

Complaint

118 F.T.C.

IN THE MATTER OF

ROCHE HOLDING LTD., 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-3542. Complaint, Nov. 22, 1994--Decision, Nov. 22, 1994

This consent order requires, among other things, Roche to divest Syva's drugs of abuse testing (DAT) business within 12 months to a Commission-approved buyer, to operate the Syva assets separately from its own DAT business pending the divestiture, and to obtain, for ten years, prior Commission approval before acquiring assets or interests of any entity involved in the market for drugs of abuse reagent products.

Appearances

For the Commission: *Claudia Higgins, Ann Malester and Elizabeth Jet.*

For the respondents: *Arthur Golden, Davis, Polk & Wardwell, New York, N.Y. and Neal R. Stoll, Skadden, Arps, Slate, Meagher & Flom, New York, N.Y.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, Roche Holding Ltd ("Roche"), a corporation subject to the jurisdiction of the Commission, has proposed to acquire all of the voting stock of respondent Syntex Corporation ("Syntex"), a corporation subject to the jurisdiction of the Commission, 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, ("FTC Act"), 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent Roche Holding Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of

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Switzerland with its principal executive offices located at Grenzachstrasse 124, Basel, Switzerland.

2. Respondent Syntex Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of Panama, with its principal executive offices located at 3401 Hillview Avenue, Palo Alto, California.

II. JURISDICTION

3. Respondents are and, at all times relevant herein have been, 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 affect commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. THE ACQUISITION

4. On or about May 1, 1994, Roche and Syntex signed an agreement and plan of merger whereby Roche would acquire 100 percent of the voting securities of Syntex for approximately \$5.3 billion ("acquisition").

IV. THE RELEVANT MARKET

5. The relevant line of commerce in which to analyze the effects of the acquisition is the manufacture and sale of drugs of abuse reagent products. Drugs of abuse reagents products are diagnostic products used to screen for the presence or absence of illegal drugs in urine.

6. For purposes of this complaint, the United States is the relevant geographic area in which to analyze the effects of the acquisition.

7. The relevant market set forth in paragraphs five and six is highly concentrated, whether measured by Herfindahl-Hirschmann Indices ("HHI") or two-firm and four-firm concentration ratios.

8. Entry into the relevant market is difficult and time consuming.

9. Roche and Syntex are actual competitors in the relevant market.

V. EFFECTS OF THE ACQUISITION

10. The effects of the acquisition may be substantially to lessen competition or tend to create a monopoly 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 FTC Act, as amended, 15 U.S.C. 45, by, among other things:

- (a) Eliminating actual, direct and substantial competition between Roche and Syntex in the relevant market;
- (b) Increasing the likelihood that Roche will unilaterally exercise market power in the relevant market;
- (c) Creating a dominant firm in the relevant market; and
- (d) Enhancing the likelihood of collusion or coordinated interaction between or among the firms in the relevant market.

VI. VIOLATIONS CHARGED

11. The acquisition described in paragraph four, 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 FTC Act, as amended, 15 U.S.C. 45.

12. The acquisition agreement described in paragraph four constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Roche Capital Corporation, a Panamanian corporation and an indirect, wholly-owned subsidiary of Roche Holding Ltd, a Swiss corporation (collectively referred to as "Roche"), of Syntex Corporation ("Syntex"), and it now appearing that Roche and Syntex, hereinafter sometimes referred to as "respondents," having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations 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

Respondents, by their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true 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 said Acts, and the 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 Roche Holding Ltd. is a corporation organized, existing, and doing business, under and by virtue of the laws of Switzerland with its principal executive offices located at Grenzacherstrasse 124, Basel, Switzerland 4002. Hoffmann-La Roche Inc., an indirect wholly-owned subsidiary of Roche Holding Ltd., is located at 340 Kingsland Street, Nutley, New Jersey.

2. Respondent Syntex is a corporation, organized, existing, and doing business under and by virtue of the laws of Panama with its principal executive offices located at 3401 Hillview Avenue, Palo Alto, California. Syva Company, an indirect wholly-owned subsidiary of Syntex, is headquartered at 3403 Yerba Buena Road, San Jose, California.

