

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.

2. "*Isoptin SR*" means the sustained-release form of verapamil hydrochloride for which Knoll Pharmaceutical Company holds an approved New Drug Application.

3. "*Generic verapamil*" means any pharmaceutical drug receiving the therapeutic equivalence evaluation code "AB" by the FDA, which designates such product as being therapeutically equivalent to Isoptin SR.

II. RESPONDENT

4. Respondent IVAX is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 8800 N.W. 36th Street, Miami, Florida.

5. Respondent is, and at all times relevant to this proceeding 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.

6. Respondent manufactures and sells generic verapamil to wholesalers, retailers, mail order firms, hospitals, and managed care organizations.

III. ACQUIRED COMPANY

7. Zenith Laboratories, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 140 LeGrand Avenue, Northvale, New Jersey.

8. Zenith is, and at all times relevant to this proceeding 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.

9. At the time of the Acquisition described in paragraph ten of this complaint, Zenith was the exclusive distributor of generic verapamil for G.D. Searle & Co., which product it marketed and sold to wholesalers, retailers, mail order firms, hospitals, and managed care organizations.

IV. ACQUISITION

10. On or about August 26, 1994, IVAX and Zenith entered into an agreement whereby IVAX will acquire all of the voting securities of Zenith ("Acquisition").

V. THE RELEVANT MARKET

11. For purposes of this complaint, the relevant line of commerce in which to analyze the Acquisition is the sale of generic verapamil.

12. For purposes of this complaint, the relevant section of the country in which to analyze the Acquisition is the United States.

13. The relevant market set forth in paragraphs eleven and twelve is highly concentrated, whether measured by the Herfindahl-Hirschmann Index or two-firm concentration ratio.

14. Entry into the relevant market would not be timely, likely or sufficient to deter or counteract the adverse competitive effects described in paragraph sixteen of this complaint because it is difficult and time-consuming to develop a bioequivalent, sustained-release pharmaceutical drug and receive the necessary FDA approvals for it. In addition, generic drugs in development or awaiting FDA approval have no impact on approved generic-drug pricing until they have been approved by the FDA.

15. IVAX and Zenith are the only two companies that supply generic verapamil and as such are the only two actual competitors in the relevant market.

VI. EFFECTS OF THE ACQUISITION

16. The effects of the Acquisition if consummated may be substantially to lessen competition and to tend to create a monopoly in the relevant market 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. By eliminating direct actual competition between IVAX and Zenith;

b. By increasing the likelihood that IVAX will unilaterally exercise market power; and

c. By increasing the likelihood that generic verapamil customers will be forced to pay higher prices and/or endure having reduced amounts of generic verapamil available for purchase.

17. All of the above increase the likelihood that the only remaining firm in the relevant market will increase prices and restrict output both in the near future and in the long term.

VII. VIOLATIONS CHARGED

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

19. The acquisition described in paragraph ten, 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 by respondent of certain assets and businesses of the IVAX Corporation, and the respondent 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

Respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, 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 respondent

has 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 IVAX Corporation ("IVAX") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 8800 N.W. 36th Street, Miami, Florida.

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

A. "*Respondent*" or "*IVAX*" means IVAX Corporation, its subsidiaries, divisions, and groups and affiliates controlled by IVAX Corporation, their directors, officers, employees, agents, and representatives, and their successors and assigns.

B. "*Zenith*" means Zenith Laboratories, Inc., its subsidiaries, divisions, and groups and affiliates controlled by Zenith, their directors, officers, employees, agents, and representatives, and their successors and assigns.

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

D. "*Acquisition*" means the acquisition of all voting securities of Zenith by IVAX.

E. "*FDA*" means the United States Food & Drug Administration.

F. "*Isoptin SR*" means the sustained-release form of verapamil hydrochloride for which Knoll Pharmaceutical Company holds an approved New Drug Application.

G. "*Verapamil HCl*" means any pharmaceutical drug receiving the therapeutic equivalence evaluation code "AB" by the FDA, which designates such product as being therapeutically equivalent to Isoptin SR.

