

Complaint

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IN THE MATTER OF

## PRECISION CASTPARTS CORP., 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-3904. Complaint, Nov. 9, 1999--Decision, Dec. 17, 1999*

This consent order, among other things, requires two corporations, that develop and manufacture aerospace cast components, to divest certain assets, in the time-frame specified, to a Commission-approved acquirer.

*Participants*

For the Commission: *Matthew Reilly, Nicholas Koberstein, Ann Malester, Richard Parker, Jeremy Bulow, Daniel O'Brien and Curtis Wagner.*

For the respondents: *Jeffrey Brennan, Collier, Shannon, Rill & Scott, Washington, D.C. and J. Anthony Downs, Goodwin, Proctor & Hoar, Boston, MA.*

## COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent Precision Castparts Corp. ("PCC"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire 100 percent of the voting securities of respondent Wyman-Gordon Company ("Wyman-Gordon"), a company 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 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. "*Aerospace Investment Cast Components*" means dimensionally precise metal components manufactured using the investment casting process that are used primarily in aerospace jet engine and aerospace airframe applications.

2. "*Titanium Aerospace Investment Cast Components*" means Aerospace Investment Cast Components manufactured using titanium alloy.

3. "*Large Stainless Steel Aerospace Investment Cast Components*" means Aerospace Investment Cast Components with a diameter greater than 24 inches manufactured using stainless steel.

4. "*Large Nickel-based Superalloy Aerospace Investment Cast Components*" means Aerospace Investment Cast Components with a diameter greater than 24 inches manufactured using nickel-based superalloy.

5. "*Merger Agreement*" means the Agreement and Plan of Merger Among Precision Castparts Corp., WGC Acquisition Corp., and Wyman-Gordon Company, dated May 17, 1999.

6. "*Respondents*" means PCC and Wyman-Gordon.

## II. RESPONDENTS

7. Respondent PCC is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Oregon, with its office and principal place of business located at 4650 S.W. Macadam Avenue, Suite 440, Portland, Oregon.

8. Respondent Wyman-Gordon is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 244 Worcester Street, Grafton, Massachusetts.

9. Respondent Wyman-Gordon, through a joint venture with Titanium Metals Corporation, and respondent PCC are engaged in, among other things, the development, manufacture, and sale of Titanium Aerospace Investment Cast Components.

10. Respondent Wyman-Gordon and respondent PCC are engaged in, among other things, the development, manufacture, and sale of Large Stainless Steel and Large Nickel-based Superalloy Aerospace Investment Cast Components.

11. 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 are in or affect commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

## III. THE ACQUISITION

12. On May 17, 1999, PCC and Wyman-Gordon entered into the Merger Agreement under which PCC is to acquire through a cash

tender offer 100 percent of the voting securities of Wyman-Gordon valued at approximately \$721 million ("Acquisition").

#### IV. THE RELEVANT MARKETS

13. For purposes of this complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are:

- a. The development, manufacture, and sale of Titanium Aerospace Investment Cast Components;
- b. The development, manufacture, and sale of Large Stainless Steel Aerospace Investment Cast Components; and
- c. The development, manufacture, and sale of Large Nickel-based Superalloy Aerospace Investment Cast Components.

14. For purposes of this complaint, the world is the relevant geographic area in which to analyze the effects of the Acquisition in the relevant lines of commerce.

#### V. STRUCTURE OF THE MARKETS

15. The market for the development, manufacture, and sale of Titanium Aerospace Investment Cast Components is highly concentrated as measured by the Herfindahl-Hirschman Index. PCC and Wyman-Gordon are two of four significant suppliers of Titanium Aerospace Investment Cast Components in the world.

16. The market for the development, manufacture, and sale of Large Stainless Steel Aerospace Investment Cast Components is highly concentrated as measured by the Herfindahl-Hirschman Index. PCC and Wyman-Gordon are two of six significant suppliers of Large Stainless Steel Aerospace Investment Cast Components in the world.

17. The market for the development, manufacture, and sale of Large Nickel-based Superalloy Aerospace Investment Cast Components is highly concentrated as measured by the Herfindahl-Hirschman Index. PCC and Wyman-Gordon are two of four significant suppliers of Large Nickel-based Superalloy Aerospace Investment Cast Components in the world.

#### VI. BARRIERS TO ENTRY

18. Entry into each relevant market is difficult and would not occur in a timely manner to deter or counteract the adverse competitive effects described in paragraph 19 because of the time required to acquire a manufacturing facility and the necessary

specialized equipment, to develop the necessary engineering and process technology, and to obtain the customer-required certifications and approvals that are necessary to develop, manufacture, and sell Titanium, Large Stainless Steel, and Large Nickel-based Superalloy Aerospace Investment Cast Components.

#### VII. EFFECTS OF THE ACQUISITION

19. The effects of the Acquisition, if consummated, 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, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45, in the following ways, among others:

(a) By eliminating the actual, direct, and substantial competition between PCC and Wyman-Gordon in the relevant markets for the development, manufacture, and sale of Titanium, Large Stainless Steel, and Large Nickel-based Superalloy Aerospace Investment Cast Components;

(b) By increasing the likelihood of unilateral anticompetitive effects in the relevant markets for the development, manufacture, and sale of Titanium, Large Stainless Steel, and Large Nickel-based Superalloy Aerospace Investment Cast Components;

(c) By increasing the likelihood of coordinated interaction in the relevant markets for the development, manufacture, and sale of Titanium, Large Stainless Steel, and Large Nickel-based Superalloy Aerospace Investment Cast Components;

(d) By increasing the likelihood that customers of Titanium, Large Stainless Steel, and Large Nickel-based Superalloy Aerospace Investment Cast Components would be forced to pay higher prices; and

(e) By reducing innovation in the relevant markets for the development, manufacture, and sale of Titanium, Large Stainless Steel, and Large Nickel-based Superalloy Aerospace Investment Cast Components.

#### VIII. VIOLATIONS CHARGED

20. The Merger Agreement described in paragraph 12 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

21. The Acquisition described in paragraph 12, 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.

#### ORDER TO HOLD SEPARATE

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by Respondent Precision Castparts Corp. ("PCC") of all of the outstanding shares of Respondent Wyman-Gordon Company ("Wyman-Gordon"), and Respondents having been furnished thereafter with a copy of a draft of Complaint which 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, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent 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 Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having determined to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of thirty (30) days, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Hold Separate:

1. Respondent PCC is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Oregon, with its office and principal place of business located at 4650 S.W. Macadam Avenue, Suite 440, Portland, Oregon.

2. Respondent Wyman-Gordon is a corporation organized, existing, and doing business under and by virtue of the laws of the

Commonwealth of Massachusetts, with its office and principal place of business located at 244 Worcester Street, Grafton, Massachusetts.

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. "*PCC*" means Precision Castparts Corp., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, including Wyman-Gordon after the Acquisition, divisions, groups and affiliates controlled by PCC, and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

B. "*Wyman-Gordon*" means Wyman-Gordon Company, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Wyman-Gordon, and the respective directors, officers, employees, agents and representatives, successors, and assigns of each; "*Wyman-Gordon*" includes Wyman-Gordon Titanium Castings, LLC, the joint venture with Titanium Metals Corporation through which Wyman-Gordon conducts its Titanium Aerospace Investment Cast Components business.

C. "*Respondents*" means PCC and Wyman-Gordon, individually and collectively.

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

E. "*Doncasters*" means Doncasters plc, a corporation organized, existing, and doing business under and by virtue of the laws of the United Kingdom, with its office and principal place of business located at 28-30 Derby Road, Melbourne, Derbyshire, United Kingdom.

F. "*Acquisition*" means the proposed acquisition by PCC of all the voting securities of Wyman-Gordon.

G. "*Investment Casting*" means a method of manufacturing metal components, whereby a wax model of the metal component is dipped into a ceramic slurry which dries to form a ceramic shell. The wax is then removed using a special furnace, leaving a cavity within the ceramic shell into which molten metal is poured. Once the metal

cools, the ceramic shell is removed producing dimensionally precise metal components.

H. "*Aerospace Investment Cast Components*" means dimensionally precise metal components manufactured using the Investment Casting process that are used primarily in aerospace jet engine and aerospace airframe applications.

I. "*Titanium Aerospace Investment Cast Components*" means Aerospace Investment Cast Components manufactured using titanium alloy.

J. "*Albany Facility*" means Wyman-Gordon's Investment Casting manufacturing plant located at 150 Queen Avenue SW, Albany, Oregon, and all assets used in the production of Titanium Aerospace Investment Cast Components at the Albany Facility.

K. "*Groton Large Parts Facility*" means Wyman-Gordon's Investment Casting manufacturing plant located at 839 Poquonnock Road, Groton, Connecticut, identified by Wyman-Gordon for internal accounting purposes as Plant 08, and all assets used in the production of Aerospace Investment Cast Components at the Groton Large Parts Facility included in the Groton Divestiture Agreement, as defined in paragraph I.U. in the Decision & Order.

L. "*Groton Facility*" means Wyman-Gordon's Investment Casting manufacturing plants, referred to internally by Wyman-Gordon as Plant 08 and Plant 02, located at 839 Poquonnock Road, Groton, Connecticut, and all assets used in the production of Aerospace Investment Cast Components at the Groton Facility.

M. "*Albany Facility Assets*" means all assets, properties, businesses and goodwill, tangible and intangible, of Wyman-Gordon used in the development, manufacture and sale of Titanium Aerospace Investment Cast Components at the Albany Facility, including, without limitation, the following:

1. All owned or leased real property and improvements, buildings, plants, manufacturing operations, machinery, fixtures, equipment, furniture, tools and other tangible personal property located in Wyman-Gordon's Albany Facility;

2. All intellectual property, inventions, technology, trademarks, trade names, trade secrets, copyrights, Manufacturing Know-How, as defined in Paragraph I.L. of the Decision & Order, research material, technical information, management information systems, software specifications, designs, drawings, processes and quality control data;

provided, however, that this does not include any rights in the name "Wyman-Gordon";

3. All customer lists, vendor lists, catalogs, sales promotion literature and advertising materials; inventory and storage capacity; rights, titles and interests in and to owned or leased real property, together with appurtenances, licenses and permits;

4. All rights, titles and interests in and to contracts relating to the development, manufacture and sale of any Titanium Aerospace Investment Cast Component; all rights, titles and interests 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, consignees;

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

6. All books, records and files, and all items of prepaid expense; and

7. All Sales and Service Operations.

N. "*Groton Large Parts Facility Assets*" means all assets, properties, businesses and goodwill, tangible and intangible, of Wyman-Gordon used in the development, manufacture and sale of Aerospace Investment Cast Components at the Groton Large Parts Facility, including, without limitation, the following:

1. All owned or leased real property and improvements, buildings, plants, manufacturing operations, machinery, fixtures, equipment, furniture, tools and other tangible personal property located in Wyman-Gordon's Groton Large Parts Facility;

2. All intellectual property, inventions, technology, trademarks, trade names, trade secrets, copyrights, Manufacturing Know-How, research material, technical information, management information systems, software specifications, designs, drawings, processes and quality control data; provided, however, that this does not include any rights in the name "Wyman-Gordon";

3. All customer lists, vendor lists, catalogs, sales promotion literature and advertising materials; inventory and storage capacity; rights, titles and interests in and to owned or leased real property, together with appurtenances, licenses and permits;



4. All rights, titles and interests in and to contracts relating to the development, manufacture and sale of any Aerospace Investment Cast Component; all rights, titles and interests 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, consignees;

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

6. All books, records and files, and all items of prepaid expense;  
and

7. All Sales and Service Operations.

O. "*Groton Facility Assets*" means all assets, properties, businesses and goodwill, tangible and intangible, used in the development, manufacture and sale of Aerospace Investment Cast Components at the Groton Facility, including, without limitation, the following:

1. All owned or leased real property and improvements, buildings, plants, manufacturing operations, machinery, fixtures, equipment, furniture, tools and other tangible personal property located in Wyman-Gordon's Groton Facility;

2. All intellectual property, inventions, technology, trademarks, trade names, trade secrets, copyrights, Manufacturing Know-How, research material, technical information, management information systems, software specifications, designs, drawings, processes and quality control data; provided, however, that this does not include any rights in the name "Wyman-Gordon";

3. All customer lists, vendor lists, catalogs, sales promotion literature and advertising materials; inventory and storage capacity; rights, titles and interests in and to owned or leased real property, together with appurtenances, licenses and permits;

4. All rights, titles and interests in and to contracts relating to the development, manufacture and sale of any Aerospace Investment Cast Component; all rights, titles and interests 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, consignees;

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

6. All books, records and files, and all items of prepaid expense;  
and

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## 7. All Sales and Service Operations.

P. "*Sales and Service Operations*" means all of Wyman-Gordon's assets, properties, business and goodwill, tangible and intangible, used in the sale or service of Wyman-Gordon's Aerospace Investment Cast Components business at either the Albany Facility, the Groton Large Parts Facility, or the Groton Facility, as applicable.

Q. "*Material Confidential Information*" means competitively sensitive or proprietary information not independently known to an entity from sources other than the entity to which the information pertains, and includes, but is not limited to, all customer lists, price lists, marketing methods, patents, technologies, processes, Manufacturing Know-How, or other trade secrets.

R. "*Key Employees*" means the employees listed in Appendix A to the Decision & Order.

## II.

*It is further ordered, That:*

A. Respondents shall hold the Albany Facility Assets as a separate and independent business, except to the extent that Respondents must exercise direction and control over the Albany Facility Assets to assure compliance with this Order to Hold Separate, or with the Consent Agreement, and except as otherwise provided in this Order to Hold Separate, and shall vest the Albany Facility with all powers and authorities necessary to conduct its business. The purpose of this Order is to: (i) preserve the Albany Facility as a viable, competitive, and ongoing Titanium Aerospace Investment Cast Components business, independent of Respondents, until divestiture is achieved; (ii) assure that no Material Confidential Information is exchanged between Respondents and the Albany Facility; and (iii) prevent interim harm to competition pending divestiture and other relief.

B. Respondents shall hold the Albany Facility Assets separate and independent on the following terms and conditions:

1. The Commission at any time may appoint an Independent Auditor to monitor Respondents' compliance with Paragraph II. of this Order to Hold Separate, and Respondents shall give the Independent Auditor, if one is appointed, all powers and authority necessary to effectuate his/her responsibilities pursuant to this Order to Hold Separate.

2. If an Independent Auditor is appointed by the Commission for the Albany Facility Assets, Respondents shall consent to the following procedures:

a. The Commission shall select the Independent Auditor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Independent Auditor shall be a person with experience necessary to perform his or her duties. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Independent Auditor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Independent Auditor, Respondents shall be deemed to have consented to the selection of the proposed Independent Auditor.

b. Within ten (10) days after appointment of the Independent Auditor, Respondents shall execute an Independent Auditor agreement that, subject to the prior approval of the Commission, transfers to the Independent Auditor all rights and powers necessary to permit the Independent Auditor to perform his or her duties.

c. The Independent Auditor shall have full and complete access to all personnel, books, records, documents and facilities of Respondents or to any other relevant information relating to the Albany Facility Assets, as the Independent Auditor may reasonably request, including but not limited to all documents and records kept in the normal course of business that relate to the Albany Facility Assets. Respondents shall develop such financial or other information as the Independent Auditor may reasonably request and shall cooperate with the Independent Auditor. Respondents shall take no action to interfere with or impede the Independent Auditor's ability to perform his/her responsibilities consistent with the terms of this Order to Hold Separate or to monitor Respondents' compliance with this Order to Hold Separate.

d. The Independent Auditor shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonable and necessary to carry out the Independent Auditor's duties and responsibilities. The Independent Auditor shall account for all expenses incurred, including fees for his/her services, subject to the approval of the Commission.

e. Respondents may require the Independent Auditor to sign a confidentiality agreement prohibiting the disclosure of any Material

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Confidential Information gained as a result of his or her role as Independent Auditor to anyone other than the Commission.

3. Respondents shall appoint, subject to the approval of the Independent Auditor, three (3) individuals from among the current employees of Wyman-Gordon working in the management, sales, marketing, or financial operations of the Titanium Aerospace Investment Cast Components business at the Albany Facility to manage and maintain the Albany Facility Assets. The Management Team, in its capacity as such, shall report directly and exclusively to the Independent Auditor, and shall manage the Albany Facility Assets independently of the management of Respondents. The Management Team shall not be involved in any way in the operations of the businesses of Respondents, other than the Titanium Aerospace Investment Cast Components business at the Albany Facility, during the hold separate period.

4. Respondents shall not change the composition of the management of the Albany Facility, except that the Management Team shall be permitted to remove management employees for cause subject to approval of the Independent Auditor. The Independent Auditor shall have the power to remove members of the Management Team for cause and to require Respondents to appoint replacement members to the Management Team in the same manner as provided in subparagraph II.B.3. of this Order to Hold Separate.

5. The Independent Auditor shall have responsibility, through the Management Team, for managing the Albany Facility Assets consistent with the terms of this Order to Hold Separate; for maintaining the independence of the Albany Facility Assets consistent with the terms of this Order to Hold Separate and the Consent Agreement; and for assuring Respondents' compliance with their obligations pursuant to this Order to Hold Separate.

6. The Albany Facility shall be staffed with sufficient employees to maintain the viability and competitiveness of that facility. Employees of the Albany Facility shall include: (i) all personnel employed by the Albany Facility as of the date the Commission accepts the Consent Agreement for public comment; and (ii) those persons hired from other sources. The Management Team, with the approval of the Independent Auditor, shall have the authority to replace employees who have otherwise left their positions with the Albany Facility since January 1, 1999. To the extent that employees

of the Albany Facility leave the Albany Facility prior to the divestiture of the Albany Facility Assets, the Management Team, with the approval of the Independent Auditor, may replace the departing employees of the Albany Facility with persons who have similar experience and expertise.

7. Respondents shall cause the Independent Auditor, each member of the Management Team, and each employee of the Albany Facility to submit to the Commission a signed statement that the individual will maintain the confidentiality required by the terms and conditions of this Order to Hold Separate. These individuals must retain and maintain all Material Confidential Information relating to the held separate business on a confidential basis and, except as is permitted by this Order to 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 of Respondents' businesses other than the Albany Facility business. These persons shall not be involved in any way in the management, sales, marketing, and financial operations of the competing products of Respondents.

8. Respondents shall establish written procedures to be approved by the Independent Auditor covering the management, maintenance, and independence of the Albany Facility Assets consistent with the provisions of this Order to Hold Separate.

9. Respondents shall circulate to employees of the Albany Facility and to Respondents' employees who are responsible for the operation or marketing of Titanium Aerospace Investment Cast Components in the United States, a notice of this Order to Hold Separate and Consent Agreement, in the form attached as Attachment A.

