IN THE MATTER OF

SHAW'S SUPERMARKETS, INC., ET AL.

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

Docket C-3934; File No. 991 0075
Complaint, April 5, 2000--Decision, April 5, 2000

This consent addresses the $490 million acquisition by Shaw's Supermarkets, Inc., a wholly owned subsidiary of J Sainsbury plc, of Star Market Holdings, Inc., the second and third largest supermarket chains, respectively, operating in the Greater Boston area. The complaint alleges that the proposed acquisition would substantially lessen competition in the markets for the retail sale of food and grocery items in supermarkets in the relevant geographic market. The consent order requires Shaw's to divest ten supermarkets, which represent all of either the Shaw's or Star supermarkets in the relevant market areas to buyers who do not currently operate supermarkets in these markets.

Participants

For the Commission: *Jessica D. Gray* and *David von Nirschl*

For the Respondents: *Carrie M. Anderson* and *Steven A. Newborn, Rogers & Wells;* and *John Herfort* and *Malcolm Pfunder, Gibson, Dunn &Crutcher.*

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 respondent J Sainsbury plc ("J Sainsbury") and respondent Shaw's Supermarkets, Inc. ("Shaw's"), a wholly-owned subsidiary of respondent J Sainsbury's, have entered into an agreement to acquire all of the outstanding shares of respondent Star Markets Holdings, Inc. ("Star Markets"), all subject to the jurisdiction of the Commission, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15

U.S.C. § 45, that such 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 that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

Definition

1. For the purposes of this complaint:

   "Supermarket" means a full-line retail grocery store with annual sales of at least $2 million that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products; refrigerated and frozen food and beverage products; fresh and prepared meats and poultry; produce, including fresh fruits and vegetables; shelf-stable food and beverage products, including canned and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, and tea; and other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids.

J Sainsbury plc

2. Respondent J Sainsbury is a corporation organized, existing, and doing business under and by virtue of the laws of England, with its office and principal place of business located at Stamford House, Stamford Street, London SE 19LL, England.

3. Respondent J Sainsbury, through its wholly-owned domestic subsidiary, Shaw's is, and at all times relevant herein has been, engaged in the operation of supermarkets in Massachusetts, Connecticut, Maine, New Hampshire, Rhode Island, and Vermont. J Sainsbury and Shaw's operate 126 supermarkets in

these states under the “Shaw's” trade name. J Sainsbury had $2.8 billion in total sales in the United States for fiscal year 1998.

4. Respondent J Sainsbury is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

Star Markets Holdings, Inc.

5. Respondent Star Markets is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Massachusetts, with its office and principal place of business located at 625 Mt. Auburn Street, Cambridge, Massachusetts 02138.

6. Respondent Star Markets is, and at all times relevant herein has been, engaged in the operation of supermarkets in Massachusetts. Star Markets operates 53 supermarkets under the “Star Markets” and “Wild Harvest” trade names. Star Markets had $1.034 billion in total sales for the fiscal year ending January 31, 1998.

7. Respondent Star Markets is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C.§ 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

Acquisition

8. On November 25, 1998, J Sainsbury plc and Star Markets entered into a Stock Purchase Agreement. J Sainsbury through its Shaw's subsidiary will acquire all of the outstanding voting securities of Star Markets for approximately $490 million.

Trade and Commerce

9. The relevant line of commerce (*i.e.*, the product market) in which to analyze the acquisition described herein is the retail sale of food and grocery products in supermarkets.

10. Supermarkets provide a distinct set of products and services for consumers who desire to one-stop shop for food and grocery products. Supermarkets carry a full line and wide selection of both food and nonfood products (typically more than 10,000 different stock-keeping units ("SKUs")) as well as a deep inventory of those SKUs. In order to accommodate the large number of food and nonfood products necessary for one-stop shopping, supermarkets are large stores that typically have at least 10,000 square feet of selling space.

11. Supermarkets compete primarily with other supermarkets that provide one-stop shopping for food and grocery products. Supermarkets primarily base their food and grocery prices on the prices of food and grocery products sold at nearby supermarkets. Supermarkets do not regularly price-check food and grocery products sold at other types of stores and do not significantly change their food and grocery prices in response to prices at other types of stores. Most consumers shopping for food and grocery products at supermarkets are not likely to shop elsewhere in response to a small price increase by supermarkets.

12. Retail stores other than supermarkets that sell food and grocery products, such as neighborhood "mom & pop" grocery stores, convenience stores, specialty food stores *(e.g.*, seafood markets, bakeries, etc.), club stores, military commissaries, and mass merchants, do not effectively constrain prices at supermarkets because they operate significantly different retail formats. None of these stores offers a supermarket's distinct set

of products and services that enable consumers to one-stop shop for food and grocery products.

13. The relevant sections of the country (*i.e.*, the geographic markets) in which to analyze the acquisition described herein are the county or counties that include the following incorporated cities and towns in Massachusetts:

a) Waltham area that includes Waltham, Auburndale, Watertown, Newton, West Newton, Weston, and Lexington;

b) Quincy-Dorchester area that includes Quincy, N. Quincy, Milton, Dorchester, Boston, S. Boston, Braintree, and Weymouth;

c) Norwood area that includes Norwood, Walpole, Westwood, Dedham, Wrentham, and Sharon;

d) Milford area that includes Milford, Hopedale, Mendon, and Upton;

e) Salem-Lynn area that includes Salem, Lynn, Peabody, Swampscott, Danvers, Nahant, and Marblehead;

f) Norwell area that includes Norwell, Hanover, Rockland, Pembroke, Hanson, Scituate, Halifax, Hingham, Weymouth, Cohasset, and Hull;

g) Hudson-Stow area that includes Stow, Hudson, Sudbury, Marlborough, and Bolton; and

h) Saugus-Melrose-Stoneham area that includes Saugus, Melrose, Stoneham, and Wakefield.

