

Complaint

119 F.T.C.

IN THE MATTER OF

WRIGHT MEDICAL TECHNOLOGY, INC., 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-3564. Complaint, March 23, 1995--Decision, March 23, 1995

This consent order requires, among other things, a Tennessee-based research and development corporation to transfer to the Mayo Foundation, the licensor of the implant technology to Orthomet, Inc., a complete copy of all assets relating to Orthomet's business of researching and developing orthopaedic implants for use in human hands, and also requires Wright Medical Technology to obtain Commission approval before acquiring any interest in any firm that has received, or has applied for, Food and Drug Administration approval to market orthopaedic hand implants in the United States.

Appearances

For the Commission: *Richard B. Dagen* and *Benjamin H. Tahyar*.

For the respondents: *Linda R. Blumkin, Fried, Frank, Harris, Shriver & Jacobson*, New York, N.Y. *Edward R. Mandell, Parker, Chapin, Flattau & Klimpl*, New York, N.Y.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondents, Wright Medical Technology, Inc., a corporation subject to the jurisdiction of the Commission, Kidd, Kamm Equity Partners, L.P. ("KKEP"), a limited partnership subject to the jurisdiction of the Commission, KKEP's general partner, Kidd, Kamm Investments, L.P. ("KKI"), a limited partnership subject to the jurisdiction of the Commission, and KKI's general partner, Kidd, Kamm Investments, Inc. ("KKI, Inc."), a corporation subject to the jurisdiction of the Commission, have agreed to acquire all of the outstanding shares of common and convertible preferred stock issued by Orthomet, Inc., 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 ("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. THE RESPONDENTS

1. Respondent Wright Medical Technology, Inc. ("WMTI") is a corporation organized and existing under the laws of the State of Delaware, with its principal offices located at 5677 Airline Road, Arlington, Tennessee.

2. Respondent Kidd, Kamm Equity Partners, L.P. ("KKEP") is a limited partnership organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal offices located at Three Pickwick Plaza, Greenwich, Connecticut.

3. Respondent Kidd, Kamm Investments, L.P. ("KKI") is a limited partnership organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located c/o Kidd, Kamm & Company, 9454 Wilshire Boulevard, Suite 920, Beverly Hills, California.

4. Respondent Kidd, Kamm Investments, Inc. ("KKI, Inc.") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located c/o Kidd, Kamm & Company, 9454 Wilshire Boulevard, Suite 920, Beverly Hills, California.

5. For purposes of this proceeding, WMTI, KKEP, KKI, and KKI, Inc. 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 WMTI is a corporation, KKEP is a limited partnership, KKI is a limited partnership, and KKI, Inc. is a corporation whose businesses are in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

II. THE ACQUIRED COMPANY

6. Orthomet, Inc. ("Orthomet") is a corporation organized and existing under the laws of the State of Minnesota, with its principal offices located at 6301 Cecilia Circle, Minneapolis, Minnesota.

7. Orthomet is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton

Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. THE ACQUISITION

8. On or about October 15, 1994, WMTI and Orthomet entered into an Agreement and Plan of Merger whereby WMTI would make a cash tender offer for all the outstanding shares of common stock and for all the outstanding shares of convertible preferred stock issued by Orthomet for a total aggregate price of approximately \$66 million (the "Acquisition").

IV. THE RELEVANT MARKETS

9. The relevant lines of commerce in which to analyze the effects of the Acquisition are (i) manufacture and sale of orthopaedic implants used or intended for use in the human hand approved by the United States Food and Drug Administration ("FDA") for sale in the United States, and (ii) the research and development of orthopaedic implants used or intended for use in the human hand.

10. The relevant section of the country in which to analyze the effects of the Acquisition is the United States.

11. The relevant markets set forth in paragraphs nine and ten are highly concentrated, whether measured by Herfindahl-Hirschmann Indices ("HHI") or two-firm and four-firm concentration ratios.

12. Entry into the relevant markets is difficult.

13. Orthomet is a potential competitor of WMTI in the market for orthopaedic implants used or intended for use in the human hand approved by the FDA. WMTI and Orthomet are actual competitors in the market for the research and development of orthopaedic implants used or intended for use in the human hand.

V. EFFECTS OF THE ACQUISITION

14. The effects of the Acquisition may be substantially to lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the, Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, in the following ways, among others:

- a. Eliminate Orthomet as a potential competitor of WMTI in the market for orthopaedic implants used or intended for use in the human hand approved by the FDA;
- b. Increase the likelihood that WMTI will unilaterally exercise market power in the market for orthopaedic implants used or intended for use in the human hand approved by the FDA; and
- c. Eliminate actual competition between WMTI and Orthomet in the market for the research and development of orthopaedic implants used or intended for use in the human hand.