10. The Independent Auditor, if one is appointed, and the Management Team shall serve, without bond or other security, at the cost and expense of Respondents, on reasonable and customary terms commensurate with the person's experience and responsibilities. Respondents shall indemnify the Independent Auditor and the Management Team, and hold the Independent Auditor and the Management Team harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Independent Auditor's or the Management Team'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

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that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Independent Auditor or the Management Team.

11. Respondents shall provide the Albany Facility with sufficient working capital to operate the Albany Facility at least at current rates of operation, to meet all capital calls with respect to the Albany Facility and to carry on, at least at their scheduled pace, all capital projects for the Albany Facility that are ongoing or approved as of January 1, 1999. In addition, Respondents shall continue, at least at their scheduled pace, any additional expenditures for the Albany Facility authorized prior to the date this Order to Hold Separate is signed by Respondents. During the period this Order to Hold Separate is effective, Respondents shall make available for use by the Albany Facility funds sufficient to perform all necessary routine maintenance to, and replacements of, assets of the Albany Facility. Respondents shall provide the Albany Facility with such funds as are necessary to maintain the viability, competitiveness, and marketability of the Albany Facility Assets until the date the divestiture is completed, provided the Albany Facility may not assume any new long-term debt except as necessary to meet a competitive threat and as approved by the Independent Auditor.

12. Respondents shall continue to provide the same support services to the Albany Facility Assets as are being provided to such assets by Wyman-Gordon as of the date this Order to Hold Separate is signed by Respondents. Respondents may charge the Albany Facility the same fees, if any, charged by Respondents for such support services as of the date this Order to Hold Separate is signed by Respondents. Respondents' personnel providing such support services must retain and maintain all Material Confidential Information of the Albany Facility Assets on a confidential basis, and, except as is permitted by this Order to Hold Separate, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any person whose employment involves any of Respondents' businesses, other than the Titanium Aerospace Investment Cast Components business at the Albany Facility. Such personnel shall also execute confidentiality agreements prohibiting the disclosure of any Material Confidential Information of the Albany Facility Assets.

13. Except as provided in this Order to Hold Separate, Respondents shall not employ or make offers of employment to

employees of the Albany Facility during the hold separate period. The acquirer of the Albany Facility Assets shall have the option of offering employment to the Albany Facility employees. After the hold separate period, Respondents may offer employment to Albany Facility employees who have not been offered employment or have been terminated by the acquirer of the Albany Facility Assets. Respondents shall not interfere with the employment of employees of the Albany Facility by the acquirer of the Albany Facility Assets; shall not offer any incentive to said employees to decline employment with the acquirer of the Albany Facility Assets or accept other employment with Respondents; and shall remove any impediments that may deter employees of the Albany Facility from accepting employment with the acquirer of the Albany Facility Assets including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with the Albany Facility that would affect the ability of employees of the Albany Facility to be employed by the acquirer of the Albany Facility Assets.

14. For a period of one (1) year commencing on the date the Albany Facility Assets are divested, Respondents shall not employ or make offers of employment to any Key Employee of the Albany Facility who has been offered employment with the acquirer of the Albany Facility Assets unless such individual has been terminated by the acquirer of the Albany Facility Assets.

15. Notwithstanding subparagraph II.B.14., Respondents may offer a bonus or severance to those Key Employees of the Albany Facility that continue their employment with the Albany Facility until the date that the Albany Facility Assets are divested.

16. Respondents shall not exercise direction or control over, or influence directly or indirectly, the Albany Facility Assets, the Independent Auditor, the Management Team, or any of its operations; provided, however, that Respondents may exercise only such direction and control over the Albany Facility Assets as are necessary to assure compliance with this Order to Hold Separate or the Consent Agreement, or with all applicable laws.

17. Except for the Management Team and except to the extent provided in subparagraphs II.B.12. and II.B.16., Respondents shall not permit any non-Albany Facility employees, officers, or directors to be involved in the operations of the Albany Facility Assets.

18. Respondents shall maintain the viability, competitiveness, and marketability of the Albany Facility Assets; shall not sell, transfer, or

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encumber any of the Albany Facility Assets (other than in the normal course of business); and shall not cause or permit the destruction, removal, wasting, or deterioration, or otherwise impair the viability, competitiveness, or marketability of the Albany Facility Assets.

19. If the Independent Auditor ceases to act or fails to act diligently and consistent with the purposes of this Order to Hold Separate, the Commission may appoint a substitute Independent Auditor in the same manner as provided in Paragraph II.B.1. of this Order to Hold Separate.

20. Until the divestiture of the Albany Facility Assets is accomplished, Respondents shall ensure that Albany Facility employees continue to be paid their salaries, all accrued bonuses, pensions and other accrued benefits to which such employees would otherwise have been entitled had they remained in the employment of Wyman-Gordon during the hold separate period.

21. Except as required by law, and except to the extent that necessary information is exchanged in the course of consummating the Acquisition, defending investigations, defending or prosecuting litigation, obtaining legal advice, negotiating agreements to divest assets pursuant to the Consent Agreement, or complying with this Order to Hold Separate or the Consent Agreement, Respondents shall not receive or have access to, or use or continue to use, any Material Confidential Information, not in the public domain, about the Albany Facility Assets. Respondents may receive, on a regular basis, aggregate financial information relating to the Albany Facility necessary to allow Respondents to prepare United States consolidated financial reports and tax returns. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph.

22. Within thirty (30) days after the date Respondents sign the Consent Agreement and every thirty (30) days thereafter until the Order to Hold Separate terminates, the Independent Auditor or the Management Team shall report in writing to the Commission concerning the efforts to accomplish the purposes of this Order to Hold Separate. Included within that report shall be the Independent Auditor's or the Management Team's assessment of the extent to which the Albany Facility is meeting (or exceeding) its projected goals as are reflected in operating plans, budgets, projections or any other regularly prepared financial statements.



## III.

*It is further ordered,* That until the date the Commission issues the Decision & Order, Respondents shall take such actions as are necessary to maintain the viability and marketability of the Groton Facility Assets, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Groton Facility Assets except for ordinary wear and tear.

## IV.

*It is further ordered,* That:

A. If the Groton Large Parts Facility Assets are not divested to Doncasters pursuant to Paragraph IV.A.1. of the Decision & Order, or if the Commission orders rescission of the Groton Divestiture Agreement with Doncasters pursuant to Paragraph 12 of the Consent Agreement, Respondents shall hold the Groton Facility Assets as a separate and independent business, except to the extent that Respondents must exercise direction and control over the Groton Facility Assets to assure compliance with this Order to Hold Separate, or with the Consent Agreement, and except as otherwise provided in this Order to Hold Separate, and shall vest the Groton Facility with all powers and authorities necessary to conduct its business. The purpose of this Order is to: (i) preserve the Groton Facility as a viable, competitive, and ongoing Aerospace Investment Cast Components business, independent of Respondents, until divestiture is achieved; (ii) assure that no Material Confidential Information is exchanged between Respondents and the Groton Facility; and (iii) prevent interim harm to competition pending divestiture and other relief.

B. Respondents shall hold the Groton Facility Assets separate and independent on the following terms and conditions:

1. The Commission at any time may appoint an Independent Auditor to monitor Respondents' compliance with Paragraph IV. of this Order to Hold Separate, and Respondents shall give the Independent Auditor, if one is appointed, all powers and authority necessary to effectuate his/her responsibilities pursuant to this Order to Hold Separate. The Independent Auditor for the Groton Facility may be the same person as the Independent Auditor appointed by the

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Commission for the Albany Facility Assets pursuant to Paragraph II.B.1. of this Order to Hold Separate.

2. If an Independent Auditor is appointed by the Commission for the Groton Facility Assets, Respondents shall consent to the following procedures:

a. The Commission shall select the Independent Auditor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Independent Auditor shall be a person with experience necessary to perform his or her duties. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Independent Auditor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Independent Auditor, Respondents shall be deemed to have consented to the selection of the proposed Independent Auditor.

b. Within ten (10) days after appointment of the Independent Auditor, Respondents shall execute an Independent Auditor agreement that, subject to the prior approval of the Commission, transfers to the Independent Auditor all rights and powers necessary to permit the Independent Auditor to perform his or her duties.

c. The Independent Auditor shall have full and complete access to all personnel, books, records, documents and facilities of Respondents or to any other relevant information relating to the Groton Facility Assets, as the Independent Auditor may reasonably request, including but not limited to all documents and records kept in the normal course of business that relate to the Groton Facility Assets. Respondents shall develop such financial or other information as the Independent Auditor may reasonably request and shall cooperate with the Independent Auditor. Respondents shall take no action to interfere with or impede the Independent Auditor's ability to perform his/her responsibilities consistent with the terms of this Order to Hold Separate or to monitor Respondents' compliance with this Order to Hold Separate.

d. The Independent Auditor shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonable and necessary to carry out the Independent Auditor's duties and responsibilities. The Independent Auditor shall account for all

expenses incurred, including fees for his/her services, subject to the approval of the Commission.

e. Respondents may require the Independent Auditor to sign a confidentiality agreement prohibiting the disclosure of any Material Confidential Information gained as a result of his or her role as Independent Auditor to anyone other than the Commission.

3. Respondents shall appoint, subject to the approval of the Independent Auditor, three (3) individuals from among the current employees of Wyman-Gordon working in the management, sales, marketing, or financial operations of the Aerospace Investment Cast Components business at the Groton Facility, to manage and maintain the Groton Facility Assets. This additional Management Team, in its capacity as such, shall report directly and exclusively to the Independent Auditor, and shall manage the Groton Facility Assets independently of the management of Respondents. The Groton Management Team shall not be involved in any way in the operations of the businesses of Respondents, other than the Aerospace Investment Cast Components business at the Groton Facility, during the hold separate period.

4. Respondents shall not change the composition of the management of the Groton Facility, except that the Management Team shall be permitted to remove management employees for cause subject to the approval of the Independent Auditor. The Independent Auditor shall have the power to remove members of the Management Team for cause and to require Respondents to appoint replacement members to the Management Team in the same manner as provided in subparagraph IV.B.3. of this Order to Hold Separate.

5. The Independent Auditor shall have responsibility, through the Management Team, for managing the Groton Facility Assets consistent with the terms of this Order to Hold Separate; for maintaining the independence of the Groton Facility Assets consistent with the terms of this Order to Hold Separate and the Consent Agreement; and for assuring Respondents' compliance with their obligations pursuant to this Order to Hold Separate.

6. The Groton Facility shall be staffed with sufficient employees to maintain the viability and competitiveness of that facility. Employees of the Groton Facility shall include: (i) all personnel employed by the Groton Facility as of the date the Commission accepts the Consent Agreement for public comment; and (ii) those

persons hired from other sources. The Management Team, with the approval of the Independent Auditor, shall have the authority to replace employees who have otherwise left their positions with the Groton Facility since January 1, 1999. To the extent that employees of the Groton Facility leave the Groton Facility prior to the divestiture of the Groton Facility Assets, the Management Team, with the approval of the Independent Auditor, may replace the departing employees of the Groton Facility with persons who have similar experience and expertise.

7. Respondents shall cause the Independent Auditor, each member of the Management Team, and each employee of the Groton Facility to submit to the Commission a signed statement that the individual will maintain the confidentiality required by the terms and conditions of this Order to Hold Separate. These individuals must retain and maintain all Material Confidential Information relating to the held separate business on a confidential basis and, except as is permitted by this Order to 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 of Respondents' businesses other than the Groton Facility business. These persons shall not be involved in any way in the management, sales, marketing, and financial operations of the competing products of Respondents.

8. Respondents shall establish written procedures to be approved by the Independent Auditor covering the management, maintenance, and independence of the Groton Facility Assets consistent with the provisions of this Order to Hold Separate.

9. Respondents shall circulate to employees of the Groton Facility and to Respondents' employees who are responsible for the operation or marketing of Aerospace Investment Cast Components in the United States, a notice of this Order to Hold Separate and Consent Agreement, in the form attached as Attachment B.

10. The Independent Auditor, if one is appointed, and the Management Team shall serve, without bond or other security, at the cost and expense of Respondents, on reasonable and customary terms commensurate with the person's experience and responsibilities. Respondents shall indemnify the Independent Auditor and the Management Team, and hold the Independent Auditor and the Management Team harmless against any losses, claims, damages,

liabilities, or expenses arising out of, or in connection with, the performance of the Independent Auditor's or the Management Team'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 losses, claims, damages, liabilities or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Independent Auditor or the Management Team.

11. Respondents shall provide the Groton Facility with sufficient working capital to operate the Groton Facility, at least at current rates of operation, to meet all capital calls with respect to the Groton Facility and to carry on, at least at their scheduled pace, all capital projects for the Groton Facility that are ongoing or approved as of January 1, 1999. In addition, Respondents shall continue, at least at their scheduled pace, any additional expenditures for the Groton Facility authorized prior to the date this Order to Hold Separate is signed by Respondents. During the period this Order to Hold Separate is effective, Respondents shall make available for use by the Groton Facility funds sufficient to perform all necessary routine maintenance to, and replacements of, assets of the Groton Facility. Respondents shall provide the Groton Facility with such funds as are necessary to maintain the viability, competitiveness, and marketability of the Groton Facility Assets until the date the divestiture is completed, provided the Groton Facility may not assume any new long-term debt except as necessary to meet a competitive threat and as approved by the Independent Auditor.

12. Respondents shall continue to provide the same support services to the Groton Facility Assets as are being provided to such assets by Wyman-Gordon as of the date this Order to Hold Separate is signed by Respondents. Respondents may charge the Groton Facility the same fees, if any, charged by Respondents for such support services as of the date this Order to Hold Separate is signed by Respondents. Respondents' personnel providing such support services must retain and maintain all Material Confidential Information of the Groton Facility Assets on a confidential basis, and, except as is permitted by this Order to Hold Separate, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any person whose employment involves any of Respondents' businesses. Such personnel shall also execute confidentiality

agreements prohibiting the disclosure of any Material Confidential Information of the Groton Facility Assets.

13. Except as provided in this Order to Hold Separate, Respondents shall not employ or make offers of employment to employees of the Groton Facility during the hold separate period. The acquirer of the Groton Facility Assets shall have the option of offering employment to Groton Facility employees. After the hold separate period, Respondents may offer employment to Groton Facility employees who have not been offered employment or have been terminated by the acquirer of the Groton Facility Assets. Respondents shall not interfere with the employment of employees of the Groton Facility by the acquirer of the Groton Facility Assets; shall not offer any incentive to said employees to decline employment with the acquirer of the Groton Facility Assets or accept other employment with Respondents; and shall remove any impediments that may deter employees of the Groton Facility from accepting employment with the acquirer of the Groton Facility Assets including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with the Groton Facility that would affect the ability of employees of the Groton Facility to be employed by the acquirer of the Groton Facility Assets.

14. For a period of one (1) year commencing on the date the Groton Facility Assets are divested, Respondents shall not employ or make offers of employment to any Key Employee of the Groton Facility who has been offered employment with the acquirer of the Groton Facility Assets unless such individual has been terminated by the acquirer of the Groton Facility Assets.

15. Notwithstanding subparagraph IV.B.14., Respondents may offer a bonus or severance to those Key Employees of the Groton Facility that continue their employment with the Groton Facility until the date that the Groton Facility Assets are divested.

16. Respondents shall not exercise direction or control over, or influence directly or indirectly, the Groton Facility Assets, the Independent Auditor, the Management Team, or any of its operations; provided, however, that Respondents may exercise only such direction and control over the Groton Facility Assets as are necessary to assure compliance with this Order to Hold Separate or the Consent Agreement, or with all applicable laws.

17. Except for the Management Team and except to the extent provided in subparagraphs IV.B.12. and IV.B.16., Respondents shall not permit any non-Groton Facility employees, officers, or directors to be involved in the operations of the Groton Facility Assets.

18. Respondents shall maintain the viability, competitiveness, and marketability of the Groton Facility Assets; shall not sell, transfer, or encumber any of the Groton Facility Assets (other than in the normal course of business); and shall not cause or permit the destruction, removal, wasting, or deterioration, or otherwise impair the viability, competitiveness, or marketability of the Groton Facility Assets.

19. If the Independent Auditor ceases to act or fails to act diligently and consistent with the purposes of this Order to Hold Separate, the Commission may appoint a substitute Independent Auditor in the same manner as provided in Paragraph IV.B.1. of this Order to Hold Separate.

20. Until the divestiture of the Groton Facility Assets is accomplished, Respondents shall ensure that Groton Facility employees continue to be paid their salaries, all accrued bonuses, pensions and other accrued benefits to which such employees would otherwise have been entitled had they remained in the employment of Wyman-Gordon during the hold separate period.

21. Except as required by law, and except to the extent that necessary information is exchanged in the course of consummating the Acquisition, defending investigations, defending or prosecuting litigation, obtaining legal advice, negotiating agreements to divest assets pursuant to the Consent Agreement, or complying with this Order to Hold Separate or the Consent Agreement, Respondents shall not receive or have access to, or use or continue to use, any Material Confidential Information, not in the public domain, about the Groton Facility Assets. Respondents may receive, on a regular basis, aggregate financial information relating to the Groton Facility necessary to allow Respondents to prepare United States consolidated financial reports and tax returns. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph.

22. Within thirty (30) days after the date Respondents sign the Consent Agreement and every thirty (30) days thereafter until the Order to Hold Separate terminates, the Independent Auditor or the Management Team shall report in writing to the Commission concerning the efforts to accomplish the purposes of this Order to

Hold Separate. Included within that report shall be the Independent Auditor's or the Management Team's assessment of the extent to which the Groton Facility, if applicable, is meeting (or exceeding) its projected goals as are reflected in operating plans, budgets, projections or any other regularly prepared financial statements.

## V.

*It is further ordered,* That Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondents 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 this Order to Hold Separate.

## VI.

*It is further ordered,* That for the purposes of determining or securing compliance with this Order to Hold Separate, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents made to their principal United States offices, Respondents shall permit any duly authorized representatives of the Commission:

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

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

## VII.

*It is further ordered,* That this Order to Hold Separate shall terminate on the earlier of:



A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 CFR 2.34; or

B. Three (3) business days after the divestiture of the Albany Facility Assets, or three (3) business days after the divestiture of the Groton Facility Assets (provided the Groton Large Parts Facility Assets have not been divested to Doncasters pursuant to Paragraph IV.A.1 of the Decision & Order), whichever is later.

#### ATTACHMENT A

#### NOTICE OF DIVESTITURE AND REQUIREMENT FOR CONFIDENTIALITY

Precision Castparts Corp. ("PCC") and Wyman-Gordon Company ("Wyman-Gordon"), hereinafter referred to as "Respondents," have entered into an Agreement Containing Consent Orders ("Consent Agreement") with the Federal Trade Commission relating to the divestiture of certain assets.

As used herein, the term "Albany Facility," as defined in Paragraph I.M. of the Federal Trade Commission's Decision & Order, means Wyman-Gordon's Titanium Aerospace Investment Cast Components manufacturing facility.

