS CHARGED

13. The proposed acquisition of Marschall by Rhone-Poulenc would, if consummated, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

14. The Asset Purchase Agreement set forth in paragraph 6 constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

15. The proposed acquisition of Marschall by Rhone-Poulenc would, if consummated, violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

Commissioner Azcuenaga dissenting.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of respondents' proposed acquisition of certain assets of the Marschall Dairy Products Division of Miles Inc., 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 Act and the Federal Trade Commission Act; and

The respondents, their attorneys, 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, 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 Rhone-Poulenc S.A. is a corporation organized, existing and doing business under and by virtue of the laws of France, with its office and principal place of business located at 25 Quai Paul Doumer, 92408 Courbevoie, Cedex, France.

2. Respondent Rhone-Poulenc Inc. is a corporation organized, existing and doing business under and by virtue of the laws of New York, with its office and principal place of business located at 125 Black Horse Lane, Monmouth Junction, New Jersey.

3. 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

I.

As used in this order, the following definitions shall apply:

a. "*Rhone-Poulenc*" means Rhone-Poulenc S.A., a French corporation, its predecessors, any other corporations, partnerships, joint ventures, companies, subsidiaries, divisions, groups and affiliates that Rhone-Poulenc controls, directly or indirectly, and their respective directors, officers, employees, agents, and representatives, and their respective successors and assigns. "*RPI*" means Rhone-Poulenc Inc., a New York corporation which is a wholly owned subsidiary of Rhone-Poulenc.

b. "*Acquisition*" means RPI's acquisition of substantially all of the assets of the Marschall Dairy Products division of Miles.

c. "*Respondents*" means Rhone-Poulenc and RPI.

d. "*Dairy cultures*" means culture products which are used in the manufacture of various dairy products, including cheese, sour cream, buttermilk, yogurt and cottage cheese.

e. "*Commission*" means the Federal Trade Commission.

f. "*New entrant or expander*" means any entity which, during the five years following the date this order becomes final, is engaged in the commercial production and sale of dairy culture products in the United States to customers in the United States, or seeks to begin such production and sale. "New entrant or expander" shall not include Chris Hansen Laboratories and Dairyland Food Laboratories, or any entity directly or indirectly controlling, controlled by, under common control with, or otherwise affiliated with either.

g. "*Marschall Dairy Products Dairy Cultures*" means the dairy culture products offered for sale in the United States by Marschall to customers in the United States, immediately prior to the acquisition. "Marschall Dairy Products Dairy Cultures" shall not include any dairy culture products with respect to which Marschall's production or sale of such product involves a license from, or the payment of royalties to, another entity.

II.

It is ordered, That:

A. Respondent RPI shall grant a license to duplicate and sell, on a

royalty free basis, any products among the Marschall Dairy Products Dairy Cultures to any and all new entrants or expanders who, during the five (5) years following the date this order becomes final, request such a license. The license to each such new entrant or expander shall run for four (4) years, and shall contain, as applicable to the license contemplated by this order, the provisions customarily found in licensing agreements. The license will also warrant the quality of the Marschall Dairy Products Dairy Cultures to be provided to the licensee and contain an undertaking concerning their prompt delivery. After the termination of its license, each such new entrant or expander may continue to duplicate and sell the licensed products. Within sixty (60) days after the date this order becomes final, respondents shall file with the Commission a copy of the license agreement that will be offered to new entrants or expanders pursuant to this order.

B. Within sixty (60) days after the date of the acquisition, respondents shall file with the Commission a list of the Marschall Dairy Products Dairy Cultures, together with information identifying the dairy products that each is used to produce. This information shall subsequently be made available to any new entrant or expander that requests information about, or receives, a license.

C. Respondents shall allow any new entrant or expander who licenses products from among the Marschall Dairy Products Dairy Cultures to represent to the public, during the period of its license, and only during that period, that it has received Marschall Dairy Products Dairy Cultures pursuant to a license, that it has been given information identifying the dairy products that each is used to produce, and that it is licensed to duplicate and sell them.