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

ORDER

I.

It is ordered, That, as used in this order, the following definitions shall apply:

A. “*Roche*” means Roche Holding Ltd., its predecessors, subsidiaries, including, without limitation Roche Capital Corporation, divisions, and groups and affiliates controlled by Roche, their directors, officers, employees, agents, and representatives, and their successors and assigns.

B. “*Syntex*” means Syntex Corporation, its predecessors, subsidiaries, divisions, and groups and affiliates controlled by Syntex, their directors, officers, employees, agents, and representatives, and their successors and assigns.

C. “*Syva*” or “*Syva Company*” means Syva Company, a Delaware corporation and an indirect wholly-owned subsidiary of Syntex Corporation, its predecessors, subsidiaries, divisions, and groups and affiliates controlled by Syva, their directors, officers, employees, agents, and representatives, and their successors and assigns.

D. “*Respondents*” means Roche and Syntex.

E. “*Commission*” means the Federal Trade Commission.

F. “*Acquisition*” means Roche’s proposed acquisition of voting securities of Syntex pursuant to the Acquisition Agreement and Plan of Merger dated May 1, 1994.

G. “*Patents*” means some, all or any part of all U.S. or foreign unexpired patents and patents issued in the future based upon patent applications filed in any country as of August 1, 1994, and all substitutions, continuations, continuations-in-part, divisions, renewals, reissues and extensions based on said patents, the applications therefor, or said patent applications.

H. “*Drugs of abuse reagent products*” means diagnostic reagent products used for drugs of abuse testing, including without limitation, reagent, control and calibrator products used to test for cannabinoids or marijuana, cocaine and cocaine metabolites, opiates, amphetamines and methamphetamines, phencyclidine, methadone, methaqualone, propoxyphene, barbiturates, benzodiazepine, lysergic acid diethylamide, ethyl alcohol, or other controlled substances for which drugs of abuse testing is conducted.

I. “*Syva Business*” means all of Syntex’s United States rights, title and interest in and to:

(1) Drugs of abuse reagent products, including but not limited to, EMIT®, EMIT® II, and all patents, production technology and know-how related to the manufacture and sale of drugs of abuse reagent products in the United States; and

(2) All of the Syva Company's assets and businesses as further delineated in Schedule A, attached hereto and made a part hereof.

II.

It is further ordered, That:

A. Roche shall divest, absolutely and in good faith, within twelve (12) months of the date this order becomes final, the Syva Business, and shall also divest such additional ancillary assets and businesses and effect such arrangements as are necessary to assure the marketability, viability, and competitiveness of the Syva Business; provided that Roche is not required to divest any of the Syva assets and businesses identified in Part 2 of Schedule A, if such assets and businesses are not requested by the acquirer.

B. Roche shall divest the Syva Business only to an acquirer that receives the prior approval of the Commission and that has made any necessary notice to or obtained any necessary approval from the FDA to manufacture and sell all of the Syva drugs of abuse reagent products, and only in a manner that has received the prior approval of the Commission. The purpose of the divestiture of the Syva Business is to ensure the continuation of the Syva Business as an ongoing, viable operation, engaged in the same business in which the Syva Business is engaged at the time of the proposed divestiture, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission’s complaint.

C. Upon reasonable notice from the acquirer to respondents, respondents shall provide such personnel, information, technical assistance, advice and training to the acquirer as is necessary to transfer technology and know-how to assist the acquirer in obtaining any necessary FDA approval for the manufacture and sale of the Syva drugs of abuse reagent products and any other products identified in Schedule A that are acquired pursuant to this order. Such assistance

shall include reasonable consultation with knowledgeable employees of respondents and training at the acquirer's facility for a period of time sufficient to satisfy the acquirer's management that its personnel are appropriately trained in the manufacture of the Syva drugs of abuse reagent products and any other products identified in Schedule A that are acquired pursuant to this order. Respondents shall not charge the acquirer a rate more than their own direct costs for providing such technical assistance.