As used herein, the term "Albany Facility Assets," as defined in Paragraph I.P. of the Decision & Order, means the Wyman-Gordon assets located at the Albany Facility that are used to develop, manufacture and sell Titanium Aerospace Investment Cast Components. Under the terms of the Consent Agreement, Respondents must divest the Albany Facility Assets within six (6) months from the date they sign the Consent Agreement.

The term "Acquisition" means the acquisition of 100% of the voting securities of Wyman-Gordon by PCC.

The Albany Facility Assets must be managed and maintained as a separate, ongoing business, independent of all other businesses of the Respondents until such assets are divested. All competitive information relating to the Albany Facility Assets must be retained and maintained by the persons involved in the operation of those assets 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 business of the Respondents. Similarly, persons involved in similar activities at Wyman-Gordon or PCC shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any similar information to or with any other person whose employment involves the Albany Facility Assets.

Any violation of the Consent Agreement may subject Respondents to civil penalties and other relief as provided by law.

ATTACHMENT B

**NOTICE OF DIVESTITURE AND REQUIREMENT  
FOR CONFIDENTIALITY**

Precision Castparts Corp. ("PCC") and Wyman-Gordon Company ("Wyman-Gordon"), hereinafter referred to as "Respondents," have entered into an Agreement Containing Consent Orders ("Consent Agreement") with the Federal Trade Commission relating to the divestiture of certain assets.

As used herein, the term "Groton Facility," as defined in Paragraph I.O. of the Federal Trade Commission's Decision & Order, means Wyman-Gordon's Aerospace Investment Cast Components manufacturing facility.

As used herein, the term "Groton Facility Assets," as defined in Paragraph I.R. of the Decision & Order, means the Wyman-Gordon assets located at the Groton Facility that are used to develop, manufacture and sell Aerospace Investment Cast Components. Under the terms of the Consent Agreement, if Respondents fail to divest the Groton Large Parts Facility Assets, as defined in Paragraph I.Q. of the Decision & Order, to Doncasters pursuant to Paragraph IV.A.1. of the Decision & Order, Respondents must divest the Groton Facility Assets within six (6) months from the date they sign the Consent Agreement.

The term "Acquisition" means the acquisition of 100% of the voting securities of Wyman-Gordon by PCC.

The Groton Facility Assets must be managed and maintained as a separate, ongoing business, independent of all other businesses of the Respondents until such assets are divested. All competitive information relating to the Groton Facility Assets must be retained and maintained by the persons involved in the operation of those assets 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 business of the Respondents. Similarly, persons involved in similar activities at Wyman-Gordon or PCC shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any similar information to or with any other person whose employment involves the Groton Facility Assets.

Any violation of the Consent Agreement may subject Respondents to civil penalties and other relief as provided by law.

## DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by Respondent Precision Castparts Corp. ("PCC") of all of the outstanding shares of Respondent Wyman-Gordon Company ("Wyman-Gordon"), and Respondents having been furnished thereafter with a copy of a draft of Complaint which 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, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent 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 Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and an Order to Hold Separate, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 CFR 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Order:

1. Respondent PCC is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Oregon, with its office and principal place of business located at 4650 S.W. Macadam Avenue, Suite 440, Portland, Oregon.

2. Respondent Wyman-Gordon is a corporation organized, existing, and doing business under and by virtue of the laws of the

Commonwealth of Massachusetts, with its office and principal place of business located at 244 Worcester Street, Grafton, Massachusetts.

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. "*PCC*" means Precision Castparts Corp., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, including Wyman-Gordon after the Acquisition, divisions, groups and affiliates controlled by PCC, and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

B. "*Wyman-Gordon*" means Wyman-Gordon Company, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Wyman-Gordon, and the respective directors, officers, employees, agents and representatives, successors, and assigns of each; "*Wyman-Gordon*" includes Wyman-Gordon Titanium Castings, LLC, the joint venture with Titanium Metals Corporation through which Wyman-Gordon conducts its Titanium Aerospace Investment Cast Components business.

C. "*Respondents*" means PCC and Wyman-Gordon, individually and collectively.

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

E. "*Doncasters*" means Doncasters plc, a corporation organized, existing, and doing business under and by virtue of the laws of the United Kingdom, with its office and principal place of business located at 28-30 Derby Road, Melbourne, Derbyshire, United Kingdom.

F. "*Acquisition*" means the proposed acquisition by PCC of all the voting securities of Wyman-Gordon.

G. "*Investment Casting*" means a method of manufacturing metal components, whereby a wax model of the metal component is dipped into a ceramic slurry which dries to form a ceramic shell. The wax is then removed using a special furnace, leaving a cavity within the

ceramic shell into which molten metal is poured. Once the metal cools, the ceramic shell is removed producing dimensionally precise metal components.

H. "*Aerospace Investment Cast Components*" means dimensionally precise metal components manufactured using the Investment Casting process that are used primarily in aerospace jet engine and aerospace airframe applications.

I. "*Titanium Aerospace Investment Cast Components*" means Aerospace Investment Cast Components manufactured using titanium alloy.

J. "*Stainless Steel and/or Nickel-based Superalloy Aerospace Investment Cast Components*" means Aerospace Investment Cast Components of a diameter or length of twelve (12) inches or greater manufactured using stainless steel and/or nickel-based superalloys.

K. "*Tooling*" means the metal die or tool necessary to produce the wax model of the component in the Investment Casting process.

L. "*Manufacturing Know-How*" means gating schemes, temperature controls, and other fixed process documentation, and all information, data and notes relating thereto, used in the development, manufacture and sale of Aerospace Investment Cast Components.

M. "*Albany Facility*" means Wyman-Gordon's Investment Casting manufacturing plant located at 150 Queen Avenue SW, Albany, Oregon, and all assets used in the production of Titanium Aerospace Investment Cast Components at the Albany Facility.

N. "*Groton Large Parts Facility*" means Wyman-Gordon's Investment Casting manufacturing plant located at 839 Poquonnock Road, Groton, Connecticut, identified by Wyman-Gordon for internal accounting purposes as Plant 08, and all assets used in the production of Titanium Aerospace Investment Cast Components and Stainless Steel and/or Nickel-based Superalloy Aerospace Investment Cast Components at the Groton Large Parts Facility included in the Groton Divestiture Agreement.

O. "*Groton Facility*" means Wyman-Gordon's Investment Casting manufacturing plants, referred to internally by Wyman-Gordon as Plant 08 and Plant 02, located at 839 Poquonnock Road, Groton, Connecticut, and all assets used in the production of Titanium Aerospace Investment Cast Components and Stainless Steel and/or Nickel-based Superalloy Aerospace Investment Cast Components at the Groton Facility.

P. "*Albany Facility Assets*" means all assets, properties, businesses and goodwill, tangible and intangible, of Wyman-Gordon used in the development, manufacture and sale of Titanium Aerospace Investment Cast Components at the Albany Facility, including, without limitation, the following:

1. All owned or leased real property and improvements, buildings, plants, manufacturing operations, machinery, fixtures, equipment, furniture, tools and other tangible personal property located in Wyman-Gordon's Albany Facility;

2. All intellectual property, inventions, technology, trademarks, trade names, trade secrets, copyrights, Manufacturing Know-How, research material, technical information, management information systems, software specifications, designs, drawings, processes and quality control data; provided, however, that this does not include any rights in the name "Wyman-Gordon";

3. All customer lists, vendor lists, catalogs, sales promotion literature and advertising materials; inventory and storage capacity; rights, titles and interests in and to owned or leased real property, together with appurtenances, licenses and permits;

4. All rights, titles and interests in and to contracts relating to the development, manufacture and sale of any Titanium Aerospace Investment Cast Component; all rights, titles and interests 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, consignees;

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

6. All books, records and files, and all items of prepaid expense;  
and

7. All Sales and Service Operations.

Q. "*Groton Large Parts Facility Assets*" means all assets, properties, businesses and goodwill, tangible and intangible, of Wyman-Gordon used in the development, manufacture and sale of Titanium Aerospace Investment Cast Components or Stainless Steel and/or Nickel-based Superalloy Aerospace Investment Cast Components at the Groton Large Parts Facility, including, without limitation, the following:

1. All owned or leased real property and improvements, buildings, plants, manufacturing operations, machinery, fixtures, equipment, furniture, tools and other tangible personal property located in Wyman-Gordon's Groton Large Parts Facility;

2. All intellectual property, inventions, technology, trademarks, trade names, trade secrets, copyrights, Manufacturing Know-How, research material, technical information, management information systems, software specifications, designs, drawings, processes and quality control data; provided, however, that this does not include any rights in the name "Wyman-Gordon";

3. All customer lists, vendor lists, catalogs, sales promotion literature and advertising materials; inventory and storage capacity; rights, titles and interests in and to owned or leased real property, together with appurtenances, licenses and permits;

4. All rights, titles and interests in and to contracts relating to the development, manufacture and sale of any Aerospace Investment Cast Component; all rights, titles and interests 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, consignees;

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

6. All books, records and files, and all items of prepaid expense; and

7. All Sales and Service Operations.

R. "*Groton Facility Assets*" means all assets, properties, businesses and goodwill, tangible and intangible, used in the development, manufacture and sale of Titanium Aerospace Investment Cast Components or Stainless Steel and/or Nickel-based Superalloy Aerospace Investment Cast Components at the Groton Facility, including, without limitation, the following:

1. All owned or leased real property and improvements, buildings, plants, manufacturing operations, machinery, fixtures, equipment, furniture, tools and other tangible personal property located at the Groton Facility;

2. All intellectual property, inventions, technology, trademarks, trade names, trade secrets, copyrights, Manufacturing Know-How, research material, technical information, management information systems, software specifications, designs, drawings, processes and

quality control data; provided, however, that this does not include any rights in the name "Wyman-Gordon";

3. All customer lists, vendor lists, catalogs, sales promotion literature and advertising materials; inventory and storage capacity; rights, titles and interests in and to owned or leased real property, together with appurtenances, licenses and permits;

4. All rights, titles and interests in and to contracts relating to the development, manufacture and sale of any Aerospace Investment Cast Component; all rights, titles and interests 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, consignees;

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

6. All books, records and files, and all items of prepaid expense; and

7. All Sales and Service Operations.

S. "*Acquirer-Albany*" means the entity that acquires the Albany Facility Assets pursuant to Paragraphs II.A. or III.A. of this Order, as applicable.

T. "*Acquirer-Groton*" means Doncasters, or the entity that acquires the Groton Facility Assets pursuant to Paragraphs IV.A.2. or V.A. of this Order, as applicable.

U. "*Groton Divestiture Agreement*" means all agreements between Respondents and any Acquirer-Groton, and all exhibits thereof.

V. "*Albany Divestiture Agreement*" means all agreements between Respondents and any Acquirer-Albany, and all exhibits thereof.

W. "*Non-Public Acquirer Information*" means any information not in the public domain obtained by Respondents directly or indirectly from the Acquirer-Albany or the Acquirer-Groton, prior to the effective date, or during the term, of the provision of assistance to the acquirer as required by Paragraphs II.E. and IV.C. of this Order. Non-Public Acquirer Information shall not include information that subsequently falls within the public domain through no violation of this Order by Respondents.

X. "*Cost*" means direct cash cost of raw materials and labor.

Y. "*Sales and Services Operations*" means all of Wyman-Gordon's assets, properties, business and goodwill, tangible and intangible, used in the sale or service of Wyman-Gordon's Aerospace



Investment Cast Components business at either the Albany Facility, the Groton Large Parts Facility, or the Groton Facility, as applicable.

Z. "*Material Confidential Information*" means competitively sensitive or proprietary information not independently known to an entity from sources other than the entity to which the information pertains, and includes, but is not limited to, all customer lists, price lists, marketing methods, patents, technologies, processes, Manufacturing Know-How, or other trade secrets.

AA. "*Key Employees*" means the employees listed in Appendix A to this Order.

## II.

*It is further ordered, That:*

A. Respondents shall divest the Albany Facility Assets, at no minimum price, absolutely and in good faith, within six (6) months from the date the Consent Agreement is signed by Respondents.

Provided that, if the Acquirer-Albany expresses a preference not to acquire any portion of the Albany Facility Assets, and if the Commission approves the Acquirer-Albany and the Albany Divestiture Agreement, then Respondents shall not be required to divest that portion of such assets.

B. Respondents shall divest the Albany Facility Assets only to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the Albany Facility Assets is to ensure that the Albany Facility Assets continue to be used in the development, manufacture and sale of Titanium Aerospace Investment Cast Components in substantially the same manner and quality currently employed or achieved by Wyman-Gordon and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

C. Pending divestiture of the Albany Facility Assets, Respondents shall take such actions as are necessary to maintain the viability and marketability of the Albany Facility Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Albany Facility Assets except for ordinary wear and tear. Prior to divestiture, Respondents shall not transfer any of the individuals identified pursuant to Paragraph II.I. of this Order to any other position outside the Albany Facility.

D. Respondents will ensure that at the time of the divestiture required under Paragraph II.A., the Albany Facility Assets shall be unencumbered and free of current and future claims of ownership or any equity interest, including, but not limited to, any claims of right of first refusal, by any third-party entity or entities, including, but not limited to, Titanium Metals Corporation. Provided, however, that if the Acquirer-Albany determines to allow Titanium Metals Corporation to retain all or a part of its interest in the Albany Facility Assets after the divestiture, and if the Commission approves such retention, then the Respondents shall be deemed to have complied with this Paragraph II.D.

E. With respect to Titanium Aerospace Investment Cast Components, the applicable Tooling for which existed at the Albany Facility at the time of the divestiture, Respondents shall provide, at cost, upon reasonable notice and request by Acquirer-Albany, for a period not to exceed twelve (12) months from the date the divestiture is completed: (a) such assistance and training as are reasonably necessary to enable the Acquirer-Albany to develop, manufacture and sell Titanium Aerospace Investment Cast Components in substantially the same manner and quality, and using the same Manufacturing Know-How, as employed or achieved by Wyman-Gordon; and (b) such assistance and training as are reasonably necessary to enable the Acquirer-Albany to obtain any customer-required approvals and/or certifications.

F. Respondents shall not provide, disclose or otherwise make available to any of their employees not involved in providing assistance to the Acquirer-Albany, any Non-Public Acquirer Information, nor shall Respondents use any Non-Public Acquirer Information obtained or derived by Respondents in their capacity as a provider of assistance pursuant to Paragraph II.E., except for the sole purpose of providing assistance pursuant to Paragraph II.E.

G. Respondents shall comply with the terms of the Albany Divestiture Agreement for the Albany Facility Assets, which will be incorporated by reference into this Order, and made a part thereof. Any failure by Respondents to comply with the terms of the Albany Divestiture Agreement shall constitute a failure to comply with this Order.

H. For a period of twelve (12) months from the date the divestiture occurs, Respondents shall, upon reasonable notice and

request by a customer of any Titanium Aerospace Investment Cast Component(s):

1. Transfer to the Albany Facility all Tooling and Manufacturing Know-How located in any other Wyman-Gordon manufacturing facility at any time prior to the date the Acquisition is completed, used in the development, manufacture and sale of the Titanium Aerospace Investment Cast Component(s) identified by the customer;

2. Pay all costs reasonably incurred in the delivery of such Tooling and Manufacturing Know-How to the Albany Facility;

3. Pay fifty (50) percent of the costs, if any, that are reasonably and necessarily incurred by the Acquirer-Albany in conforming such Tooling so as to enable the manufacture of Titanium Aerospace Investment Cast Component(s) to substantially the same quality employed or achieved by Wyman-Gordon; and

4. With respect to such Tooling, pay fifty (50) percent of the costs, if any, that are reasonably and necessarily incurred by the Acquirer-Albany in obtaining customer-required certification or approval for Titanium Aerospace Investment Cast Component(s) produced from the same Manufacturing Know-How and having substantially the same quality employed or achieved by Wyman-Gordon.

I. No later than the time of the execution of the Albany Divestiture Agreement, Respondents shall provide the Acquirer-Albany with a complete list of all non-clerical, salaried employees of Wyman-Gordon who have been involved in the development, manufacture or sale of any Titanium Aerospace Investment Cast Component at the Albany Facility at any time during the period from January 1, 1999 until the date of the Albany Divestiture Agreement. The list shall state each individual's name, position or positions held from January 1, 1999 until the date of the Albany Divestiture Agreement, address, telephone number, and a description of the duties and work performed by the individual in connection with any Titanium Aerospace Investment Cast Component developed, manufactured or sold by Wyman-Gordon's Albany Facility. Respondents shall provide the Acquirer-Albany the opportunity to enter into employment contracts with such individuals, provided that such contracts are contingent upon the Commission's approval of the Albany Divestiture Agreement.

J. Respondents shall provide the Acquirer-Albany with an opportunity to inspect the personnel files and other documentation relating to the individuals identified pursuant to Paragraph II.I. of this Order to the extent permissible under applicable laws, at the request of the Acquirer-Albany any time after the execution of the Albany Divestiture Agreement.

K. Respondents shall not enforce any confidentiality or non-compete restrictions relating to the Albany Facility Assets that apply to any employee identified pursuant to Paragraph II.I. who accepts employment with the Acquirer-Albany. In addition, Respondents shall provide all Key Employees of the Albany Facility with reasonable financial incentives to continue in their employment positions during the period covered by the Order to Hold Separate, hereto attached, in order that such employees may be in a position to accept employment with the Acquirer-Albany at the time of the divestiture. Such incentives shall include:

1. Continuation of all employee benefits offered by Wyman-Gordon until the date of the divestiture, including regularly scheduled raises and bonuses; and

2. A bonus, based on the schedule identified in Appendix A, of an employee's annual salary (including any other bonuses) as of the date this Order becomes final for any individual who agrees to accept an offer of employment from the Acquirer-Albany, payable by Respondents as of the date the divestiture is accomplished.

L. For a period of one (1) year commencing on the date of the individual's employment by the Commission-approved Acquirer-Albany, Respondents shall not employ any of the Key Employees who have been offered employment with the Commission-approved Acquirer-Albany, unless the individual's employment has been terminated by the Acquirer-Albany.

### III.

*It is further ordered, That:*

A. If Respondents have not divested, absolutely and in good faith and with the Commission's prior approval, the Albany Facility Assets within the time required by Paragraph II.A. of this Order, the Commission may appoint a trustee to divest the Albany Facility Assets. In the event that the Commission or the Attorney General

brings an action pursuant to Section 5(I) of the Federal Trade Commission Act, 15 U.S.C. 45(I), or any other statute enforced by the Commission, Respondents 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(I) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.

B. If a trustee is appointed by the Commission or a court pursuant to Paragraph III.A. of this Order, Respondents 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 the Respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have 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 Respondents of the identify of the proposed trustee, Respondents 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 Albany Facility Assets.