D. In order to compensate respondent RPI for handling costs, and to deter nuisance requests, respondent RPI shall be entitled to request a charge of not more than \$50 per culture at the time any new entrant or expander requests a license of cultures, subject to the condition that the total such charge per license shall not exceed \$4,000.

III.

It is further ordered, That for the purposes of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to respondents made to their principal offices, respondents shall make available, in the United States, to any duly authorized representatives of the Commission:

A. All books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of respondents relating to any matters contained in this order, for inspection and copying during office hours and in the presence of counsel; and

B. Upon five (5) days' notice to respondents, and without restraint or interference from respondents, for interview, officers or employees of respondents, who may have counsel present, regarding such matters.

IV.

It is further ordered, That within sixty (60) days after the date this order becomes final and annually thereafter on the anniversary date of the order for each of the five (5) years following the date this order becomes final, respondents shall submit to the Commission a verified report setting forth in detail the manner and form in which they intend to comply, are complying or have complied with this order. Among the other things that are required from time to time, respondents shall include in their compliance reports (and, for a period of five (5) years from the date of the report, maintain all records relating to) the identities of new entrants and expanders who have applied for licenses, and the identities of those who have received licenses. Respondents shall also include copies of the licenses granted.

V.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in any respondent, such as dissolution, assignment or sale resulting in the emergence of a successor, or the creation or dissolution of subsidiaries or any other change that may affect compliance with this order.

VI.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondents shall cease and desist from acquiring, without the prior approval of the Commission, directly or indirectly, through subsidiaries or otherwise, assets used in, or all or any part of the stock or share capital of, or any interest in, any company engaged in the manufacture or sale of dairy cultures in the

United States. *Provided, however*, that these prohibitions shall not apply to the acquisition of (i) new machinery or equipment from manufacturers or suppliers, or (ii) assets outside the United States. One year from the date this order becomes final and annually thereafter for nine (9) years, respondents shall file with the Commission a verified written report of their compliance with this paragraph.

Commissioner Azcuenaga dissenting.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

Although I agree with the majority that a remedy is warranted in this matter, the licensing requirement in the consent order may provide no competitive relief at all. No potential licensees have been identified, and Rhone Poulenc is not required to find one. Compulsory licensing may be an appropriate remedy in certain limited circumstances, for example, when an effective divestiture of assets is impracticable, but that does not appear to be the situation here. *See* Separate Statement of Chairman James C. Miller in *Xidex Corp.*, Docket 9146, 102 FTC 1, 19 (1983). The order has the potential to be highly regulatory and falls far short of the competitive relief that a simple structural remedy would provide. I dissent.

IN THE MATTER OF
IMPORT IMAGE INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE
TEXTILE FIBER PRODUCTS IDENTIFICATION AND
THE FEDERAL TRADE COMMISSION ACTS

Docket C-3288. Complaint, May 1, 1990—Decision, May 1, 1990

This consent order prohibits, among other things, a New York wholesaler of women's clothing from falsely or deceptively labeling, invoicing, or advertising its textile fiber products as to name or amount of constituent fibers; failing to affix, or removing, labels containing the information required by the Textile Fiber Products Identification Act; and misrepresenting or failing to disclose the country of origin of its products.

Appearances

For the Commission: *Katherine B. Alphin* and *Paul K. Davis*.

For the respondents: *Stanley M. Spiegler, Kirschenbaum, Fleischman & Spiegler*, New York, N.Y.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*, and the Textile Fiber Products Identification Act, 15 U.S.C. 70, hereinafter "Textile Fiber Act", and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Import Image Inc., a corporation, and Bertram Turoff, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, 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. Respondent Import Image Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 498 Seventh Avenue, New York, New York.

PAR. 2. Respondent Bertram Turoff is sole shareholder and