D. Pending divestiture of the Syva Business, respondents shall take such actions as are necessary to maintain the viability and marketability of the Syva Business and to prevent the destruction, removal, wasting, deterioration or impairment of any of the Syva Business except for ordinary wear and tear.

III.

It is further ordered, That:

A. If Roche has not divested, absolutely and in good faith, and with the prior approval of the Commission, the Syva Business within twelve (12) months of the date this order becomes final, to an acquirer that has made any necessary notice to or obtained any necessary approval from the FDA to manufacture and sell Syva drugs of abuse products, the Commission may appoint a trustee to divest the Syva Business.

B. In the event that the Commission or the Attorney General brings an action pursuant to Section 5 (1) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, Roche shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5 (1) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Roche to comply with this order.

C. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A. or B. of this order, Roche shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of Roche, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Roche has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to Roche of the identity of any proposed trustee, Roche shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Syva Business.

3. Within ten (10) days after appointment of the trustee, Roche shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.C.3. to accomplish the divestiture, which, shall be subject to the prior approval of the Commission. If, however, at the end of the twelve month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to Syva, or to any other relevant information, as the trustee may request. Roche shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Roche shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Roche shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is admitted to the Commission, subject to Roche's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to the acquirer as set out in paragraph II of this order, as appropriate; provided, however, if the trustee

receives *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by Roche from among those approved by the Commission. If requested by the trustee or acquirer, Roche shall provide the acquirer(s) with the assistance required by paragraph II.C. of this order.

7. The trustee shall serve, without bond or other security, at the cost and expense of Roche, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Roche, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Roche, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Syva Business.

8. Roche shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III of this order.

10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the Syva Business.

12. The trustee shall report in writing to Roche and the Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

IV.

It is further ordered, That respondents shall comply with all terms of the Agreement to Hold Separate, attached to this order and made a part hereof as Appendix I. The Agreement to Hold Separate shall continue in effect until Roche has divested all of the Syva Business as required by this order.

V.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, Roche shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

(a) Acquire more than 1% of the stock, share capital, equity or other interest in any concern, corporate or non-corporate, engaged in at the time of such acquisition, or within the two years preceding such acquisition engaged in, the manufacture or production of drugs of abuse reagent products in the United States; or

(b) Acquire any assets used or previously used (and still suitable for use) in the manufacture and production of drugs of abuse reagent products in the United States to which sales of \$3 million or more of drugs of abuse reagent products were attributable in the year preceding such acquisition.

Provided, however, that this paragraph V shall not apply to the acquisition of products or services acquired in the ordinary course of business or to any acquisition of a non-exclusive license to any United States patents or other form of intellectual property (excluding assets of the Syva Business).

VI.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until the respondents have fully complied with paragraphs II and III of this order, Roche shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraphs II, III, and IV of this order. Roche shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II, III, and IV of this order, including a description of all substantive contacts or negotiations for the divestiture required by this order, including the identity of all parties contacted. Roche shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the divestiture.

B. One (1) year from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at such other times as the Commission may require, Roche shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with paragraph V of this order.

VII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, respondents shall permit any duly authorized representatives of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy 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; and

B. Upon five (5) days, notice to respondents, and without restraint or interference from respondents, to interview officers, directors, or employees of respondents. Officers and employees of re-

spondents whose place of employment is outside the United States shall be made available on reasonable notice.

VIII.

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

Commissioner Varney not participating.

SCHEDULE A

Roche shall divest all of the assets and businesses of the Syva Business pursuant to the terms of this order. The associated assets identified in paragraph I. I.(2) of this order shall include all assets, properties, business and goodwill, tangible and intangible, of the Syva Company in and relating to the development, manufacture, sale, distribution and marketing of drugs of abuse reagent products in the United States, including without limitation, the following:

PART I

1. All rare reagent inventory (including antibody reagent pools, hapten conjugates, and detection labels), all inventory (finished and work in process), all sources of the antibodies (whether animals or cell lines), immunogens, commodities, cross-reactants machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools, and other tangible personal property;