3. Within ten (10) days after appointment of the trustee, Respondents 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.B.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 the Albany Facility Assets or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents 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 submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously at no minimum price. The divestiture shall be made in the manner and to an acquirer as set out in Paragraph II.A. of this Order; provided, however, if the trustee receives bona fide offers from more than one such acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity selected by Respondents from among those approved by the Commission; provided further, however, that Respondents shall select such entity within five (5) business days of receiving notification of the Commission's approval.

7. The trustee shall serve, without bond or other security, at the cost and expense of Respondents, 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 Respondents, 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 Respondents, 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 Albany Facility Assets.

8. Respondents 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 losses, claims, damages, liabilities 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.A. 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. In the event the trustee reasonably determines that he or she is unable to divest the Albany Facility Assets in a manner consistent with the Commission's purpose as described in Paragraph II.B., the trustee may also divest such additional ancillary assets and business and effect such arrangements as are necessary to maintain the marketability, viability and competitiveness of the Albany Facility Assets.

12. The trustee shall have no obligation or authority to operate or maintain the Albany Facility Assets.

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

#### IV.

*It is further ordered, That:*

A. Respondents shall divest, absolutely and in good faith:

1. The Groton Large Parts Facility Assets as a competitive, viable, on-going business to Doncasters, in accordance with the Asset Purchase Agreement between Wyman-Gordon Investment Castings, Inc. and Doncasters dated October 8, 1999 within sixteen (16) business days of the date the Commission accepts the Consent Agreement for public comment; or

2. The Groton Facility Assets, at no minimum price, to an Acquirer-Groton within six (6) months after the date the Respondents sign the Consent Agreement. Respondents shall divest the Groton Facility Assets pursuant to Paragraph IV.A.2. of this Order only to an Acquirer-Groton that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

Provided that, if the Acquirer-Groton expresses a preference not to acquire any portion of the Groton Large Parts Facility Assets or the Groton Facility Assets, as applicable, and if the Commission approves the Acquirer-Groton and the Groton Divestiture Agreement, then Respondents shall not be required to divest that portion of such assets.

B. The purpose of the divestiture of the Groton Large Parts Facility Assets or the Groton Facility Assets is to ensure that these assets continue to be used in the development, manufacture and sale of Aerospace Investment Cast Components in substantially the same manner and quality currently employed or achieved by Wyman-Gordon and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission's complaint.

C. With respect to Aerospace Investment Cast Components, the applicable Tooling for which existed at the Groton Large Parts Facility or, if applicable, the Groton Facility, at the time of the divestiture, Respondents shall provide, at cost, upon reasonable notice and request by the Acquirer-Groton, for a period not to exceed twelve (12) months from the date the divestiture is completed: (a) such assistance and training as are reasonably necessary to enable the Acquirer-Groton to develop, manufacture and sell Aerospace Investment Cast Components in substantially the same manner and quality, and using the same Manufacturing Know-How, as employed or achieved by Wyman-Gordon; and (b) such assistance and training as are reasonably necessary to enable the Acquirer-Groton to obtain any customer-required approvals and/or certifications.

D. Respondents shall not provide, disclose or otherwise make available to any of their employees not involved in providing assistance to the Acquirer-Groton, any Non-Public Acquirer Information, nor shall Respondents use any Non-Public Acquirer Information obtained or derived by Respondents in their capacity as



a provider of assistance pursuant to Paragraph IV.C., except for the sole purpose of providing assistance pursuant to Paragraph IV.C.

E. Pending either the divestiture of the Groton Large Parts Facility Assets to Doncasters pursuant to Paragraph IV.A.1. of this Order or the divestiture of the Groton Facility Assets pursuant to Paragraphs IV.A.2. or V.A. of this Order, if applicable, Respondents shall take such actions as are necessary to maintain the viability and marketability of the Groton Facility Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Groton Facility Assets except for ordinary wear and tear. Prior to divestiture, Respondents shall not transfer, without the consent of the Acquirer-Groton, any of the individuals identified pursuant to Paragraph IV.H. of this Order to any other position.

F. For a period of twelve (12) months from the date the divestiture occurs, upon reasonable notice and request by a customer of any Aerospace Investment Cast Component(s) of a diameter or length twelve (12) inches or greater, Respondents shall:

1. Transfer to the Groton Large Parts Facility or the Groton Facility, as applicable, all Tooling and Manufacturing Know-How located in any other Wyman-Gordon manufacturing facility, other than the Albany Facility, at any time prior to the date the Acquisition is completed, used in the development, manufacture and sale of the Aerospace Investment Cast Component(s) identified by the customer;

2. Pay all costs reasonably incurred in the delivery of such Tooling and Manufacturing Know-How to the Groton Large Parts Facility or the Groton Facility, as applicable;

3. Pay fifty (50) percent of the costs, if any, that are reasonably and necessarily incurred by the Acquirer-Groton in conforming such Tooling so as to enable the manufacture of Aerospace Investment Cast Component(s) to substantially the same quality employed or achieved by Wyman-Gordon; and

4. With respect to such Tooling, pay fifty (50) percent of the costs, if any, that reasonably and necessarily are incurred by the Acquirer-Groton in obtaining customer-required certification or approval for Aerospace Investment Cast Component(s) having substantially the same quality and using the same Manufacturing Know-How, as employed or achieved by Wyman-Gordon.

G. Respondents shall comply with the terms of the Groton Divestiture Agreement, which is incorporated by reference into this Order, and made a part thereof. Any failure by Respondents to comply with the terms of the Groton Divestiture Agreement shall constitute a failure to comply with this Order.

H. No later than the time of the execution the Groton Divestiture Agreement, Respondents shall provide the Acquirer-Groton with a complete list of all non-clerical, salaried employees of Wyman-Gordon's Groton Facility who have been involved in the development, manufacture or sale of any Aerospace Investment Cast Component at the Groton Facility, at any time during the period from January 1, 1999 until the date of the Groton Divestiture Agreement. The list shall state each individual's name, position or positions held from January 1, 1999 until the date of the Groton Divestiture Agreement, address, telephone number, and a description of the duties and work performed by the individual in connection with any Aerospace Investment Cast Component developed, manufactured or sold by Wyman-Gordon's Groton Facility. Respondents shall provide the Acquirer-Groton the opportunity to enter into employment contracts with such individuals, provided that such contracts are contingent upon the Commission's approval of the Groton Divestiture Agreement.

I. Respondents shall provide the Acquirer-Groton with an opportunity to inspect the personnel files and other documentation relating to the individuals identified pursuant to Paragraph IV.H. of this Order to the extent permissible under applicable laws, at the request of the Acquirer-Groton any time after the execution of the Groton Divestiture Agreement.

J. Respondents shall not enforce any confidentiality or non-compete restrictions relating to the Groton Large Parts Facility or the Groton Facility, as applicable, that apply to any employee identified pursuant to Paragraph IV.H. who accepts employment with the Acquirer-Groton. In addition, Respondents shall provide all Key Employees of the Groton Facility with reasonable financial incentives to continue in their employment positions, either (1) pending divestiture of the Groton Large Parts Facility Assets, or (2) during the period covered by the Order to Hold Separate, hereto attached, as applicable, in order that such employees may be in a position to

accept employment with the Acquirer-Groton at the time of the divestiture. Such incentives shall include:

1. Continuation of all employee benefits offered by Wyman-Gordon until the date of the divestiture, including regularly scheduled raises and bonuses; and

2. A bonus, based on the schedule identified in Appendix A, of an employee's annual salary (including any other bonuses) as of the date this Order becomes final, payable by Respondents six (6) months from the date the divestiture is accomplished, for any individual who is employed at that time by the Acquirer-Groton.

K. For a period of one (1) year commencing on the date of the individual's employment by the Commission-approved Acquirer-Groton, Respondents shall not employ any of the Key Employees of the Groton Facility who have been offered employment with the Commission-approved Acquirer-Groton, unless the individual's employment has been terminated by the Acquirer-Groton.

#### V.

*It is further ordered, That*

A. If Respondents have not divested, absolutely and in good faith, and with the Commission's prior approval, the Groton Large Parts Facility Assets or Groton Facility Assets within the time required by Paragraph IV.A. of this Order, then the Commission may appoint a trustee to divest the Groton Facility Assets. The trustee may be the same person as the trustee appointed in Paragraph III.A. of this Order. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, Respondents 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(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.

B. If a trustee is appointed by the Commission or a court pursuant to Paragraph V.A. of this Order, Respondents 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 the Respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have 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 Respondents of the identify of the proposed trustee, Respondents 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 Groton Facility Assets.

3. Within ten (10) days after appointment of the trustee, Respondents 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 V.B.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 the Groton Facility Assets or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents 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 submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously at no minimum price. The divestiture shall be made in the manner and to an acquirer as set out in Paragraph IV.A.2. of this Order; provided, however, if the trustee receives bona fide offers from more than one such acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity selected by Respondents from among those approved by the Commission; provided further, however, that Respondents shall select such entity within five (5) business days of receiving notification of the Commission's approval.

7. The trustee shall serve, without bond or other security, at the cost and expense of Respondents, 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 Respondents, 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 Respondents, 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 Groton Facility Assets.

8. Respondents 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 losses, claims, damages, liabilities, 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 V.A. 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. In the event the trustee reasonably determines that he or she is unable to divest the Groton Facility Assets in a manner consistent with the Commission's purpose as described in Paragraph IV.B., the trustee may also divest such additional ancillary assets and business and effect such arrangements as are necessary to maintain the marketability, viability and competitiveness of the Groton Facility Assets.

12. The trustee shall have no obligation or authority to operate or maintain the Groton Facility Assets.

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

## VI.

*It is further ordered, That:*

A. Within thirty (30) days after the date this order becomes final and every thirty (30) days thereafter until Respondents have fully complied with the provisions of Paragraphs II. through V. 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. through V. of this Order and with the Order to Hold Separate. 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 Paragraphs II. through V. of the Order, including a description of all substantive contacts or negotiations for the divestitures and the identities of all parties contacted. Respondents shall include in their compliance reports copies, other than of privileged materials, of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture. The final compliance report required by this Paragraph VI.A. shall include a statement that the divestitures have been accomplished in the manner approved by the Commission and shall include the dates the divestitures were accomplished.

B. One year from the date of divestiture of the Albany Facility Assets and annually thereafter until the Order terminates, Respondents shall file a verified written report to the Commission setting forth in

detail the manner in which they have complied and are complying with this Order.

C. One year from the date of divestiture of the Groton Large Parts Facility Assets or the Groton Facility Assets, as applicable, and annually thereafter until the Order terminates, Respondents shall file a verified written report to the Commission setting forth in detail the manner in which they have complied and are complying with this Order.

#### VII.

*It is further ordered,* That Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondents 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 the Order.

#### VIII.

*It is further ordered,* That, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents, Respondents shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all non-privileged books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondents relating to any matter contained in this Order; and

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

#### IX.

*It is further ordered,* That this Order shall terminate one (1) year after the divestitures required in Paragraphs II.A. and IV.A. of this Order are accomplished.

Commissioner Leary not participating.

**[CONFIDENTIAL APPENDIX A REDACTED]**

IN THE MATTER OF  
SHELL OIL COMPANY, ET AL.

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

*Docket C-3912. Complaint, Dec. 22, 1999--Decision, Dec. 22, 1999*

This consent order, among other things, prohibits two Texas-based corporations, that manufacture, advertise, and distribute gasoline additives, from making any representation regarding the performance, benefits, efficacy, attributes or use of fuel additive products or ingredients unless, they possess and rely upon competent and reliable scientific evidence that substantiates the representation. In addition, the consent order prohibits the respondents from misrepresenting the existence, contents, validity, results, or interpretation of any test, study, or research regarding such products.

*Participants*

For the Commission: *Michael Dershowitz, Sydney Knight, C. Lee Peeler, Lisa Daniel, Susan Braman and Genevieve Fu.*

For the respondents: *Barry Cutler, Baker & Hostetler, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Shell Oil Company, a corporation, and Shell Chemical Company, a corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Shell Oil Company ("Shell Oil") is a Delaware corporation. Respondent Shell Chemical Company ("Shell Chemical") is a Delaware corporation and a wholly-owned subsidiary of Shell Oil. Shell Oil and Shell Chemical have their principal offices or places of business at One Shell Plaza, 910 Louisiana Street, Houston, TX. Shell Oil controls the acts and practices of its subsidiary Shell Chemical.

2. Respondents have manufactured, tested, advertised, offered for sale, sold, and distributed motor vehicle gasoline additives, including the VEKTRON™ 3000 series of gasoline additives. This series of additives contains the active ingredient polyether pyrrolidone ("PEP"), a molecule patented for use in gasoline additives. Respondents have advertised and sold these additives to trade customers for use in their



fuel system treatment products. The trade customers who have purchased these additives include Castrol North America Automotive, Inc. ("Castrol") and Blue Coral/Slick 50, Inc. ("Blue Coral/Slick 50"). Castrol and Blue Coral/Slick 50 have marketed fuel system treatment products containing respondents' additives as their active ingredient to the public under the brand names Castrol Syntec Power System and Slick 50 Synchron Premium Octane Treatment, respectively.

3. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

4. Respondents have promoted their PEP-containing additives to trade customers through their Internet website, advertisements in trade publications, and a promotional videotape, among other means, including the attached Exhibits A through D. These materials have been provided to trade customers, including Castrol and Blue Coral/Slick 50, and contain the following statements and depictions:

A. VEKTRON™ 3000 Gasoline Additives

Tests Confirm revolutionary additive's unique performance advantages.

To demonstrate that VEKTRON™ 3000 additized gasoline returns power to engines equipped with knock sensors, we conducted field acceleration tests using a runway at the Westheimer Airport in Houston, Texas. . . . The results: all of the test cars with gasoline containing VEKTRON™ 3000 Additive performed better in every acceleration range versus those run on base fuel with EPA-grade additive . . . . After running the cars with VEKTRON™ 3000 Additive, acceleration was improved by .6 seconds and 32 feet, roughly two car lengths faster. . . . VEKTRON™ 3000 Gasoline Additive is based on a revolutionary new technology that has proven to provide superior performance: returning power to engines. . . .

[Exhibit A: Internet Advertisement]

B. VEKTRON™ 3000 Gasoline Additives

A Revolutionary New Advancement In Gasoline Additive Technology

\* \* \* \*

ACCELERATION

In vehicles fitted with electronic knock sensors, the use of VEKTRON™ 3000 Additive technology can provide power and acceleration benefits unattainable from other technologies.

A bar graph depicts acceleration results based upon results achieved (1) with a clean engine, (2) with an EPA grade additive, and (3) with respondents' PEP-containing additive.

[Exhibit B: Internet Advertisement]

C. OUR NEW VIDEO SHOWS PERFORMANCE SO HOT WE'VE RATED IT "R"

\* \* \* \*

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Complaint

Every additive supplier makes superiority claims. Shell Additives would like to prove theirs. Our new VEKTRON™ 3000 Gasoline Additives go beyond merely removing some of the engine deposits; they actually can help restore and maintain power and performance by chemically enhancing the combustion process.

\* \* \* \*

[Exhibit C: Trade Publication advertisement]

D. Promotional video depicts actual field acceleration tests conducted by Shell, and graphically depicts a car with respondents' PEP-containing additives going 2 car lengths faster than a car that does not contain respondents' additives. The video depicts what this test data "means to consumers": (a) that in trying to pass a truck on a two-lane roadway, a car with respondents' PEP-containing additives is able to accelerate just fast enough to pass the truck and avoid a head-on collision with an oncoming tractor trailer truck in the other lane; and (b) in merging into the flow of highway traffic at high speed, a car with respondents' PEP-containing additive is able to accelerate and merge fast enough to barely avoid an accident with an 18-wheel tractor trailer.

[Exhibit D: Promotional video advertisement]

5. Through the means described in paragraph four, respondents have represented, expressly or by implication, that:

A. Respondents' PEP-containing additives significantly improve engine power and acceleration in motor vehicles generally.

B. Respondents' PEP-containing additives are superior to other fuel system additives in improving engine power and acceleration in motor vehicles generally.

6. Through the means described in paragraph four, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph five, at the time the representations were made.

7. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph five, at the time the representations were made. Therefore, the representation set forth in paragraph six was, and is, false or misleading.

8. Through the means described in paragraph four, respondents have represented, expressly or by implication, that:

A. Scientific tests prove that respondents' PEP-containing additives significantly improve engine power and acceleration in motor vehicles generally.

B. Scientific tests prove that respondents' PEP-containing additives are superior to other fuel system additives in improving engine power and acceleration in motor vehicles generally.

9. In truth and in fact:

A. Scientific tests do not prove that respondents' PEP-containing additives significantly improve engine power and acceleration in motor vehicles generally.

B. Scientific tests do not prove that respondents' PEP-containing additives are superior to other fuel system additives in improving engine power and acceleration in motor vehicles generally.

Therefore, the representations set forth in paragraph eight were, and are, false or misleading.

10. Respondents have performed tests of their PEP-containing additives relating to their purported acceleration benefits, as well as tests for their trade customers, including Castrol and Blue Coral/Slick 50, of the PEP-containing formulations of those customers' fuel system treatment products sold to the public. In connection with the promotion and sale of their PEP-containing additives, respondents have reported the results of those tests to their trade customers. In so doing, respondents have represented to their trade customers, expressly or by implication, that:

A. The reported test results constitute scientific proof that respondents' PEP-containing additives, and fuel system treatment products containing respondents' PEP-containing additives, significantly improve engine power and acceleration in motor vehicles generally.

B. The reported test results constitute scientific proof that respondents' PEP-containing additives, and fuel system treatment products containing respondents' PEP-containing additives, are superior to other fuel system additives in improving engine power and acceleration in motor vehicles generally.

11. In truth and in fact:

A. The reported test results referred to in paragraph ten do not constitute scientific proof that respondents' PEP-containing additives, and fuel system treatment products containing respondents' PEP-containing additives, significantly improve engine power and acceleration in motor vehicles generally.

B. The reported test results referred to in paragraph ten do not constitute scientific proof that respondents' PEP-containing additives, and fuel system treatment products containing respondents' PEP-containing additives, are superior to other fuel system additives in improving engine power and acceleration in motor vehicles generally.

Therefore, the representations set forth in paragraph ten were, and are, false or misleading.

12. By providing their trade customers, including Castrol and Blue Coral/Slick 50, with the advertising and promotional materials referred to in paragraph four, and with the test data and reports referred to in paragraph ten, respondents have furnished the means and instrumentalities to those customers to engage in deceptive acts and practices in violation of Section 5(a) of the Federal Trade Commission Act.

13. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 (a) of the Federal Trade Commission Act.

Commissioner Swindle dissenting and Commissioner Leary not participating.