15. All of the above increase the likelihood that firms in the relevant markets will increase prices and restrict output both in the near future and in the long term.

VI. VIOLATIONS CHARGED

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

17. The acquisition described in paragraph eight, 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.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition of all the outstanding shares of common and convertible preferred stock of Orthomet, Inc. ("Orthomet") by Wright Medical Technology, Inc. ("WMTI"), a subsidiary of Kidd, Kamm Equity Partners, Inc. ("KKEP"), KKEP's general partner, Kidd, Kamm Investments, L.P. ("KKI"), and KKI's general partner, Kidd, Kamm Investments, Inc. ("KKI, Inc."), and the 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 respondent 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, 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, 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 a 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 described 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 WMTI is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 5677 Airline Road, Arlington, Tennessee.

2. Respondent KKEP is a limited partnership organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at Three Pickwick Plaza, Greenwich, Connecticut.

3. Respondent KKI is a limited partnership organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located c/o Kidd, Kamm & Company, 9454 Wilshire Boulevard, Suite 920, Beverly Hills, California.

4. Respondent KKI, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located c/o Kidd, Kamm & Company, 9454 Wilshire Boulevard, Suite 920, Beverly Hills, California.

5. 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.

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

A. "*WMTI*" means Wright Medical Technology, Inc., its subsidiaries, divisions, groups and affiliates controlled by WMTI, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

B. "*KKEP*" means Kidd, Kamm Equity Partners, L.P., its subsidiaries (including WMTI), divisions, groups and affiliates controlled by KKEP, and their respective general partners, directors, officers, employees, agents and representatives, and their respective successors and assigns.

C. "*KKI*" means Kidd, Kamm Investments, L.P., its subsidiaries, divisions, groups and affiliates controlled by KKI, and their respective general partners, directors, officers, employees, agents and representatives, and their respective successors and assigns.

D. "*KKI, Inc.*" means Kidd, Kamm Investments, Inc., its subsidiaries, divisions, groups and affiliates controlled by KKI, Inc., and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

E. "*Orthomet*" means Orthomet, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Minnesota, with its principal place of business located at 6301 Cecilia Circle, Minneapolis, Minnesota.

F. "*Respondents*" mean WMTI, KKEP, KKI, and KKI, Inc.

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

H. "*Acquisition*" means the acquisition by WMTI of outstanding shares of stock of Orthomet pursuant to a cash tender offer commenced on October 17, 1994.

I. "*Mayo*" means the Mayo Foundation for Medical Education and Research, a Minnesota Charitable Corporation, with its principal place of business located at 200 First Street SW, Rochester, Minnesota.

J. "*Mayo PIP Orthopaedic Finger Implant Design*" means the Mayo proximal interphalangeal prosthesis design together with modifications, enhancements, and improvements, whether or not

patentable, that is the subject of a technology license contract between Mayo and Orthomet dated as of December 24, 1992.

K. "*Mayo MCP Orthopaedic Finger Implant Design*" means the metacarpophalangeal prosthesis design developed as a cooperative effort between Mayo and Orthomet, together with modifications, enhancements, and improvements, whether or not patentable, that is the subject of a technology license contract between Mayo and Orthomet dated as of May 1, 1993.

L. "*Mayo CMC Orthopaedic Finger Implant Design*" means the carpometacarpal prosthesis design developed as a cooperative effort between Mayo and Orthomet, together with modifications, enhancements, and improvements, whether or not patentable, that is the subject of a technology license contract between Mayo and Orthomet dated as of May 1, 1993.

M. "*Licensed Inventions*" means (1) the Mayo PIP Orthopaedic Finger Implant Design, (2) the Mayo MCP Orthopaedic Finger Implant Design, and (3) the Mayo CMC Orthopaedic Finger Implant Design.

N. "*Technology License Contracts*" means the contracts between Mayo and Orthomet (1) relating to the Mayo PIP Orthopaedic Finger Implant Design and any amendments thereto, (2) relating to the Mayo MCP Orthopaedic Finger Implant Design and any amendments thereto, and (3) relating to the Mayo CMC Orthopaedic Finger Implant Design and any amendments thereto.

O. "*Orthopaedic Finger Implants*" means orthopaedic implants designed for use in the proximal interphalangeal joint, the metacarpophalangeal joint, and the carpometacarpal joint of the human hand.