2. All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, technical information, management information systems, software, inventions, copyrights, trademarks, trade names, trade secrets, intellectual property, formulations, patents, technology, know-how, specifications, designs, drawings, processes, quality assurance and control data, research materials, and information, relating to the manufacture and sale of the drugs of abuse reagent products, including without limitation information relating to FDA approvals and applications for FDA approvals, re-

search and development data, data required under the Good Manufacturing Practices Guidelines, regulatory data packages, process validation, and documentation relating to Drug Enforcement Agency ("DEA") approvals;

3. All rights, title and interest in and results of all research and development efforts by Syntex relating to improvements, developments, and variants of the Syva EMIT, EMIT II, and other drugs of abuse reagent product lines;

4. All rights, title and interest in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors, and consignees;

5. All rights under warranties and guarantees, express or implied;

6. All books, records and files; and

7. All items of prepaid expense.

PART 2

1. All assets, properties, business and goodwill, tangible and intangible, of the Syva Company in and relating primarily to the development, manufacture, sale, distribution and marketing of any in vitro diagnostic products other than drugs of abuse reagent products, including therapeutic drug monitoring reagent products, infectious disease reagent products, endocrine (thyroid) testing reagent products, and reagents used on the VISTA system (*e.g.*, hormone, cancer, anemia, protein, and hepatitis/HIV testing);

2. Inventory and storage capacity; and

3. All rights, title and interest in and to owned or leased real property, together with appurtenances, licenses and permits.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate ("Hold Separate") is by and between Roche Holding Ltd ("Roche"), a corporation organized, existing, and doing business under and by virtue of the laws of Switzerland, with its office and principal place of business at Grenzacherstrasse 124, Basel, Switzerland 4002; Syntex Corporation ("Syntex"), a corporation, organized, existing, and doing business under and by virtue of the laws of Panama with its principal place of business located at 3401 Hillview Avenue, Palo Alto, California; and the Federal Trade Commission ("the Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively, the "Parties").

PREMISES

Whereas, on May 1, 1994, Roche entered into an Acquisition Agreement and Plan of Merger with Syntex Corporation ("Syntex") to acquire all the voting stock of Syntex (hereinafter "Acquisition"); and

Whereas, Syntex with its principal office and place of business located at 3401 Hillview Avenue, Palo Alto, California, manufactures and markets through its indirect wholly-owned subsidiary, the Syva Company, among other things, drugs of abuse reagent products; and

Whereas, Hoffmann-La Roche Inc., an indirect wholly-owned subsidiary of Roche, with its principal office and place of business located at 340 Kingsland Street, Nutley, New Jersey, through its subsidiary Roche Diagnostic Systems, Inc., manufacturing and markets, among other things, drugs of abuse reagent products; and

Whereas, the Commission is now investigating the Acquisition to determine whether it would violate any of the statutes enforced by the Commission; and

Whereas, if the Commission accepts the Agreement Containing Consent Order ("Consent Order"), the Commission must place it on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission is concerned that if an understanding is not reached, preserving the *status quo ante* of the Syva Business as defined in paragraph I. of the Consent Order during the period prior to the final acceptance of the Consent Order by the Commission (after the 60-day public comment period), divestiture resulting from any proceeding challenging the legality of the Acquisition might not be possible, or might be less than an effective remedy; and

Whereas, the Commission is concerned that if the Acquisition is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of the Syva Business and the Commission's right to have the Syva Business continue as a viable competitor; and

Whereas, the purpose of the Hold Separate and the Consent Order is:

1. To preserve the Syva Business as a viable, independent business pending its divestiture as a viable and ongoing enterprise,
2. To remedy any anticompetitive effects of the Acquisition, and
3. To preserve the Syva Business as an ongoing and competitive entity engaged in the same business in which it is presently employed until divestiture is achieved; and

Whereas, Roche and Syntex's entering into this Hold Separate shall in no way be construed as an admission by Roche and Syntex that the Acquisition is illegal; and

Whereas, Roche and Syntex understand that no act or transaction contemplated by this Hold Separate shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Hold Separate.