Complaint

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## EXHIBIT A

# VEKTRON<sup>TM</sup> 3000 ADDITIVES

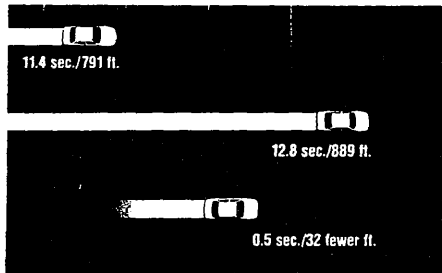
EXHIBIT A

## Tests confirm revolutionary additive's unique performance advantages.

To demonstrate that VEKTRON<sup>TM</sup> 3000 additized gasoline returns power to engines equipped with knock sensors, we conducted field acceleration tests using a runway at the Westheimer Airport in Houston, Texas. The experiment physically measured time and distance of acceleration

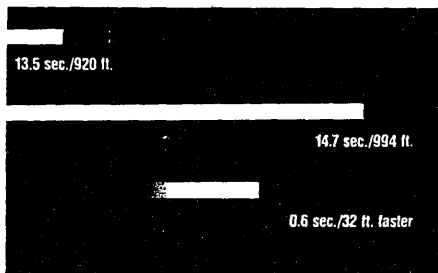
from 15 to 70 miles per hour with two sets of cars: three each of Dodge Intrepid LEs and Lexus GS300s.

The results: all of the test cars with gasoline containing VEKTRON 3000 Additive performed better in every acceleration range versus those run on base fuel with EPA-grade additive.



### Acceleration Test: Dodge Intrepids

When tested with clean engines, the Dodge Intrepids averaged 11.4 seconds and 791 feet to reach 70 miles per hour. At the 10,000 mile mark, 12.8 seconds and 889 feet were required to reach the 70 mile-per-hour point. After VEKTRON 3000 Additive was introduced and run for 5,000 additional miles, acceleration had improved by one-half of a second, the equivalent of 32 fewer feet. This acceleration improvement translates to about two car lengths.



### Acceleration Test: Lexus GS300s

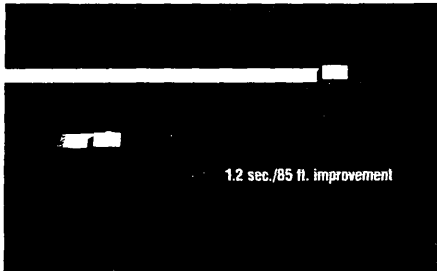
The Lexus GS300 testing also showed impressive results. The average time and distance needed to reach the 70 mile-per-hour point were 13.5 seconds and 920 feet with the clean engine, and 14.7 seconds and 994 feet at the 10,000 mile mark. That's an additional 74 feet because of accumulated engine deposits. After running the cars with VEKTRON 3000 Additive, acceleration was improved by .6 seconds and 32 feet, roughly two car lengths faster.

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Complaint

EXHIBIT A

**Gasoline with VEKTRON™ 3000.**



**Acceleration/Load Test: Dodge Intrepid**

In one final experiment, we measured the acceleration time and distance differences that a Dodge Intrepid towing a 2,000 pound U-Haul trailer might experience using the latest VEKTRON technology. Based on results from our 30 car fleet trial, we simulated the four octane number difference (which VEKTRON 3000 can easily achieve) with two different base fuels, much like the CRC testing protocol. In this case, the acceleration improvement noted was 1.2 seconds and 85 feet, or roughly 5 car lengths faster.

*VEKTRON™ 3000 Gasoline Additive is based on a revolutionary new technology that has proven to provide superior performance: returning power to engines, reducing harmful NOx emissions, and improving miles per gallon.*

*The proof has been captured on our new video, which is yours for the asking. Take advantage of this unique marketing opportunity by calling us now at 1-800-4-VEKTRON. You'll also find us on the Internet at: [www.shellus.com](http://www.shellus.com)*

**Warranty** All products purchased from or supplied by Shell are subject to terms and conditions set out in the contract, order acknowledgment and/or bill of lading. Shell warrants only that its product will meet those specifications designated as such herein or in other publications. All other information, including that herein supplied by Shell is considered accurate but is furnished upon the express condition that the customer shall make

its own assessment to determine the product's suitability for a particular purpose. Shell makes no other warranty either express or implied, regarding such other information, the data upon which the same is based, or the results to be obtained from the use thereof; that any products shall be merchantable or fit for any particular purpose; or that the use of such other information or product will not infringe any patent.



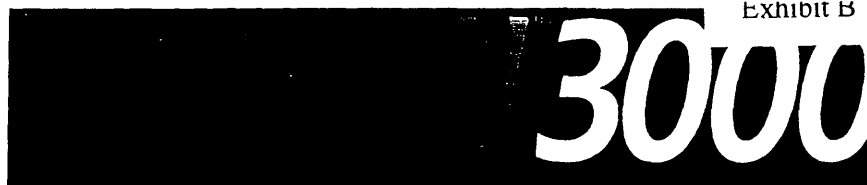
Shell Additives

*Never underestimate what we can do together.™*

SC 2439-96  
Printed in U.S.A.  
25M 3 96

VEKTRON™ is a trademark of Shell Chemical Company.

EXHIBIT B

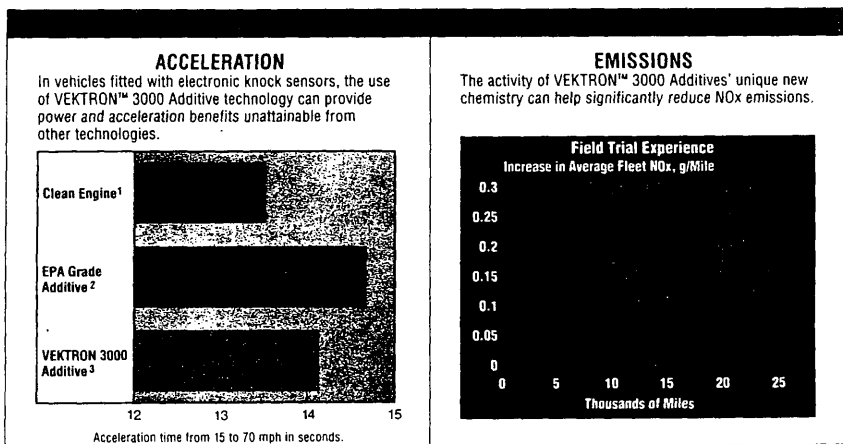
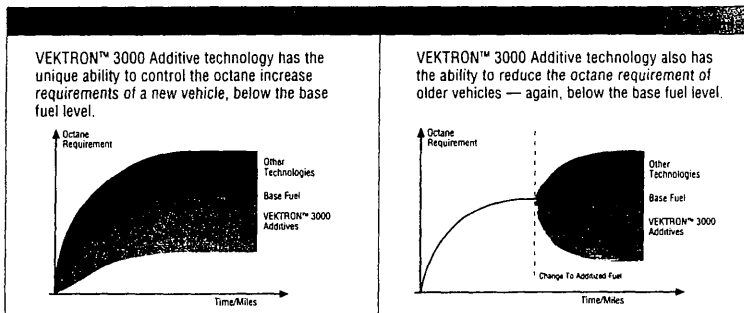


## A Revolutionary New Advancement In Gasoline Additive Technology

VEKTRON™ 3000 Gasoline Additives are based on a revolutionary new additive technology that provides superior performance and emissions benefits. This unique technology not only works to keep combustion chamber deposits at lower levels but actually chemically enhances the combustion process to restore engine

power and efficiency. VEKTRON 3000 Gasoline Additives can also help to significantly reduce NOx emissions.

Take advantage of this unique marketing opportunity by calling us now at 1-800-4-VEKTRON.



1. Result achieved when clean engine tested.  
2. Result achieved at 10,000 miles using EPA Grade Additives.

## Complaint

## EXHIBIT B

<p>Intake system detergency, now regulated by the federal government, is still very important in the development of gasoline additive packages. VEKTRON™ 3000 Additive Packages include the most effective intake system detergents to provide the superior intake system cleanliness that you have come to expect:</p>	<p>For example, packages have demonstrated:</p> <ul style="list-style-type: none"> <li>• "1 Tank" PFI Clean-Up</li> <li>• 0 mg in BMW Testing</li> <li>• &lt;10 mg in the Ford 2.3 L Test</li> <li>• IVD Clean-Up Tailored to Customer Needs</li> </ul> <p>These capabilities exist not only in the industry standard tests; but also in a range of engines selected to be representative of the U.S. fleet.</p>
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<p>VEKTRON 3000 Additives can be blended into gasoline at the refinery, distribution terminal, or pipeline terminal using conventional additive injection equipment and product mixing techniques.</p>	<p>For specific safety and handling information, please consult the Material Safety Data Sheet available upon request.</p>
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<p>Shell's VEKTRON 3000 Additive Packages will be tailored to meet our customers' specific requirements. However, treat rates and typical properties of representative packages will be in line with more conventional technologies.</p>
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**Warranty**

All products purchased from or supplied by Shell are subject to terms and conditions set out in the contract, order acknowledgment and/or bill of lading. Shell warrants only that its product will meet those specifications designated as such herein or in other publications. All other information, including that herein, supplied by Shell is considered accurate but is furnished upon the express condition that the customer shall make its

own assessment to determine the product's suitability for a particular purpose. Shell makes no other warranty either express or implied, regarding such other information, the data upon which the same is based, or the results to be obtained from the use thereof; that any products shall be merchantable or fit for any particular purpose; or that the use of such other information or product will not infringe any patent.

VEKTRON™ is a trademark of Shell Chemical Company.



Shell Additives

Never underestimate what we can do together.™



Complaint

128 F.T.C.

EXHIBIT C

Exhibit C

**OUR NEW VIDEO  
SHOWS PERFORMANCE SO**

**HOT**

**WE'VE RATED IT**

**R\***

**\*Revolutionary New Technology  
is how you'll rate our VEKTRON™  
3000 Gasoline Additives.**

Every additive supplier makes superiority claims. Shell Additives would like to *prove* theirs. Our new VEKTRON™ 3000 Gasoline Additives go beyond merely removing some of the engine deposits:

they actually can help restore and maintain power and performance by chemically enhancing the combustion process. And the proof has been captured on our new video, which is yours for the



asking. Just call 1-800-4-VEKTRON to get your hands on this free VEKTRON 3000 Gasoline Additives video. Oh, yeah. We'll even throw in the popcorn.



Shell Additives

*Never underestimate what we can do together.*

## EXHIBIT D

[PROMOTIONAL VIDEO]

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorney, and counsel for Federal Trade 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, 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 the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments received, 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.a. Respondent Shell Oil Company is a Delaware corporation with its principal office or place of business at One Shell Plaza, 910 Louisiana Street, Houston, Texas.

1.b. Respondent Shell Chemical Company is a Delaware corporation with its principal office or place of business at One Shell Plaza, 910 Louisiana Street, Houston, Texas. Shell Chemical Company is a wholly-owned subsidiary of Shell Oil Company.

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

## ORDER

### DEFINITIONS

For purposes of this order, the following definitions shall apply:

1. "*Competent and reliable scientific evidence*" shall mean tests, analyses, research, studies, or other evidence based upon the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. "*Fuel additive product*" shall mean a product that is added to gasoline by a consumer, including but not limited to gasoline or fuel treatments, octane boosters, and octane treatments.

3. "*Fuel additive ingredient*" shall mean any active ingredient marketed for use in any fuel additive product.

4. "*PEP molecule*" shall mean polyether pyrrolidone, a patented fuel additive ingredient.

5. Unless otherwise specified, "*respondents*" shall mean Shell Oil Company, a corporation, and Shell Chemical Company, a corporation, their successors and assigns, and their officers, agents, representatives, and employees.

6. "*Commerce*" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

### I.

*It is ordered*, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, advertising, labeling, promotion, offering for sale, sale, or distribution of any fuel additive product or fuel additive ingredient in or affecting commerce, shall not make any representation, in any manner, expressly or by implication:

A. That such product or ingredient will significantly improve engine power and acceleration in motor vehicles generally;

B. That such product or ingredient is superior to any other fuel additive product in improving engine power and acceleration in motor vehicles generally; or

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Decision and Order

C. Regarding the performance, benefits, efficacy, attributes or use of such product or ingredient,

unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

II.

*It is further ordered*, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, promotion, offering for sale, sale, or distribution of any fuel additive product or fuel additive ingredient in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

III.

*It is further ordered*, That respondents, and their successors and assigns shall, within thirty (30) days after the date of service of this order, send by first class mail, return receipt requested, a copy of this order along with the Commission's complaint in this matter to each trade customer that purchased a product that contained the "PEP" molecule.

IV.

*It is further ordered*, That respondents, and their successors and assigns shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

## V.

*It is further ordered,* That respondents, their successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors, managers, employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

## VI.

*It is further ordered,* That respondents, and their successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

## VII.

*It is further ordered,* That respondents and their successors and assigns shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

## VIII.

This order will terminate on December 22, 2019, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

- A. Any Part of this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondents did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

Commissioner Swindle dissenting and Commissioner Leary not participating.

PUBLIC STATEMENT OF CHAIRMAN PITOFSKY,  
COMMISSIONER ANTHONY AND COMMISSIONER THOMPSON

We conclude that there is ample evidence to find reason to believe that the consent agreement with Shell Oil Company ("Shell") should be accepted. The facts show that Shell provided promotional materials to its customers that contained unsubstantiated claims that ultimately appeared in its customers' ads. There is also evidence that Shell actively encouraged its customers to repeat the claims contained in its promotional materials and actively supported customers' efforts to do so. In fact, the similarities between promotional materials used by Shell and its customers are quite striking. Finally, we do not find that Shell used a disclaimer -- either clearly or conspicuously. Accordingly, we conclude that Shell was properly alleged to have

violated Section 5 because it "put into the hands of others the means by which they may mislead the public." *Waltham Watch Co v. FTC*, 318 F.2d 28, 32 (7<sup>th</sup> Cir. 1963).

It is true, as the Complaint alleges, that Shell provided its product to sophisticated trade customers, who then incorporated Shell's product into a subsequent product. But we do not believe that this sequence of events allows Shell to escape liability. We believe that all would agree that the interposition of a "sophisticated" party between the originator of deceptive claims and the consumer is not necessarily a defense to "means and instrumentalities" liability. Indeed, the means and instrumentalities doctrine is *intended* to apply in cases like this one where the originator of the unlawful material is not in privity with consumers, and does not control the actions of those (sophisticated or not) who will make the final decisions as to the message conveyed to consumers. It is well settled law that the originator is liable if it passes on a false or misleading representation with knowledge or reason to expect that consumers may possibly be deceived as a result. *See Regina Corp. v. FTC*, 322 F.2d 765, 768 (3<sup>rd</sup> Cir. 1963). Based on the facts, we have reason to believe that standard is met in this case and, accordingly, have voted to finalize the consent agreement.

DISSENTING STATEMENT OF COMMISSIONER ORSON SWINDLE

The Commission has issued a final order against Shell Oil Company ("Shell") to settle complaint allegations that Shell provided its customers, who purchased from Shell an ingredient used in their fuel treatment additive products, with the "means and instrumentalities" with which two of these customers deceived consumers. I agree with my colleagues that there is reason to believe that two of Shell's customers made deceptive acceleration claims to consumers about their fuel treatment additive products. However, I do not think that Shell made deceptive acceleration claims to consumers through the promotional materials and test results that Shell provided to these two customers. I therefore do not have reason to believe that Shell is liable under a means and instrumentalities theory.

Shell manufactures a chemical substance marketed to fuel treatment additive companies under the trade name "VEKTRON." Shell supplies VEKTRON to Castrol (the marketer of Castrol Syntec), Blue Coral/Slick 50 (the marketer of Slick 50), and to other companies which market fuel treatment additive products to consumers. Each

fuel treatment additive company determines the particular amount of VEKTRON to include in its own product. The specific concentration of VEKTRON that has been included differs among each of these fuel treatment additive products. Each fuel treatment additive company also determines the other chemical substances (such as detergents and solvents) to include in its product.

Shell provided fuel treatment additive companies with advertising and promotional materials to persuade them to purchase VEKTRON. Shell's advertising and promotional materials claim that VEKTRON significantly increases acceleration when used in motor vehicle engines. Specifically, these materials report that when gasoline bulk treated with VEKTRON was used in an engine continuously for 5,000 miles ("the bulk treatment test"), a 32-foot improvement (two car lengths) was recorded in accelerating from 15 mph to 70 mph. Both in its promotional materials and through other methods, Shell made the disclaimer that the information it provided concerning the VEKTRON ingredient, including the bulk treatment test result, was "furnished upon the express condition that [the customer] shall make its own assessment to determine the product's suitability for a particular purpose."

It makes sense that Shell would make this disclaimer. VEKTRON is but one ingredient (albeit an active ingredient) in fuel treatment additive products. In addition, the amount of VEKTRON varies with each fuel treatment additive product. Many fuel treatment additive products further are claimed to work when added to a single tank of gasoline (roughly 300 miles of use) rather than when included in bulk treated gasoline used over thousands of miles. Because the acceleration results that were obtained in the bulk treatment test of the VEKTRON ingredient thus clearly would not necessarily apply to fuel treatment additive final products, it makes sense that Shell would have informed its customers that they must make their own assessment of the acceleration benefits attributable to their own products.

Castrol and Blue Coral/Slick 50 purchased VEKTRON from Shell for use in their fuel treatment additive products and both paid Shell to conduct product-specific acceleration tests. In my view, clearly none of the tests of either of these products reported a significant increase in acceleration. Nevertheless, the two fuel treatment additive companies allegedly made the deceptive claim to



consumers that their respective fuel treatment additive products would *significantly improve* acceleration in motor vehicles generally.<sup>1</sup> The Commission has accepted a consent agreement with Shell that would hold Shell responsible for the allegedly deceptive claims made to consumers by the two fuel treatment additive companies. The basic complaint allegation is that Shell provided these companies with the "means and instrumentalities" (in the form of advertising and promotional materials concerning the VEKTRON ingredient and test reports concerning their specific products) with which these companies deceived consumers.

Means and instrumentalities is a form of primary liability, and a respondent is primarily liable only for *its own* misrepresentations to consumers. See, e.g., *In re JWP Inc. Securities Lit.*, 928 F. Supp. 1239, 1256 (S.D.N.Y. 1996) (defendant "may not be held primarily liable unless it has actually *made* a misrepresentation") (emphasis in original); *In re Kendall Square Research Corp. Sec. Lit.*, 868 F. Supp. 26, 28 (D. Mass. 1994) (primary violators are "those who *make* a material misstatement") (emphasis in original); *Vosgerichian v. Commodore Int'l.*, 862 F. Supp. 1371, 1378 (E.D. Pa. 1994) (no primary liability because the alleged misrepresentations were made by a party other than the defendant).<sup>2</sup> In contrast, a respondent who has provided assistance to another party that has made misrepresentations is at most secondarily liable - - in particular, for aiding and abetting another's misrepresentations. *Wright v. Ernst & Young LLP*, 152 F.3d 169, 175 (2d Cir. 1998), *cert. denied*, 119 S.Ct. 870 (1999); *Shapiro v. Cantor*, 123 F.3d 717, 720 (2d Cir. 1997); *Anixter v. Home-Stake Production Co.*, 77 F.3d 1215, 1225 (10<sup>th</sup> Cir. 1996) ("[t]he critical element separating primary from aiding and abetting violations is the existence of a representation \* \* \* made by the defendant"). Regardless of the nature and extent of the assistance that a respondent may have provided to a party who made deceptive claims to consumers, the respondent cannot be held primarily liable

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<sup>1</sup> The Commission has issued a final order against Castrol to settle the allegations that it made deceptive acceleration claims concerning Castrol Syntec, and I have voted in favor of issuing that final order. *Castrol North America, Inc.*, C- \_\_\_\_\_.