P. "*Orthomet/Mayo Orthopaedic Finger Implant Business*" means Orthomet's or WMTI's business of researching and developing Orthopaedic Finger Implants for eventual commercialization based upon the Licensed Inventions.

Q. "*Orthomet/Mayo Orthopaedic Finger Implant Research Assets*" means all tangible and intangible assets constituting or otherwise relating to the Orthomet/Mayo Orthopaedic Finger Implant Business, including but not limited to:

1. All books, records, CAD files and other documents;
2. All data, materials, and information relating to the Orthomet/Mayo Orthopaedic Finger Implant Business, including, but

not limited to, FDA approvals for Orthopaedic Finger Implants, list of clinicians, clinical testing, surgical techniques and protocols, surgical instrumentation design development, and biomechanical materials;

3. All intellectual property, including, but not limited to, patents and patent applications, formulas, processes, technology, know-how, trade secrets, manufacturing information, specifications, plans, drawings, designs and data, product prototypes, and other tangible embodiments of know-how, including, but not limited to, the technology and know-how required to manufacture commercially acceptable products; and

4. All product testing and laboratory research data and samples, including, but not limited to, bench testing, wear testing, and materials testing.

R. "*Orthopaedic Finger Implant Licensee*" means the party or parties, other than respondents, to whom Mayo licenses the Licensed Inventions.

S. "*FDA*" means the United States Food and Drug Administration.

T. "*510(k) Application*" means an application made to the FDA pursuant to 21 U.S.C. 360(k), or successor provisions.

U. "*IDE Application*" means an application made to the FDA pursuant to 21 CFR 812.20, or successor provisions, for an investigational device exemption.

II.

It is further ordered, That:

A. Within five (5) days after the date this order becomes final, respondents shall:

1. Transfer to Mayo a full and complete copy of the Orthomet/Mayo Orthopaedic Finger Implant Research Assets;

2. Grant Mayo a license to such assets, where applicable, with full right of sublicense thereunder, in perpetuity; and

3. Make any and all such arrangements and transfers as are necessary to enable Mayo to license an Orthopaedic Finger Implant Licensee.

B. Upon reasonable notice and request from the Orthopaedic Finger Implant Licensee, respondents shall provide reasonable assistance to the Orthopaedic Finger Implant Licensee regarding the Orthomet/Mayo Orthopaedic Finger Implant Research Assets transferred pursuant to paragraph II.A of this order. Such assistance shall include consultation with knowledgeable employees of respondents at the Orthopaedic Finger Implant Licensee's facilities or at such other place as is mutually satisfactory to respondents and the Orthopaedic Finger Implant Licensee for a period of time sufficient to satisfy the Orthopaedic Finger Implant Licensee's management. However, respondents shall not be required to continue providing such assistance for more than six (6) months. Respondents may require reimbursement from the Orthopaedic Finger Implant Licensee for all the actual hourly cost of pay and benefits for respondents' personnel providing the assistance and, if travel is required, the travel cost and per diem subsistence incurred by respondents in providing the assistance to the Orthopaedic Finger Implant Licensee.

C. Pending the transfer (and licensing, where applicable) of Orthomet/Mayo Orthopaedic Finger Implant Research Assets, respondents shall take such actions as are necessary to maintain the viability and marketability of Orthomet/Mayo Orthopaedic Finger Implant Research Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of Orthomet/Mayo Orthopaedic Finger Implant Research Assets except for ordinary wear and tear.

III.

It is further ordered, That:

A. If respondents do not, within six (6) months of the date this order becomes final, obtain the Commission's approval for an Orthopaedic Finger Implant Licensee pursuant to the procedures set forth in Section 2.41(f) of the Commission's Rules of Practice, 16 CFR 2.41(f), respondents shall:

1. Take whatever steps are necessary to effect the immediate termination of the Technology License Contracts within five (5) days after the end of the six (6)-month period;
2. After the termination of the Technology License Contracts, refrain from entering into any agreement of any sort with Mayo

relating to the Licensed Inventions or to the Orthomet/Mayo Orthopaedic Finger Implant Research Assets; and

3. Within ten (10) days of the termination of the Technology License Contracts ordered in this paragraph, divest to Mayo absolutely and in good faith the Orthomet/Mayo Orthopaedic Finger Implant Research Assets and grant Mayo, where applicable, a license to such assets with full right of sublicense thereunder, in perpetuity. Respondents shall retain no interest or rights in the Orthomet/Mayo Orthopaedic Finger Implant Research Assets. Mayo shall have the exclusive power and authority to grant a license relating to the Licensed Inventions.