Now, therefore, the parties agree, upon the understanding that the Commission has not yet determined whether the acquisition will be challenged, and in consideration of the Commission's agreement that, at the time it accepts the Consent Order for public comment it will grant early termination of the Hart-Scott-Rodino waiting period, and unless the Commission determines to reject the Consent Order, it will not seek further relief from Roche with respect to the Acquisition, except that the Commission may exercise any and all rights to enforce this Hold Separate, the Agreement Containing Consent Order to which it is annexed and made a part thereof and the Order, once it becomes final, and in the event that the required divestiture is not accomplished, to appoint a trustee to seek divestiture of the Syva Business pursuant to the Consent Order, as follows:

1. Roche and Syntex agree to execute and be bound by the Consent Order.
2. Roche and Syntex agree that from the date this Hold Separate is accepted until the earliest of the time listed in subparagraphs 2.a. - 2.b., they will comply with the provisions of paragraph 3. of this Hold Separate:
 - a. Three business days after the Commission withdraws its acceptance of the Consent Order pursuant to the provisions of Section 2.34 of the Commission's rules;
 - b. The time that the divestiture obligations required by the Consent Order are completed.
3. To ensure the complete independence and viability of the Syva Business and to assure that no competitive information is exchanged between the Syva Business and Roche, Roche shall hold the Syva Business as it is presently constituted separate and apart on the following terms and conditions:
 - a. The Syva Business shall be held separate and apart and shall be operated independently of Syntex (meaning here and hereinafter, Syntex excluding the Syva Business and excluding all personnel connected with the Syva Business as of the date this Agreement was signed) and Roche (meaning here and hereinafter, Roche excluding Syntex and excluding all personnel connected with Syntex as of the date this Agreement was signed) except to the extent that Syntex or Roche must exercise

direction and control over the Syva Business to assure compliance with this Agreement or the Consent Order.

b. Syntex personnel connected with Syva or providing support services to Syva as of the date of this Agreement was signed may continue, as employees of Syntex, to provide such services as they are currently providing to Syva. Such Syntex personnel must retain and maintain all material confidential information relating to the Syva Business on a confidential basis and, except as is permitted by this Hold Separate, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any other Roche business, including the drugs of abuse reagent products business, therapeutic drug monitoring business and the Roche clinical laboratories business.

c. Roche and Syntex shall elect a five-person board of directors for the Syva Company ("New Board"). The New Board shall consist of the Syva Company President and General Manager, Richard Bastiani, the Syva Company Senior Vice-President of Marketing and Sales, David Oxlade, and the Syva Company Vice-President of Finance, Wilbert Lee, as of the date of this Hold Separate (provided they agree, or comparable, knowledgeable persons among the managers of Syva Company independent of Roche); the Chief Financial Officer of Roche whose responsibilities with Roche do not involve direct management of Roche's drugs of abuse, therapeutic drug monitoring or clinical laboratories businesses, Henri B. Meier (provided he agrees, or a comparable, knowledgeable person among the financial managers of Roche); and the Chairman of Syntex, Paul Freiman (provided he agrees, or a comparable, knowledgeable person among the managers of Syntex). The Chairman of the New Board shall be Richard Bastiani (provided he agrees, or a comparable, knowledgeable person among the managers of Syva), who shall remain independent of Roche and competent to assure the continued viability and competitiveness of the Syva Company. Except for the Roche employee serving on the New Board, Roche shall not permit any director, officer, employee, or agent of Roche also to be a director, officer, employee of the Syva Company. Each New Board member shall enter into a confidentiality agreement agreeing to be bound by the terms and conditions set forth in Attachment A, appended to this Hold Separate.

d. Roche shall not exercise direction or control over, or influence directly or indirectly, the Syva Business, the New Board, or any of its operations or businesses; provided, however, that Roche may exercise only such direction and control over the Syva Business as is necessary to assure compliance with this Hold Separate, the order and with all applicable laws.