<sup>2</sup> The cases cited in the text involved allegation of securities fraud in violation of SEC Rule 10b-5. The cases are instructive because of the similarities between securities fraud and deception under Section 5 of the FTC Act. Moreover, there have been a significant number of Rule 10b-5 cases distinguishing between the concepts of primary liability and aiding and abetting liability in the aftermath of *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994).

unless it has *itself* made misrepresentations to consumers. *Wright*, 152 F.3d at 175; *Shapiro*, 123 F.3d at 720.

Primary liability, however, does not require that the respondent have made its misrepresentation *directly* to consumers. Instead, for a "misrepresentation to be actionable as a primary violation, there must be a showing that [the defendant] knew or should have known that *his* representation would be communicated [to purchasers]." *Anixter*, 77 F.3d at 1226 (emphasis added) (citations omitted); *see also Wright*, 152 F.3d at 175 (same); *Shapiro*, 123 F.3d at 720 (same). Clearly, the reason that primary liability is imposed even in the absence of a direct communication is that, otherwise, respondents could evade liability simply through the use of intermediaries (such as agents or downstream actors in a vertical chain of distribution) to convey misrepresentations to consumers.

Means and instrumentalities is a specific type of primary liability under which a respondent is held responsible for misrepresentations made *indirectly* to consumers. Liability under this theory is usually imposed against those who have provided an intermediary with an item (typically, a tangible item) that misleads consumers when that item is physically passed on to consumers. *See, e.g., FTC v. Winsted Hosiery Co.*, 258 U.S. 483 (1922) (deceptive labels on knit goods sold to consumers); *Waltham Watch Co. v. FTC*, 318 F.2d 28, 32 (7th Cir. 1963) (deceptive trade name on face or dial of clocks sold to consumers); *Globe Cardboard Novelty Co. v. FTC*, 192 F.2d 444, 446 (3d Cir. 1951) (push cards and punch boards distributed to consumers); *Jaffe v. FTC*, 139 F.2d 112 (7th Cir. 1943) (same); *International Art Co. v. FTC*, 109 F.2d 393 (7th Cir. 1940) (same); *FTC v. Magui Publishers, Inc.*, 1991-1 Trade Cas. (CCH) ¶ 69,425 (C.D. Cal. 1991) (deceptive certificates, promotional brochures, and signed prints provided to retailers who passed these items on to consumers), *aff'd*, 9 F.3d 1551 (9th Cir. 1993).

Means and instrumentalities liability also has been imposed where the intermediary has not passed on a tangible item to consumers, but instead has simply repeated to consumers the specific misrepresentations claims that were contained in the tangible item. For example, liability has been imposed under a means and instrumentalities theory where an intermediary made misrepresentations that were contained in the respondent's telemarketing scripts. *See, e.g., Regina Corp. v. FTC*, 322 F.2d 765, 768 (3d Cir. 1963) (deceptive prices from price

lists repeated in advertisements to consumers); *National Housewares, Inc.*, 90 FTC 512, 590 (1977) (telemarketing scripts and sample letters). All of these cases reflect the fundamental notion that means and instrumentalities is a form of primary liability in which the respondent was using another party as the conduit for disseminating the respondent's misrepresentations to consumers.

Shell's liability under a means and instrumentalities theory thus turns on the role that Shell played with regard to the deceptive acceleration claims that were contained in the advertising and packaging that its customers created and disseminated to consumers. If Shell was making deceptive acceleration claims to consumers through its customers, then there is reason to believe that Shell violated Section 5 of the FTC Act under a means and instrumentalities theory. But if Shell was providing assistance to its customers, who were making *their own* deceptive acceleration claims to consumers, then at most Shell could be some sort of aider and abettor.<sup>3</sup> It is often difficult to distinguish between these two theories of liability in particular factual contexts. However, it is critical to do so because the Commission certainly has the authority to bring Section 5 cases under a means and instrumentalities theory but may well be precluded from bringing Section 5 cases under an aiding and abetting theory in the aftermath of *Central Bank of Denver*.

I think that the better view here is that Shell was not making deceptive acceleration claims to consumers through the advertising that Castrol created and disseminated for its fuel treatment additive product. The advertising and promotional materials that Shell disseminated to its customers concerning the VEKTRON ingredient made the claim that the ingredient had improved acceleration in the bulk treatment test (specifically, a 32-foot improvement in going from 15 mph to 70 mph), and depicted the benefits of improved acceleration in common driving situations, such as a vehicle passing another vehicle on a two-lane road or a vehicle merging into freeway traffic. The advertising that Castrol created and disseminated to consumers concerning their fuel treatment additive products contained similar acceleration claims and depictions of the benefits of improved acceleration in common driving situations. Notwithstanding the

<sup>3</sup> The elements of aiding and abetting are: (1) the existence of an independent primary wrong; (2) actual knowledge by the alleged aider and abettor of the wrong and his role in furthering the wrong, and (3) substantial assistance in the commission of the wrong. *Magui Publishers, Inc.*, 1991-1 Trade Cas. (CCH) ¶ 69,425 at 65,727.

similarities between Shell's advertising and promotional materials concerning VEKTRON and the advertising that Castrol created and disseminated to consumers,<sup>4</sup> I do not think that Shell was making deceptive acceleration claims to consumers through Castrol's advertisements.<sup>5</sup>

Both in its promotional materials and through other methods, Shell informed its customers that they could not rely on the results of Shell's bulk treatment test of the VEKTRON ingredient and other information in Shell's promotional materials in making claims for their fuel treatment additive products. Because Castrol paid Shell to conduct product-specific single tank treatment tests, it certainly understood that such tests were necessary. None of the test results for Castrol Syntec, however, supported the claim that a significant increase in acceleration occurs when it was used in a single tank treatment.<sup>6</sup>

Castrol is a relatively large and sophisticated company with substantial experience in the fuel treatment additive business, which is characterized by vigorous competition through advertising claims. As such, Castrol employs or retains those with a technical background in fields relating to fuel treatment additives and those with advertising expertise. After Castrol received from Shell the acceleration test results of its product, it determined the acceleration claims that it wanted to make and it disseminated advertising with these claims to consumers. There is no allegation that Shell reviewed or approved any of the advertising or the advertising claims that Castrol created and disseminated. There also is no allegation that Shell reimbursed or otherwise compensated Castrol for any costs associated with its advertising. Given the respective roles played by Shell and Castrol with regard to the advertising for Castrol Syntec,

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<sup>4</sup> Although both Shell and Castrol used very similar depictions of the benefits from improved acceleration in common driving situations, this does not demonstrate that Shell was making the claims to consumers because the depictions are an obvious means for any advertiser to demonstrate the practical benefits of increased acceleration, much in the same way that an obvious means for any advertiser to depict weight loss from the use of any diet program is through "before-and-after" pictures of program participants.

<sup>5</sup> Shell's promotional materials and test results concerning VEKTRON were not passed on to consumers. These materials would have been meaningless to consumers because VEKTRON was never sold to them.

<sup>6</sup> While there may be some dispute as to whether the appropriate methodology was used to conduct these tests, in my view, the results reported on their face do not support the claims of a *significant* increase in acceleration that were made in Castrol's advertisements.

Shell clearly was not making deceptive acceleration claims to consumers through this advertising.<sup>7</sup>

A much closer question is presented by the claims on product packaging. Both Castrol and Blue Coral/Slick 50 made the specific claim on their packaging that use of their fuel treatment additive products would cause a 32-foot improvement (two car lengths) in accelerating from 15 mph to 70 mph. Given that the bulk treatment test of the VEKTRON ingredient yielded exactly this improvement in acceleration, the claim of a 32-foot improvement in acceleration found on the product packaging almost certainly had its genesis in the VEKTRON bulk treatment test. Nevertheless, through its promotional materials and through other methods, Shell instructed its customers that they could not use this information to make claims for their fuel treatment additive products.<sup>8</sup> Both this instruction and other actions by Shell indicate to me that Shell was trying to some extent to prevent its customers from making a 32-foot-improvement-in-acceleration claim, and, therefore, the better view is that Shell was not making this deceptive claim through packaging created and disseminated by its customers.

I do not have reason to believe that Shell can be held liable under a means and instrumentalities theory (or any other form of primary liability) for the deceptive claims that Shell's customers - - rather than Shell - - made to consumers. Holding Shell liable under a means and instrumentalities theory in this factual context raises concerns as to how far the Commission intends to expand the theory in future cases involving input suppliers and testing laboratories. I hope that no such expansion occurs.

I dissent.

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<sup>7</sup> I agree with the majority's statement that the interposition of a sophisticated intermediary is not necessarily a defense to liability under a means and instrumentalities theory. The sophistication of the alleged intermediary, however, may well be relevant in determining whether the alleged intermediary was making its own claims to consumers or it was simply passing along the claims of another to consumers. Here, based on Castrol's role in connection with the deceptive claims made in advertising that it created and disseminated to induce sales of its own product, I do not think that Castrol - - a company with sophistication in the fuel treatment additive business - - was simply passing on Shell's claims to consumers.

<sup>8</sup> Like Castrol, Blue Coral/Slick 50 clearly understood that product-specific tests were necessary because it paid Shell to conduct such a test. Moreover, given its experience in the fuel treatment additive business and the expertise of its employees or agents, in my view it was clear to Blue Coral/Slick 50 that the limited test result reported would not support the acceleration claim that it decided to place on its packaging.

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Complaint

IN THE MATTER OF

## THE ASSOCIATED OCTEL COMPANY LIMITED

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-3913. Complaint, Dec. 22, 1999--Decision, Dec. 22, 1999*

This consent order, among other things, requires The Associated Octel Company Limited, the leading manufacturer of lead antiknocks worldwide, to provide Allchem Industries, Inc., with quantities of lead antiknock compounds pursuant to the terms and conditions of their supply agreement and subject to the termination provision.

*Participants*

For the Commission: *Geoffrey Green, Veronica Kayne and Richard Parker.*

For the respondent: *Mark Kovner, Kirkland & Ellis, Washington, D.C.*

## COMPLAINT

The Federal Trade Commission, having reason to believe that respondent The Associated Octel Company Limited ("Octel"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire all of the voting securities of Oboadler Company Limited, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and 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 as follows:

## I. RESPONDENT

1. Respondent The Associated Octel Company Limited ("Octel") is a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom, with its office and principal place of business located at Berkeley Square House, Berkeley Square, London, W1X 6DT, England, United Kingdom.

2. Octel is engaged in, among other things, the manufacture and sale of lead antiknock compounds. Octel is the leading manufacturer of lead antiknocks worldwide, accounting for approximately 80

percent of global production. In the United States, lead antiknock compounds manufactured by Octel are distributed by two firms: Octel America Inc. (a subsidiary of Octel), and Ethyl Corporation.

3. For purposes of this proceeding, respondent 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 affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

## II. THE ACQUIRED COMPANY

4. Oboadler Company Limited ("Oboadler") is a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom, with its office and principal place of business located at High Field, Row Dow Lane, Shoreham, Kent, United Kingdom TN15 6XN.

5. Oboadler holds all of the issued share capital of three operating companies: Alcor Chemie AG, Alcor Chemie Vertriebs AG, and Novoktan GmbH. Through its subsidiaries, Oboadler is engaged in, among other things, the manufacture and sale of lead antiknock compounds. In the United States, lead antiknock compounds manufactured by Oboadler are distributed by Allchem Industries, Inc.

6. Oboadler 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 affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

## III. THE ACQUISITION

7. Pursuant to a Share Purchase Agreement dated June 1, 1999, Octel will acquire all of the issued share capital of Oboadler Company Limited for approximately \$100 million ("the Acquisition").

## IV. THE RELEVANT MARKET

8. For purposes of this complaint, the relevant line of commerce in which to analyze the effect of the Acquisition is the manufacture and sale of lead antiknock compounds. Lead antiknock compounds are gasoline additives that contain tetraethyl lead. This product is used to increase the octane rating of gasoline, and thereby eliminate engine knock during the combustion cycle and improve fuel efficiency.

Currently in the United States, lead antiknock compounds are added to aviation fuel for piston engine aircraft and to certain motor gasoline for racing cars. There are no substitutes for lead antiknock compounds to which customers would switch in response to a small but significant increase in the price of lead antiknock compounds.

9. For purposes of this complaint, the relevant geographic area in which to analyze the effect of the Acquisition on competition in lead antiknock compounds is the world.

10. The world market for the manufacture and sale of lead antiknock compounds is highly concentrated as measured by the Herfindahl-Hirschman Index. Octel and Oboadler are two of only three firms in the world that manufacture lead antiknock compounds. Further, Octel and Oboadler are the only two manufacturers of lead antiknock compounds whose product is sold in the United States.

11. Entry into the market requires significant sunk costs and would not be timely, likely and sufficient to deter or counteract the adverse competitive effects described in paragraph 12 because of, among other things, the length of time and expense necessary to construct production facilities, environmental regulations pertaining to manufacturing operations that utilize lead, the ongoing decline in worldwide demand for lead antiknock compounds, and the cost of environmental remediation at the manufacturing site when, due to decline in demand, production is no longer commercially practicable.

#### V. EFFECTS OF THE ACQUISITION

12. The effect of the Acquisition 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) By eliminating direct actual competition between Octel and Oboadler in the relevant market;
- (b) By increasing the likelihood of coordinated interaction between the remaining competitors in the relevant market; and
- (c) By increasing the likelihood that consumers of lead antiknock compounds will be forced to pay higher prices.



## VI. VIOLATIONS CHARGED

13. The Share Purchase Agreement described in paragraph 7 constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

14. The Acquisition described in paragraph 7, 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.

Commissioner Leary not participating.

## DECISION AND ORDER

The Federal Trade Commission ("the Commission") having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violations of the Clayton Act and the Federal Trade Commission Act; and

The 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 has 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 sixty (60) days, and having considered the comments filed thereafter by interested persons pursuant to Section 3.25(f) of its Rules, 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 The Associated Octel Company Limited is a corporation organized, existing and doing business under and by virtue of the United Kingdom, with its office and principal place of business located at Berkeley Square House, Berkeley Square, London, W1X 6DT, England, United Kingdom.

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

#### ORDER

##### I.

For purposes of this order, the following definitions shall apply:

A. "*Octel*" or "*respondent*" means The Associated Octel Company Limited, its directors, officers, employees, agents and representatives, predecessors, successors and assigns, and its subsidiaries, divisions, groups, and affiliates controlled, directly or indirectly, by The Associated Octel Company Limited, and the respective directors, officers, employees, agents and representatives, successors and assigns of each.

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

C. "*Allchem*" means Allchem Industries, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, and includes the assignee of Allchem Industries, Inc. (if any) under the Supply Agreement.

D. "*Supply Agreement*" means the Agreement for Supply of Tetra Ethyl Lead Additive dated as of July 19, 1999 together with and as amended by the Supplemental Agreement for the Supply of Tetra Ethyl Lead Additive dated as of July 30, 1999, between The Associated Octel Company Limited and Allchem Industries, Inc., as may be further amended from time to time in accordance with paragraph III.A of this order, and includes all appendices and schedules thereto. The Supply Agreement is incorporated by reference herein.

E. "*Compounds*" means lead antiknock compounds of the types described in Appendix 1 to the Supply Agreement.

F. "*Core Provisions of the Supply Agreement*" means each and any of the following provisions of the Supply Agreement: Paragraph 2 ("Definitions"), Paragraph 3.1 as amended by the Supplemental Agreement for the Supply of Tetra Ethyl Lead Additive dated as of July 30, 1999 ("Duration of Agreement"), Paragraph 3.2 ("Purpose of Agreement"), Paragraph 4.1 ("Product Specification"), Paragraph 4.2 ("Quantity"), Paragraph 4.5 ("Price and Payment"), and Paragraphs 25.1 and 25.2 ("Miscellaneous").

G. "*United States*" means the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, and all territories, dependencies, and possessions of the United States of America.

## II.

*It is ordered*, That, for a period of fifteen (15) years from the date this order becomes final, respondent shall provide Allchem with all such quantities of Compounds as Allchem may order from time to time for supply to customers located in the United States, pursuant to the terms and conditions of the Supply Agreement and subject to the termination provision thereof (Paragraph 3.1 as amended by the Supplemental Agreement for the Supply of Tetra Ethyl Lead Additive dated as of July 30, 1999), and shall in all other respects remain in compliance with the Supply Agreement. Any failure of respondent to comply with the terms set forth in the Supply Agreement shall constitute a failure to comply with this order.

## III.

*It is further ordered*, That:

A. Respondent shall not, directly or indirectly, without the prior approval of the Commission, make or agree to any amendment or modification with respect to the Core Provisions of the Supply Agreement. Provided, however, that respondent may agree to renew or extend the term of the Supply Agreement.

B. Respondent shall provide to the Commission, as promptly as possible and in any event no later than thirty (30) days after either their receipt or transmittal, copies of any: (i) communications between respondent and Allchem regarding any alleged breach of the Supply Agreement; (ii) notice of a force majeure event under the Supply Agreement; and/or (iii) amendment or modification to the Supply Agreement.

## IV.

*It is further ordered, That:*

A. Within sixty (60) days after the date this order becomes final, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which respondent has complied and is complying with 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 such other times as the Commission may require, respondent 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 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, upon written request, respondent shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to all facilities and access 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 days' notice to respondent and without restraint or interference from it, to interview officers, directors, or employees of respondent.

## VII.

*It is further ordered, That* this order shall terminate on December 22, 2014.

Commissioner Leary not participating.

Complaint

128 F.T.C.

IN THE MATTER OF

CONOPCO, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3914. Complaint, Dec. 22, 1999--Decision, Dec. 22, 1999*

This consent order, among other things, prohibits the New York-based corporation, that manufactures and distributes personal care products, from disseminating advertisements, for Vaseline® Brand Intensive Care® Antibacterial Hand Lotion or any other antimicrobial product, containing claims as to the effectiveness of the product in protecting users against germs unless, the respondent possesses competent and reliable scientific substantiation.

*Participants*

For the Commission: *Linda Badger, Kerry O'Brien, Gwendolyn Fanger and Jeffrey Klurfeld.*

For the respondent: *Nancy Schnell*, in-house counsel, New York, N.Y.