The purpose of licensing an Orthopaedic Finger Implant Licensee other than respondents is to ensure the continuation of the Orthomet/Mayo Orthopaedic Finger Implant Research Assets as an ongoing research project for Orthopaedic Finger Implants to be approved by the FDA for sale in the United States and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

B. Upon reasonable notice and request from the Orthopaedic Finger Implant Licensee, respondents shall provide reasonable assistance to the Orthopaedic Finger Implant Licensee regarding the Orthomet/Mayo Orthopaedic Finger Implant Research Assets divested pursuant to paragraph III.A of this order. Such assistance shall include consultation with knowledgeable employees of respondents at the Orthopaedic Finger Implant Licensee's facilities or at such other place as is mutually satisfactory to respondents and the Orthopaedic Finger Implant Licensee for a period of time sufficient to satisfy the Orthopaedic Finger Implant Licensee's management. However, respondents shall not be required to continue providing such assistance for more than six (6) months. Respondents may require reimbursement from the Orthopaedic Finger Implant Licensee for all the actual hourly cost of pay and benefits for respondents' personnel providing the assistance and, if travel is required, the travel cost and per diem subsistence incurred by respondents in providing the assistance to the Orthopaedic Finger Implant Licensee.

IV.

It is further ordered, That respondents shall not without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. For a period of ten (10) years from the date this order becomes final, acquire more than 1% of the stock, share capital, equity, or other interest in any concern, corporate or non-corporate, that (1) has filed a 510(k) Application or IDE Application relating to Orthopaedic Finger Implants or, within two (2) years prior to any such proposed acquisition, has announced publicly its intention to submit either of such applications, or (2) has received FDA approval relating to Orthopaedic Finger Implants.

B. For a period of ten (10) years from the date this order becomes final, acquire any assets (including, but not limited to, any technology, know-how, and other intellectual property) that relate to Orthopaedic Finger Implants (1) for which a 510 (k) Application or IDE Application has been filed or for which the intention to file such applications has been publicly announced within two (2) years prior to any such proposed acquisition, or (2) for which FDA approval has been received. The foregoing prohibition shall not apply to (i) the acquisition of materials, supplies, inventory, testing equipment or manufacturing equipment in the ordinary course of business, or (ii) the acquisition of product evaluations and product testing and laboratory research data (relating to Orthopaedic Finger Implants owned by respondents), including, but not limited to, bench testing, wear testing and materials testing, from outside laboratories, outside testing facilities or other third parties, in the ordinary course of respondents' business.

C. For a period of ten (10) years from the date the Technology License Contracts are terminated pursuant to paragraph III.A of this order, enter into any agreement with Mayo relating to Orthopaedic Finger Implants.

V.

It is further ordered, That,

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondents have fully complied with the provisions of paragraphs II and III of this order, respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with paragraphs II and III of this order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with these paragraphs of this order, including a description of all substantive contacts or negotiations undertaken by respondents, and assistance offered by respondents to Mayo for accomplishing the provision (and licensing, where applicable) of Orthomet/Mayo Orthopaedic Finger Implant Research Assets required by this order, including the identity of all parties contacted by respondents. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the requirements of paragraphs II and III of this order.

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 other times the Commission may require, respondents shall file with the Commission verified written reports setting forth in detail the manner and form in which they have complied and are complying with paragraph IV of this order.

VI.

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 consent order; and

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

VII.

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

VIII.

It is further ordered, That, notwithstanding any other provision of this order, this order shall terminate twenty (20) years from the date this order becomes final.

IN THE MATTER OF

IVAX CORPORATION

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-3565. Complaint, March 27, 1995--Decision, March 27, 1995

This consent order permits, among other things, IVAX, a Florida corporation, to acquire Zenith Laboratories, except for Zenith's rights to market or sell extended release generic verapamil under Zenith's exclusive distribution agreement with G.D. Searle & Co. Respondent is also required, for ten years, to obtain Commission approval before acquiring any stock in any entity that manufactures, or is an exclusive distributor for another manufacturer of, extended release generic verapamil in the United States.

Appearances

For the Commission: *Ann Malester* and *Melissa Heydenreich*.

For the respondent: *Armando A. Tabernilla*, in-house counsel,
Miami, FL.

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 ("Commission"), having reason to believe that IVAX Corporation ("IVAX"), hereinafter sometimes referred to as respondent, has agreed to acquire through a merger all of the voting stock of Zenith Laboratories, Inc. ("Zenith"), 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 ("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. DEFINITIONS

1. "FDA" means the United States Food & Drug Administration.