e. Roche and Syntex shall maintain the marketability, viability, and competitiveness of the Syva Business, and shall not cause or permit the destruction, removal, wasting, deterioration, or impairment of any assets or business they may have to divest except in the ordinary course of business and except for ordinary wear and tear, and they shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair the marketability, viability or competitiveness of the Syva Business.

f. Except as required by law and except to the extent that necessary information is exchanged in the course of evaluating and consummating the Acquisition, defending investigations or litigation, obtaining legal advice, complying with this Hold Separate or the Consent Order or negotiating agreements to divest assets, Roche and Syntex shall not receive or have access to, or the use of, any material

confidential information of the Syva Business or the activities of the New Board not in the public domain, nor shall the Syva Company, or the New Board, receive or have access to, or the use of, any material confidential information about the Roche drugs of abuse reagent business or the activities of Roche in managing the drugs of abuse reagent business not in the public domain. Roche and Syntex may receive on a regular basis from the Syva Company aggregate financial information necessary and essential to allow Roche and Syntex to file financial reports, tax returns, and personnel reports. Any such information that is obtained pursuant to this subparagraph shall be used only for the purpose set forth in this subparagraph. ("Material confidential information," as used herein, means competitively sensitive or proprietary information not independently known to Roche from sources other than the Syva Company or the New Board and includes but is not limited to customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets.)

g. Except as is permitted by this Hold Separate, the director of the Syva Company appointed by Roche who is also a director, officer, agent, or employee of Roche ("Roche New Board member"), shall not receive any Syva Business material confidential information and shall not disclose any such information obtained through his or her involvement with the Syva Business to Roche or use it to obtain any advantage for Roche. The Roche New Board member shall participate in matters that come before the New Board only for the limited purposes of considering any capital investment of over \$150,000, approving any proposed budget and operating plans, authorizing dividends and repayment of loans consistent with the provisions hereof, reviewing material transactions described in subparagraph 3.i, and carrying out Roche's responsibilities under the Hold Separate and the Order. Except as permitted by the Hold Separate, the Roche New Board member shall not participate in any matter, or attempt to influence the votes of other directors on the New Board with respect to matters that would involve a conflict of interest between Roche and the Syva Business. Meetings of the New Board during the term of the Hold Separate shall be audio recorded and the recording retained for two (2) years after the termination of the Hold Separate.

h. The Syva Company shall be staffed with sufficient employees to maintain the viability and competitiveness of the Syva Business, which employees shall be the Syva Company employees and may also be hired from sources other than the Syva Company. Each director, officer, and management employee of the Syva Company shall execute a confidentiality agreement prohibiting the disclosure of any Syva Business confidential information.

i. All material transactions, out of the ordinary course of business and not precluded by paragraph 3 hereof, shall be subject to a majority vote of the New Board.

j. Roche shall not change the composition of the New Board unless the Chairman of the New Board consents. The Chairman of the New Board shall have the power to remove members of the New Board for cause and to require Roche to appoint replacement members to the New Board in the same manner as provided in paragraph 3.c. of this Hold Separate. Roche shall not change the composition of the management of the Syva Company except that the New Board shall have the power to remove management employees for cause.

k. If the Chairman ceases to act or fails to act diligently, a substitute chairman shall be appointed in the same manner as provided in paragraph 3.c.

l. Roche shall circulate to its management employees of Roche drugs of abuse therapeutic drug monitoring and Roche clinical laboratories businesses and appropriately display a notice of this Hold Separate and Consent Order in the form attached hereto as Attachment A.

m. Roche and Syntex shall cause the Syva Business to continue to expend funds for the advertising and trade promotion of the Syva Business at levels not lower than those budgeted for 1994 and 1995, and shall increase such spending as deemed reasonably necessary by the New Board in light of competitive conditions. If necessary, Roche and Syntex shall provide the Syva Business with any funds to accomplish the foregoing. Syntex shall continue to provide to the Syva Business such support services as it provided prior to the Acquisition to the Syva Company.

n. All earnings and profits of the Syva Business shall be retained separately by the Syva Business. If necessary, Roche shall provide the Syva Business with sufficient working capital to operate at the rate of operation in effect during the twelve (12) months preceding the date of the Hold Separate.

o. The New Board shall serve at the cost and expense of Roche. Roche shall indemnify the New Board against any losses or claims of any kind that might arise out of its involvement under this Hold Separate, except to the extent that such losses or claims result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the New Board directors.

p. The New Board shall have access to and be informed about all companies who inquire about, seek or propose to buy the Syva Business.

q. The New Board shall report in writing to the Commission every thirty (30) days concerning the New Board's efforts to accomplish the purposes of this Hold Separate.