## COMPLAINT

The Federal Trade Commission, having reason to believe that Conopco, Inc., doing business as Unilever Home & Personal Care USA, a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Conopco, Inc. is a New York corporation with its principal office or place of business at 390 Park Avenue, New York, New York. Conopco, Inc. does business as "Unilever Home & Personal Care USA" and "Chesebrough-Pond's" at 33 Benedict Place, Greenwich, CT.

2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed products to the public, including Vaseline® Brand Intensive Care® Antibacterial Hand Lotion. Vaseline® Brand Intensive Care® Antibacterial Hand Lotion is a "drug," within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

4. Respondent has disseminated or has caused to be disseminated advertisements for Vaseline® Brand Intensive Care® Antibacterial Hand Lotion, including but not necessarily limited to the attached Exhibits A through E. These advertisements contain the following statements and depictions:

A. "NEW Vaseline® Brand Intensive Care® Lotion  
Anti-Bacterial Hand Lotion  
STOPS GERMS LONGER THAN WASHING ALONE

.....  
GERM PROTECTION

.....  
*New Vaseline Intensive Care Antibacterial lotion combines:*

- *A moisturizing formula to help restore and revitalize rough, dry skin.*
- *An anti-bacterial ingredient that helps keep your hands safe from germs for hours.*

*Use it every day, after washing hands, doing chores, changing diapers... anytime you need extra protection. It's the skin-caring way to stop germs while you moisturize.*

*New Vaseline Intensive Care Anti-Bacterial Lotion - Long-lasting moisturization with anti-bacterial protection.*

**Indication:** To help reduce bacteria that can potentially cause disease."

(Exhibit A).

B. "Arm your hands

With The Only Hand Lotion That Heals Dryness  
With Proven Vaseline® Moisturizers And Stops Germs For Hours."

(Exhibit B).

C. "IT'S TIME TO ARM YOUR HANDS

AGAINST DRYNESS. AND AGAINST GERMS.

The first anti-bacterial hand lotion from Vaseline® Intensive Care® is here.

[The advertisement depicts a woman's hand holding a bottle of Vaseline® Brand Intensive Care® Anti-bacterial Hand Lotion.

The bottle contains the following statement:

'NEW Vaseline® Brand Intensive Care® Lotion  
Anti-Bacterial Hand Lotion

STOPS GERMS LONGER THAN WASHING ALONE

..... GERM PROTECTION.']" (Exhibit C).

D. "We won't stop until all of you have the means to arm your hands.

[The advertisement depicts a woman in a kitchen.]

Against dryness. And against germs.

[The advertisement depicts a teacher in a classroom.]

Wherever you are....

[The advertisement depicts a bathroom.]

With the first anti-bacterial hand lotion from Vaseline Intensive Care.

[The advertisement depicts a person working at a computer keyboard. Next, it depicts a person marching in a marching band. Then, it depicts a woman in a kitchen.]

.... It's time to arm your hands." (Exhibit D).

E. "Somewhere in America, A teacher is mastering a new form of self defense. A salesman is learning hand to hand combat. A mother is launching a counterattack. Now it's your turn. Arm your hands against dryness and against germs. The first Anti-Bacterial Hand Lotion from Vaseline Intensive Care is here. It's time to arm your hands." (Exhibit E).

5. Through the means described in paragraph four, respondent has represented, expressly or by implication, that:

A. Vaseline® Brand Intensive Care® Antibacterial Hand Lotion stops germs on hands longer than washing alone.

B. Vaseline® Brand Intensive Care® Antibacterial Hand Lotion provides continuous protection from germs for hours.

C. Vaseline® Brand Intensive Care® Antibacterial Hand Lotion is effective against disease-causing germs, such as cold and flu viruses.

6. Through the means described in paragraph four, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph five, at the time the representations were made.

7. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph five, at the time the representations were made. While the active ingredient in Vaseline® Brand Intensive Care® Antibacterial Hand Lotion, triclosan, can reduce the number of germs on a user's hands, the degree and duration of germ protection has not been scientifically established. In addition, triclosan has not been proven effective against many disease-causing germs, including viruses, which are the cause of the most common diseases suffered by consumers, including colds and influenza. Therefore, the representation set forth in paragraph six was, and is, false or misleading.

8. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

Commissioner Leary not participating.



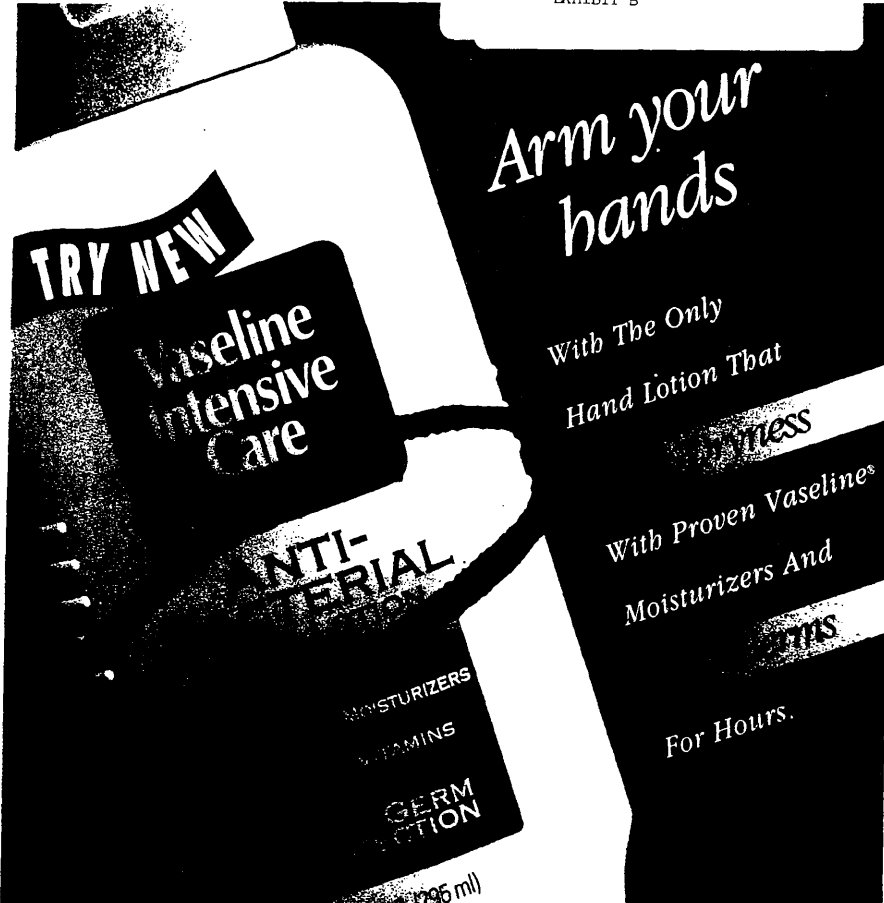


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EXHIBIT B

EXHIBIT B



MANUFACTURER'S COUPON

SAVE \$1.00

When you purchase any Vaseline® Intensive Care® Anti-Bacterial Hand Lotion product (on 2.5 oz. or larger)

07182



0052111776 3 (8100)3 07182



Limit one coupon per purchase of product specified. Void if reproduced, transferred or when purchased in quantities of one (1) per store. Redeemable at retail stores participating in this offer. Retailer's participation is not guaranteed. ©2005 P&G. P.O. Box 300000, Cincinnati, OH 45230-0000. For more information, visit us at www.pandg.com. This coupon is not valid for purchase of any other product. See back of coupon for restrictions. ©2005 P&G. P.O. Box 300000, Cincinnati, OH 45230-0000.

SAVE 60¢

When you purchase any Vaseline® Intensive Care® Lotion product (on 6 oz. or larger)

07181



0052111060 3 (8100)3 07181



Limit one coupon per purchase of product specified. Void if reproduced, transferred or when purchased in quantities of one (1) per store. Redeemable at retail stores participating in this offer. Retailer's participation is not guaranteed. ©2005 P&G. P.O. Box 300000, Cincinnati, OH 45230-0000. For more information, visit us at www.pandg.com. This coupon is not valid for purchase of any other product. See back of coupon for restrictions. ©2005 P&G. P.O. Box 300000, Cincinnati, OH 45230-0000.

EXHIBIT C

EXHIBIT C



Complaint

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EXHIBIT D

# McCANN-ER

EXHIBIT D

Client: Chesebrough-Ponds	Title: "Won't Stop"	Art Director: Steve Ohler
Product: VIC Anti-Bacterial Hand Lotion	Time: 30 Seconds	Writer: Steve Ohler
Comml. No.: CBIL 7073	Date Aired: 9/15/97	Producer: Dean Shoukas



(MUSIC UNDER THROUGHOUT)



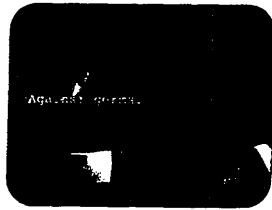
(SFX: KNOCK, KNOCK)



ANNCR: (VO) We won't stop until all of you have the means to arm your hands.



Against dryness.



And against germs.



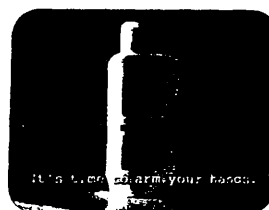
(SFX: SHOWER) Wherever you are.  
WOMAN: (VO) Is that you honey?



ANNCR: (VO) With the first anti-bacterial hand lotion from Vaseline Intensive Care.



WOMAN: Hmm.



ANNCR: (VO) Please. It's time to arm your hands.

EXHIBIT D

EXHIBIT D-1

VICL-AB  
"The Drop" :30/:15  
"Won't Stop" :30/:15

Complaint

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## EXHIBIT E

EXHIBIT E

*VICABHL RADIO*  
*8/12/97*

**AVO:**

Somewhere in America,  
A teacher is mastering a new form of self defense.  
A salesman is learning hand to hand combat.  
A mother is launching a counterattack.  
Now it's your turn.  
Arm your hands against dryness and against germs.  
The first Anti-Bacterial Hand Lotion  
from Vaseline Intensive Care is here.  
It's time to arm your hands.  
**Now available at K-Mart.**

Complaint

EXHIBIT E

EXHIBIT E-1

Vaseline Intensive Care 8/12/97  
"Somewhere in America Revised":30  
A-7-30-0496 (REVISED 8/12/97)  
Produced by: McCann-Erickson

**McCANN-ERICKSON**

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of 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 Act, 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 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 Conopco, 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 390 Park Avenue, New York, New York.
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

## DEFINITIONS

For purposes of this order, the following definitions shall apply:

1. "*Competent and reliable scientific evidence*" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. Unless otherwise specified, "*respondent*" shall mean Conopco, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees.

3. "*Commerce*" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

4. "*Germ*" shall mean any microscopic organism that is capable of causing disease, including bacteria, viruses, fungi, and protozoa.

5. "*Antimicrobial product*" shall mean any product represented as antimicrobial, antibacterial, germicidal, or otherwise represented to prevent, control or destroy any germ(s).

#### I.

*It is ordered*, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Vaseline® Brand Intensive Care® Antibacterial Hand Lotion or any other antimicrobial product in or affecting commerce, shall not make any representation, in any manner, expressly or by implication that:

A. Such product is as effective as, or more effective than, washing alone in protecting users against germs;

B. Such product has a continuous effect against germs;

C. Such product has any effect on any specific germ; or

D. Such product treats, cures, alleviates the symptoms of, prevents, or reduces the risk of developing colds, allergies, influenza, food-borne illnesses or any other disease or disorder;

unless, at the time the representation is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.



## II.

Nothing in this order shall prohibit respondent from making any representation for any drug that is permitted in labeling for such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

## III.

For the purposes of this order, "antimicrobial product" shall not include any product sold or distributed to consumers by third parties under private labeling agreements with respondent, its successors or assigns, provided respondent, its successors or assigns, does not participate in any manner, directly or indirectly, in the funding, preparation or dissemination of any advertising of said products to consumers.

## IV.

*It is further ordered*, That respondent Conopco, Inc. and its successors and assigns, shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

## V.

*It is further ordered*, That respondent Conopco, Inc. and its successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and

shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and, for a period of five (5) years from the date of issuance of this order, to future personnel within thirty (30) days after the person assumes such position or responsibilities.

#### VI.

*It is further ordered,* That respondent Conopco, Inc. and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

#### VII.

*It is further ordered,* That respondent Conopco, Inc. and its successors and assigns shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

#### VIII.

This order will terminate on December 22, 2019, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation

of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

Commissioner Leary not participating.

## IN THE MATTER OF

## TENET HEALTHCARE CORPORATION, ET AL.

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

*Docket 9289. Complaint, Aug. 19, 1998—Final Order, Dec. 23, 1999*

This final order dismisses the administrative complaint in the proceeding regarding the acquisition agreement between Tenet Healthcare Corporation and Doctors Regional Medical Center.

*Participants*

For the Commission: *Garry Gibbs, Peter Gulyn and William Baer.*

For the respondents: *Charles James, George Manning and Daryl Marsch, Jones, Day, Reavis & Pogue, Washington, D.C.*

## 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 the respondents, Tenet Healthcare Corporation ("Tenet") and Poplar Bluff Physicians Group, Inc. doing business as Doctors Regional Medical Center ("DRMC"), corporations subject to the jurisdiction of the Commission, have entered into an agreement whereby Tenet will acquire the stock and assets of DRMC; that the acquisition agreement violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; that the proposed acquisition, if consummated, would violate 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 to the Commission that a proceeding by it in respect thereof would be in the public interest, the Commission hereby issues its complaint, stating its charges in that respect as follows:

## DEFINITIONS

PARAGRAPH 1. For purposes of this complaint the following definitions shall apply:

(a) "*General acute care hospital*" means a health facility, licensed as a hospital, other than a federally owned facility, having a duly organized governing body with overall administrative and professional responsibility, and an organized professional staff, that provides 24-hour inpatient care, and may also provide outpatient services, and having as a primary function the provision of inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities.

(b) "*General acute care inpatient hospital services*" means 24-hour inpatient health care, and related medical or surgical diagnostic and treatment services, for physically injured or sick persons with short-term or episodic health problems or infirmities.

#### THE PARTIES

PAR. 2. Tenet is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Nevada, with its principal place of business located at 3820 State Street, Santa Barbara, California. Tenet owns and operates, among other things, over 120 acute care hospitals throughout the United States. Included among those hospitals is Lucy Lee Hospital ("Lucy Lee"), a 201-bed general acute care hospital in the city of Poplar Bluff, Missouri. In fiscal year 1997, Tenet had total sales of about \$8.7 billion, and Lucy Lee had total sales of over \$54 million.

PAR. 3. DRMC is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Missouri, with its principal place of business located at 621 Pine Street, Poplar Bluff, Missouri. DRMC owns and operates a 230-bed general acute care hospital in Poplar Bluff, Missouri. In fiscal year 1997, DRMC had total sales of over \$41 million.

#### JURISDICTION

PAR. 4. Tenet and DRMC, at all times relevant herein, have been and are now engaged in or affecting commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12. The businesses of Tenet and DRMC, at all times relevant herein, have been and are now in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

## THE PROPOSED ACQUISITION

PAR. 5. On or about April 2, 1997, Tenet and DRMC entered into an agreement whereby Tenet will acquire 100 percent of the voting stock of DRMC, and become the owner of all of DRMC's assets. The total value of the transaction is over \$40 million.

## NATURE OF TRADE AND COMMERCE

PAR. 6. All general acute care inpatient hospital services offered by Lucy Lee and DRMC constitute a relevant line of commerce in which to assess the competitive effects of the proposed acquisition. Other health care diagnosis and treatment services offered by Lucy Lee and DRMC, including but not limited to psychiatric care, rehabilitation care, and outpatient surgery, constitute one or more additional relevant lines of commerce in which to assess the competitive effects of the proposed acquisition.

PAR. 7. A relevant section of the country within which to assess the competitive effects of the proposed acquisition, for the relevant lines of commerce, is no larger than Butler County and portions of seven surrounding counties (Clay County, Arkansas; Ripley County, Missouri; Carter County, Missouri; Reynolds County, Missouri; Wayne County, Missouri; Stoddard County, Missouri; and Dunklin County, Missouri).

## MARKET STRUCTURE

PAR. 8. DRMC and Tenet's Lucy Lee Hospital are the two principal general acute care hospitals in the relevant markets, *i.e.*, the relevant lines of commerce in the relevant section of the country. The only other general acute care hospitals in the relevant section of the country are much smaller than Lucy Lee and DRMC, and do not and cannot practicably offer a range of general acute care hospital services as comprehensive as that available at Lucy Lee and DRMC. Moreover, in the relevant section of the country, there are no specialty hospitals, non-hospital outpatient surgery centers, or any other health facilities that are significant competitive alternatives to Lucy Lee or DRMC for any relevant lines of commerce.

PAR. 9. The relevant markets are highly concentrated, whether measured by the Herfindahl-Hirschman Index ("HHI") or by market share. The proposed acquisition would significantly increase concentration in these markets. For example, for general acute care

inpatient hospital services, the proposed acquisition would increase Tenet's market share by more than 30 percent, to over 84 percent. The HHI would increase by 2700 points, to a post-acquisition level over 6200.

#### ENTRY CONDITIONS

PAR. 10. It is unlikely that entry into the relevant markets would prevent, or remedy in a timely manner, any anticompetitive effects from the proposed acquisition. Entry is difficult and likely to take more than two years due to, among other things, the unlikelihood of obtaining state certificate of need approval required for new entry in Missouri, and the time required to complete construction of facilities necessary to provide the relevant health services.

#### COMPETITION

PAR. 11. Tenet and DRMC are actual and potential competitors in the relevant markets.

#### EFFECTS

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

- (a) It would eliminate actual and potential competition between Tenet and DRMC;
- (b) It would significantly increase the already high levels of concentration;
- (c) It would eliminate DRMC as a substantial, independent and competitive provider of the relevant health services;
- (d) It may permit Tenet to unilaterally raise prices;
- (e) It may result in less favorable prices and other terms for health plans that contract with providers to obtain the general acute care inpatient services or other relevant services for plan subscribers in the relevant area;
- (f) It may increase the possibility of collusion or interdependent coordination by the remaining providers in the relevant markets; and
- (g) It may deny patients, physicians, third-party payers, and other consumers of the relevant services the benefits of free and open competition based on price, quality, and service.

## VIOLATIONS CHARGED

PAR. 13. The acquisition agreement described in paragraph five above violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 14. The acquisition described in paragraph five, if consummated, would violate 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.

## ORDER DISMISSING COMPLAINT

In response to the Commission's Order to Show Cause issued on December 3, 1999, both complaint counsel and respondent have suggested that we dismiss the administrative complaint in this proceeding.<sup>1</sup>

In light of the positions of both parties to this litigation, and pursuant to the criteria set forth in the Statement of Federal Trade Commission Policy Regarding Administrative Merger Litigation Following the Denial of a Preliminary Injunction, 4 Trade Reg. Rep. (CCH) ¶ 13,242, and the accompanying Commission Statement, *id.* at 20,997, we have determined to dismiss the complaint. Accordingly,

*It is ordered,* That the administrative complaint in Docket No. 9289 be, and it hereby is, dismissed.