H. "*Searle Distribution Agreement*" means the agreement, dated March 7, 1994, between G.D. Searle & Co. ("Searle") and Zenith, pursuant to which Zenith is appointed the exclusive distributor of Verapamil HCl for Searle.

II.

It is further ordered, That, respondent shall not acquire, or otherwise obtain, any rights to market or sell Verapamil HCl pursuant to the Searle Distribution Agreement.

III.

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

A. Acquire any stock, share capital, equity or other interest in any concern, corporate or non-corporate, engaged at the time of such acquisition in, or within the two (2) years preceding such acquisition engaged in, the manufacture of Verapamil HCl in the United States, or any concern that is an exclusive distributor of Verapamil HCl in the United States for a manufacturer of Verapamil HCl; provided, however, that each pension, benefit, or welfare plan or trust controlled by respondent may acquire, for investment purposes only, an interest of not more than two (2) percent of the stock or share capital of such person or concern; and further provided, however, that an acquisition will be exempt from the requirements of this paragraph III.A. if it is solely for the purposes of investment and respondent will hold cumulatively no more than two (2) percent of the shares of any class of security;

B. Acquire any assets used in or previously used in (and still suitable for use in) the manufacture of Verapamil HCl in the United States; provided, however, that this paragraph III.B. shall not apply

to any acquisition of goods, services, or equipment in the ordinary course of business;

C. Enter into any agreement with a manufacturer of Verapamil HCl granting respondent the exclusive right to distribute such manufacturer's Verapamil HCl for resale.

IV.

It is further ordered, That one year (1) 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, respondent shall file a verified written report setting forth in detail the manner and form in which it has complied and is complying with this order.

V.

It is further ordered, That respondent 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.

VI.

It is further ordered, That, for the purpose of determining or securing compliance with this order, subject to any legally recognized privilege and upon written request with reasonable notice, respondent 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 respondent relating to any matters contained in this order; and

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

Modifying Order

119 F.T.C.

IN THE MATTER OF

INTERCO INCORPORATED, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE
CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-2929. Consent Order, Sept. 26, 1978--Modifying Order, March 27, 1995*

The order reopens a 1978 consent order (92 FTC 405) that settled allegations that the respondents had engaged in anticompetitive practices, including illegally fixing resale prices for their products. This order modifies the consent order so that the respondents are permitted to implement lawful price-restrictive cooperative advertising programs and to unilaterally terminate resellers for failure to adhere to previously announced resale prices or sales periods.

ORDER GRANTING IN PART AND DENYING IN PART REQUEST TO
REOPEN AND MODIFY ORDER ISSUED SEPTEMBER 26, 1978

On October 26, 1994, London Fog Industries, Inc. ("London Fog"), as successor to Londontown Corporation, filed its Petition to Reopen Proceedings and Modify Consent Order ("Petition") in Docket No. C-2929, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Federal Trade Commission's Rules of Practice, 16 CFR 2.51. London Fog asks the Commission to reopen and modify the consent order issued by the Commission on September 26, 1978 ("order"), in *Interco Inc.*, 92 FTC 405 (1978).¹

In its Petition, London Fog asks the Commission to reopen the order and modify provisions that limit London Fog's ability to restrict the prices advertised by its dealers for London Fog apparel and unilaterally to terminate a dealer for failure to adhere to previously announced resale prices. In support of its Petition, London Fog maintains that reopening and modification is warranted by the public interest.² London Fog's Petition was placed on the public record for thirty days; one comment was received. For the reasons discussed below, the Commission has determined to reopen and modify the order.

¹ The order previously was reopened and modified in 1986, *Interco, Inc.*, 108 FTC 133 (1986) (deleting paragraphs II.1 and II.2 applicable to footwear), and in 1988, *Interco, Inc.*, 110 FTC 153 (1988) (deleting prohibition on preticketing with suggested resale prices).

² London Fog does not claim that reopening is required by changed conditions of law or fact.