4. Should the Federal Trade Commission seek in any proceeding to compel Roche to divest itself of the Syva Business or any additional assets, as provided in the proposed order, or to seek any other equitable relief, Roche shall not raise any objection based on the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the Acquisition. Roche shall also waive all rights to contest the validity of this Hold Separate.

5. For the purpose of determining or securing compliance with this Hold Separate, subject to any legally recognized privilege, and upon written request with reasonable notice to Roche made to its General Counsel, Roche and Syntex shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of Roche or Syntex and in the presence of counsel to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Roche or Syntex relating to compliance with this Hold Separate;

b. Upon five (5) days' notice to Roche or Syntex, and without restraint or interference from it, to interview officers or employees of Roche or Syntex, who may have counsel present, regarding any such matters.

6. [Deleted].

7. This Hold Separate shall not be binding until approved by the Commission.

ATTACHMENT A

NOTICE OF DIVESTITURE AND
REQUIREMENT FOR CONFIDENTIALITY

Roche Holding Ltd ("Roche") and Syntex Corporation ("Syntex") have entered into a Consent Agreement and Agreement to Hold Separate with the Federal Trade Commission ("Commission") relating to the divestiture of the Syva Business. Until after the Commission's Order becomes final and the Syva Business is divested, the Syva Business must be managed and maintained as a separate, ongoing business, independent of all other Roche businesses and independent of the Roche drugs of abuse business. All competitive information relating to the Syva Business, including without limitation the drugs of abuse business, must be retained and maintained by the persons involved in the Syva Business on a confidential basis and such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any other Roche business, including the drugs of abuse business, therapeutic drug monitoring business and the Roche Biomedical Laboratories business. Similarly, all such persons involved in the Roche therapeutic drug monitoring business, drugs of abuse business and the Roche Biomedical Laboratories shall be prohibited from providing, discussing, exchanging, circulating or otherwise furnishing competitive information about such business to or with any person whose employment involves the Syva Business.

Any violation of the Consent Agreement or the Agreement to Hold Separate, incorporated by reference as part of the Consent Order, may subject Roche and Syntex to civil penalties and other relief as provided by law.

IN THE MATTER OF

HAYES MICROCOMPUTER PRODUCTS, INC.

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

Docket C-3543. Complaint, Nov. 28, 1994--Decision, Nov. 28, 1994

This consent order prohibits, among other things, a Georgia manufacturer and distributor of computer communications products from making representations for any of its modem related products regarding the risk of data loss or data destruction, or data transmission problems due to any escape method, unless the respondent possesses and relies upon competent and reliable substantiating evidence.

Appearances

For the Commission: *Linda K. Badger and Kerry O'Brien.*

For the respondent: *James Hawkins, Dennis, Goldstein, Frazer & Murphy, Atlanta, GA.*

COMPLAINT

The Federal Trade Commission having reason to believe that Hayes Microcomputer Products, Inc. ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Hayes Microcomputer Products, Inc., is a Georgia corporation, with its principal office or place of business at 5835 Peachtree Corners East, Norcross, Georgia.

PAR. 2. Respondent has manufactured, advertised, offered for sale, sold, and distributed products for computer communications, including modems, local area networks, and software. One of respondent's products is a modem with an "escape sequence." An escape sequence is a mechanism by which modems end a data transmission. Respondent patented this product under the title, "Modem with Improved Escape Sequence Mechanism to Prevent Escape in Response to Random Occurrence of Escape Character in Transmitted Data." The escape sequence mechanism defined in this