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<sup>1</sup> Complaint Counsel's Response to Order to Show Cause (Dec. 10, 1999); Response of Respondent Tenet Healthcare Corporation to Order to Show Cause (Dec. 17, 1999).



**Re: Petition of Hoechst Marion Roussel, Inc. to Quash --  
Investigation of Andrx Corp. and Hoechst Marion  
Roussel, Inc. File No. 981-0368.**

November 1, 1999

Dear Mr. Koon:

This letter advises you of the Federal Trade Commission's ruling on Hoechst Marion Roussel, Inc.'s ("Hoechst" or "Petitioner") petition to quash the subpoena *ad testificandum* issued to James M. Spears, Esquire ("Petition"). The Petition is denied for the reasons stated below. The new date and time for James M. Spears to appear and give testimony is Wednesday, November 17, 1999 at 9:00 a.m.

This ruling was made by Commissioner Sheila F. Anthony, acting as the Commission's delegate. *See* 16 CFR 2.7(d)(4). Hoechst has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.<sup>1</sup> The filing of a request for review by the full Commission will not stay or otherwise affect the new hearing date, November 17, 1999, unless the Commission rules otherwise. *See* 16 CFR 2.7(f).

Hoechst's request for oral argument is denied. Petitioner presented its arguments in substantial detail in its twenty-page Petition. Additional argument both is unnecessary and would only further delay this investigation.

I. BACKGROUND

On October 18, 1998, the Commission issued a resolution authorizing the use of compulsory process in a nonpublic investigation to determine whether Hoechst, "Andrx Corporation, or other persons, partnerships, or corporations have engaged or are engaging in unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, as amended, by monopolizing or attempting to monopolize the market for any pharmaceutical product; by entering into any agreement that has the purpose or effect of restricting entry into the generic market for any pharmaceutical product, or by otherwise

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<sup>1</sup> This letter decision is being delivered by facsimile and express mail. The facsimile copy is being provided as a courtesy. Computation of the time for appeal, therefore, should be calculated from the date you receive the original by express mail.

restricting competition in the manufacture or sale of any pharmaceutical product."

The investigation of Hoechst and Andrx has focused on an agreement the two companies entered in September, 1997 ("Agreement"), in connection with their litigation of a patent dispute regarding Hoechst's once-a-day diltiazem product, Cardizem CD. As its resolution states, the Commission is concerned that the Agreement may have unlawfully prevented or delayed Andrx and others from marketing generic alternatives, or at least may have been intended to achieve these ends. Thus, the meaning and impact of certain provisions of the Agreement, as well as the intent of the parties in entering into it, are central to the investigation. These points, in turn, are informed by facts regarding the negotiation and related conduct by the parties in arriving at the Agreement.

As part of its effort to gather these facts, on September 3, 1999, the Commission issued a subpoena to James M. Spears, outside counsel to Hoechst, requiring that he appear and give testimony on September 16, 1999, at an investigational hearing to be conducted by FTC attorneys leading the investigation. Staff identified Spears as a potential witness based upon, among other things, the testimony of other witnesses involved in the negotiation of the Agreement.<sup>2</sup> Those witnesses uniformly identified Spears as having led the negotiation on behalf of Hoechst. [ ]

On September 15, 1999, Hoechst filed a Petition to Quash the subpoena served upon Spears. Hoechst argues that (1) the subpoena "seeks privileged information for which the Commission has failed to make the requisite showing of necessity" and (2) "compliance with the subpoena would be unduly burdensome." Petition at 6.

After careful review of the Petition, Commissioner Anthony finds that none of Petitioner's arguments, each addressed separately below, provide a basis for quashing the subpoena.

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<sup>2</sup> In June, 1999, Hoechst and Andrx entered a second related agreement. In its Petition, Hoechst describes this as an agreement settling the patent litigation between the parties. Hoechst adds that Spears represented the company in the negotiation of this agreement as well. Petition at 2. In his communications with Hoechst, the FTC staff attorney leading the investigation indicated that this second related agreement also would be a topic of questioning during their hearing with Spears. *See e.g.*, Petition, Ex. C (Letter from Bradley Albert to counsel for Hoechst, dated August 18, 1999).

## II. ANALYSIS

*A. Hoechst's Privilege and Disqualification Arguments are Baseless.*

Hoechst's position in this matter boils down to the proposition that because some of the questions that may be asked during the investigational hearing of Spears might implicate one or more legal privileges, or because the hearing might lead to the disqualification of Spears from representing Hoechst in this and other related matters. Spears should not be required to submit to the hearing. While both arguments are addressed in more detail in later sections of this decision, their fundamental and overarching flaws are worth noting at the outset.

The mere fact that some questions posed during the hearing might be met with a privilege claim does not in any way provide a ground for quashing the subpoena. The questioners cannot know what information is protected by privilege or, for that matter, whether a witness will even choose to invoke an applicable privilege. This is a routine part of investigational hearings. Each witness must appear, listen to each question, and answer or assert a privilege claim as appropriate. *See* 16 CFR 2.9(b)(2). Thus, Petitioner's lengthy arguments regarding attorney-client and work-product privileges are premature.<sup>3</sup>

Petitioner's disqualification argument is likewise premature. Disqualification occurs in those instances where counsel is likely to be called as a witness at trial. *See* American Bar Association, Model Rule of Professional Conduct 3.7. An FTC hearing in a non-public investigation is not a trial. Rather, it is a process whereby the Commission attempts to gather the information needed to decide whether a law enforcement action should be initiated. This decision must be informed by as much relevant evidence as possible. The disqualification issue will not be ripe until and unless, as a result of the investigation, the Commission votes to pursue litigation against Hoechst, and a party to that litigation names Spears as a witness. Spears could be named as a witness by any party to the litigation

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<sup>3</sup> If, during his hearing, Spears asserts a privilege claim in response to a particular question, and FTC counsel do not believe the privilege applies, the invocation of the privilege can then be properly tested. *See* 16 CFR 2.8A, 2.9, 2.13. Witnesses cannot assert blanket privilege claims, as Hoechst attempts to here, which amount to: "I believe that everything you will ask me will call for privileged information. As I do not intend to waive any privileges, I should not have to appear and listen to your specific questions at all." *See. e.g.*, Petition at 4, 5, Ex. G, *Statement Pursuant to Commission Rule 2.7(d)(2)*, ¶¶ 2, 4, 9.

*whether or not the Commission holds an investigational hearing.* Of course, FTC counsel would certainly be more likely to name Spears as a witness should the investigational hearing reveal that his testimony is unique and relevant. Apparently recognizing this, Hoechst would have the Commission voluntarily abandon this promising avenue of inquiry. The Commission's mandate to enforce the antitrust laws, however, precludes the Commission from choosing to ignore likely sources of relevant evidence at the request of the target.

*B. The Subpoena Meets the Standards for Enforcement Applied by the Courts.*

The Federal Trade Commission Act grants the Commission extensive investigatory powers. *See* 15 U.S.C. 46, 49, 50, and 57b-1. These powers are essential to allow the Commission to carry out its broad mandate. Among the Commission's investigatory powers is the ability to issue subpoenas and the concomitant right to enforce them in the federal district courts. *See* 15 U.S.C. 49; 16 CFR 2.13. The courts apply a deferential standard in enforcement proceedings, asking only whether (i) the investigation is within the Commission's authority, (ii) the information sought is reasonably relevant to the investigation, and (iii) the request is not unduly burdensome. *See, e.g., FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992), *cert. denied* 507 U.S. 910 (1993). Each of these three requisites is met here.

1. Authority

Hoechst does not challenge the Commission's authority to conduct the instant investigation. Indeed, it is beyond cavil that the investigation of a potentially anticompetitive agreement between pharmaceutical companies is within the Commission's statutory authority.

2. Relevance

Hoechst does question the relevance of Spear's testimony to this investigation. While common sense counsels that little testimony is likely to be more relevant to an investigation of an agreement than that of one of its principal negotiators, we need not rely upon common sense alone here.

Hoechst's relevancy challenge is based largely on the contention that there is nothing to be gained from an investigational hearing of Spears that the Commission does not already possess or could not obtain from other sources. Petition at 19. This contention is faulty for several reasons. First, Hoechst, as a target of this non-public investigation, is not in a position to accurately assess what the Commission has so far obtained, or as yet still seeks, through its investigation. Second, the Commission, as it carries out its mandate to enforce the antitrust laws, must conduct its investigation as it sees fit, and plainly cannot simply accept a target's word that nothing fruitful will come out of an investigational hearing of a central participant in a matter under investigation. Finally, and most importantly, Hoechst's argument that the information sought from Spears is redundant and that "no non-privileged information could be gained through this subpoena that the Commission does not already possess or could readily obtain by further discovery directly from [Hoechst]" is just plain wrong. *Id.* A review of the transcripts from the other investigational hearings taken to date reveals that Spears' testimony is extremely likely to be relevant and unique. [ ]<sup>4</sup>

In short, the record compiled to date in this investigation overwhelmingly demonstrates the relevance of Spears' testimony.

### 3. Burden

Hoechst argues that it would be unreasonably burdened if Spears were to appear and give testimony at the Commission's investigational hearing because such an appearance "could result in the disqualification" of Spears, and perhaps others in his firm, from representing Hoechst in this investigation and in other actions pending in various courts throughout the country which arise from the same facts and circumstances under investigation here.<sup>5</sup> Petition at 18. This argument is unpersuasive for numerous reasons.

Disqualification is not an issue that the Commission created by serving a subpoena upon Spears. Rather, this threat, to the extent it

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<sup>4</sup> While the Andrx representatives might provide some testimony on these points, they, of course, can only provide the perspective of one party to the negotiation. In addition, it bears noting that discussions between Spears and his Andrx counterpart, as well as the drafts they exchanged, are not privileged.

<sup>5</sup> With respect to Hoechst's suggestion that the threat of disqualification might extend to other related cases pending across the country, the Commission has no control of these third-party cases and the witnesses that the plaintiffs (or even co-defendants) in these crises might call. Moreover, the Commission's investigational hearings are non-public. *See* 16 CFR 2.8(c).

exists, was created by Hoechst when it first chose to have its outside counsel act as the company's negotiator of the Agreement at issue and again when it chose to retain Spears to represent the company in connection with the Commission's investigation and other litigation relating to that Agreement. Lawyers and their clients routinely face the issue of whether representation by a lawyer is advisable in a matter where the possibility exists that the lawyer may be a witness. Clients cannot shield relevant witnesses from testifying by hiring them as counsel. This point -- that Spears is a first-hand actor and participant in the actions at issue, rather than a mere outside counsel consulted by the primary actors -- seems to be lost on Hoechst. Compare *Johnston Development Group, Inc. v. Carpenters Local Union No. 1578*, 130 F.R.D. 348, 352-54 (D.N.J. 1990) (deposition permitted where counsel was a fact witness by virtue of participating in a series of meetings), with *Shelton v. American Motors Corp.*, 805 F.2d 1323 (8<sup>th</sup> Cir. 1986) (deposition not allowed where attorney was not an actor or witness to the events at issue). This is a crucial distinction, and one that severely undermines the arguments set forth in Hoechst's Petition.

In addition, Spears would not be disqualified merely because he had testified in an investigational hearing. Hoechst argues that the hearing would make it more likely that Spears would be called as a witness should this investigation prompt the Commission to file suit or issue an administrative complaint. This argument proves too much. If the hearing shows that he has no relevant or unique information, his risk of being called as a witness and, therefore, disqualified, is remote. On the other hand, if he has such information, and its probity outweighs the prejudice to Hoechst that would result from his disqualification, he *should* be a witness. Spears' fate is controlled not by his attendance at a hearing, but rather by the nature of the evidence he possesses. The investigational hearing, therefore, only affects the likelihood that Spears will be called as a witness in any potential trial to the extent that it provides a basis for informing that decision. Hoechst seeks to render the possibility of Spears being called as a witness "less likely" by asking the Commission to commit to willful ignorance as to what evidence Spears has to offer.

In sum, the subpoena was issued in connection with a proper investigation, seeks relevant information, and does not pose an unreasonable burden on Hoechst.

*C. Hoechst's Privilege Arguments Are Premature and Misplaced.*

Hoechst's Petition largely ignores the legal standards, addressed above, applicable to the enforcement of an FTC subpoena. Instead, Hoechst poses privilege arguments based upon precedents arising under the Federal Rules of Civil Procedure. Hoechst's fervent protestations of privilege are premature and misplaced.

Hoechst argues that because some questions asked during the hearing may solicit information for which a privilege could be claimed, holding the hearing at all is improper and the subpoena invalid. If this were the case, the Commission could hold no investigational hearings because in every hearing there is the prospect of inquiries into privileged matters. While Spears' status as Hoechst's outside counsel may well give rise to privileges that may be properly asserted in response to specific questions, that does not excuse him from having to attend the hearing at all. In short, he must appear, listen to each question asked by the examiners, and either answer or assert any privileges that he or Hoechst believes apply. *See* 16 CFR 2.9.

Throughout its Petition, Hoechst confuses this issue. Again and again Hoechst makes arguments to the effect that the subpoena is aimed at intruding "upon protected attorney-client communications and attorney thought processes . . ." and that "compliance with the Commission's subpoena will require [Hoechst's] counsel to disclose privileged information and other protected material . . ." Petition at 7, 13. While questions, if and when posed, may call for such information, Hoechst is not being compelled to provide it. The issue here is simply whether Spears must appear for a hearing, not the validity of any privileges Hoechst might claim in response to questions asked during the hearing. Indeed, no assessment of privilege claims is even possible because as yet, no questions have been posed and no proper assertions of privilege have been lodged.

Relying on case law arising in the context of civil discovery, Hoechst argues that before the Commission can interview Spears, it "must offer proof of relevancy and need." Petition at 7. More specifically, Hoechst argues that the Commission "must show: (1) the information sought is otherwise not available; (2) the information sought is relevant and non-privileged; and (3) the information sought is critical to the preparation of the case." *Id.* (citations omitted).

As this is still an investigation, rather than a case pending before a judge, it is unclear to whom Hoechst believes these prerequisite showings must be made. This oversight demonstrates Hoechst's fundamental failure to appreciate the context of this subpoena: an investigation undertaken by the Commission pursuant to its statutory authority, rather than discovery undertaken in connection with litigation. While both are "investigatory" in nature, their bases and aims are quite different, and so too, therefore, are the rules that govern them.<sup>6</sup> As the Ninth Circuit explained in *EEOC v. Deer Valley Unified School Dist.*, 968 F.2d 904 (9th Cir. 1992):

The function of administrative investigatory subpoenas differs from that of the discovery provisions of the Federal Rules of Civil Procedure. The discovery provisions apply to actions that have already been filed with the court, and the parties are seeking to develop evidence for the action that is before the court. The statutory subpoena authority, on the other hand, is designed for administrative investigations, which may or may not result in any further action before the district court. The enforcement is dependent upon the interpretation of statutory authority, not interpretations of the discovery provisions of the Federal Rules of Civil Procedure.

*Id.* at 906; see also *Linde Thompson Langworthy Kohn & Van Dyke v. RTC*, 5 F.3d 1508, 1513 (D.C. Cir. 1993) ("Unlike a discovery procedure, an administrative investigation is a proceeding distinct from any litigation that may eventually flow from it"); *EPA v. Alyeska Pipeline Service Co.*, 836 P.2d 443, 447 (9th Cir. 1988) ("An administrative agency, unlike parties relying on the judicial discovery process, need not first allege a violation of the law before it can investigate" (internal citations omitted)). Thus, Hoechst's arguments regarding the Commission's failure to make requisite showings of relevancy and necessity begin from the mistaken premise that federal discovery rules apply here; they do not.

Even assuming that Hoechst was arguing by analogy in discussing the discovery standards applied by courts considering whether to allow a party to depose opposing counsel, *i.e.*, that such precedent is

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<sup>6</sup> For example, the relevancy inquiry applicable to administrative compulsory process is different than the inquiry applicable to civil litigation discovery demands:

[U]nlike a court which gathers information only as it relates to issues relevant to the litigation at hand, an agency in its acquisition of facts is not bound by the parameters of a particular case or controversy. .... Because the need for investigating allegations of unlawful activity is a substantial one, the law requires that courts give agencies leeway when considering relevance objections.

*FTC v. Invention Submission Corp.*, 1991-1 Trade Cas. (CCH) ¶ 69,338 at 65,351 (D.D.C. 1991), *aff'd*, 965 F.2d 1086 (D.C. Cir. 1992), *cert. denied* 507 U.S. 910 (1993). Thus, the bounds of relevancy in the context of an investigation are broader than those applicable to a civil suit.



persuasive, but not binding, authority,<sup>7</sup> the argument still fails. This is so because, leaving aside the issue of whether the *Shelton* standards are applicable and appropriate in the context of a Commission investigation, all of those standards -- (i) the information is not available for another source, (ii) it is relevant and non-privileged, and (iii) it is important to the case -- are plainly met here.

The primary focus of the investigational hearing of Spears will be on communications between Spears and representatives of Andrx relating to the negotiation and drafting of the Agreement. As Spears was the only Hoechst representative taking part in many of these communications, the information he can offer is not available from any other source. As discussed above, this information is clearly relevant. Moreover, communications with third-parties are not privileged. Finally, the details of the Grafting of the Agreement are essential to this investigation. In order to evaluate the likely effects of the Agreement and the parties' asserted business justifications, the Commission must obtain an understanding of the meaning and operation of specific provisions of the Agreement, as well as the purpose of the parties in including those provisions or, indeed, of not including others. Learning the thought processes that went into these negotiations, as reflected in discussions between the parties' representatives and in the drafts they exchanged, is crucial to the investigation.<sup>8</sup>

### III. CONCLUSION

For all of the foregoing reasons, the Petition is denied, and, pursuant to Rule 2.7(e), 16 CFR 2.7(e), the new date and time for James M. Spears to appear and give testimony is Wednesday, November 17, 1999 at 9:00 a.m.

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<sup>7</sup> The Commission carefully considers the use of its compulsory process powers each time they are exercised. While not technically bound by precedents established under the Federal Rules of Civil Procedure, and recognizing that the aims and limits applicable in its investigations often diverge from those applicable in litigation, the Commission's consideration of whether to issue compulsory process in a given case is informed by some of the same touchstones used by courts in assessing discovery requests in the context of civil litigation.

<sup>8</sup> None of the foregoing is intended in any way place limits on the avenues of inquiry that the FTC counsel conducting this investigation may pursue in the course of the hearing. Rather, it merely is intended to provide an example of at least one important line of inquiry that meets all of the *Shelton* standards. The Commission is confident that the FTC staff conducting the investigation will work as cooperatively as possible with Spears and Hoechst in dealing with areas where privileges might be implicated.

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