Market Structure

14. The relevant markets are highly concentrated, whether measured by the Herfindahl-Hirschman Index (commonly referred to as "HHI") or by two-firm and four-firm concentration ratios. The acquisition would substantially increase concentration in each market. Shaw's and Star Markets would have a combined market share that ranges from 29 percent to 64 percent in each geographic market. The post-acquisition HHIs in the geographic markets range from 2205 points to 5136 points.

Entry Conditions

15. Entry would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant sections of the country.

Actual Competition

16. J Sainsbury through its Shaw's subsidiary and Star Markets are actual and direct competitors in the relevant markets.

Effects

17. The effect of the acquisition, if consummated, may be substantially to lessen competition in the relevant line of commerce in the relevant sections of the country 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 competition between supermarkets owned or controlled by J Sainsbury and supermarkets owned and controlled by Star Markets;

b) by increasing the likelihood that J Sainsbury will unilaterally exercise market power; and

c) by increasing the likelihood of, or facilitating, collusion or coordinated interaction,

each of which increases the likelihood that the prices of food, groceries or services will increase, and the quality and selection of food, groceries or services will decrease, in the relevant sections of the country.

Violations Charged

18. The Stock Purchase Agreement between J Sainsbury and Star Markets to acquire all of the outstanding voting stock of Star Markets violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and the proposed acquisition would, if consummated, 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.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fifth day of April, 2000, issues its complaint against said respondents.

By the Commission, Commissioner Leary not participating.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition of Star Markets Holdings, Inc. ("Star Markets") by J Sainsbury plc and its wholly-owned subsidiary Shaw's Supermarkets, Inc. ("Shaw's") (collectively, "Respondents"), and Respondents having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its

consideration, and which, if issued by the Commission, would charge Respondents with violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the Respondents have violated the said Acts, and that 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, and having modified the consent order in certain respects, 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 J Sainsbury is a corporation organized, existing, and doing business under and by virtue of the laws of England, with its office and principal place of business located at Stamford House, Stamford Street, London SE 19LL, England.

2. Respondent Shaw's, a wholly-owned subsidiary of J Sainsbury, 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 140 Laurel Street, P.O. Box 600, East Bridgewater, Massachusetts 02333.

3. Respondent Star Markets 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 625 Mt. Auburn Street, Cambridge, Massachusetts 02138.

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

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

A. "J Sainsbury" means J Sainsbury plc, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries (including but not limited to Shaw's), divisions, groups, and affiliates controlled by J Sainsbury, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. J Sainsbury, after consummation of the Acquisition, includes Star Markets.

B. "Shaw's" means Shaw's Holdings Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Shaw's, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Star Markets" means Star Markets Holdings, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Star Markets, and the

respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "Respondents" means J Sainsbury, Shaw's, and Star Markets, individually and collectively.

E. "Commission" means the Federal Trade Commission.

F. "Acquirer" means Victory and Foodmaster and/or any other entity or entities approved by the Commission to acquire the Assets To Be Divested pursuant to this Order, individually and collectively.

G. "Acquisition" means J Sainsbury's proposed acquisition of Star Markets pursuant to the Stock Purchase Agreement dated November 25, 1998.

H. "Assets To Be Divested" means the Schedule A Assets, Schedule B Assets, Schedule C Assets, and Schedule D Assets.

I. "Applicable Consent Decree" means a consent decree in an action commenced by the Commonwealth of Massachusetts, under which decree Respondents will divest all or part of the Schedule A Assets, Schedule B Assets, Schedule C Assets, and Schedule D Assets.

J. "Schedule A Assets" means the Supermarkets identified in Schedule A of this Order and all assets, leases, properties, government permits (to the extent transferable), customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the Supermarket business operated at those locations, but shall not include those assets consisting of or pertaining to any of the Respondents' trade marks, trade dress, service marks, or trade names.

K. "Schedule B Assets" means the Supermarkets identified in Schedule B of this Order and all assets, leases, properties,

government permits (to the extent transferable), customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the Supermarket business operated at those locations, but shall not include those assets consisting of or pertaining to any of the Respondents' trade marks, trade dress, service marks, or trade names.

L. "Schedule C Assets" means the Supermarkets identified in Schedule C of this Order and all assets, leases, properties, government permits (to the extent transferable), customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the Supermarket business operated at those locations, but shall not include those assets consisting of or pertaining to any of the Respondents' trade marks, trade dress, service marks, or trade names.

M. "Schedule D Assets" means the Supermarket identified in Schedule D of this Order and all assets, leases, properties, government permits (to the extent transferable), customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the Supermarket business operated at that location, but shall not include those assets consisting of or pertaining to any of the Respondents' trade marks, trade dress, service marks, or trade names.

N. "Supermarket" means a full-line retail grocery store that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products; frozen and refrigerated food and beverage products; fresh and prepared meats and poultry; produce, including fresh fruits and vegetables; shelf-stable food and beverage products, including canned and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, and tea; and other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids.

O. "Victory" means Victory Super Markets, a corporation organized, existing and doing business under and by virtue of the

laws of the Commonwealth of Massachusetts, with its principal place of business located at 75 North Main Street, Leominster, MA 01453.

P. "Foodmaster" means Foodmaster Super Markets, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its principal place of business located at 100 Everett Avenue, Unit 12, Chelsea, MA 02150.

Q. "Victory Agreement" means the Purchase Agreement between Shaw's Holdings Inc., Shaw's Supermarkets, Inc. and Victory executed on May 27, 1999, for the divestiture by Respondents to Victory of the Schedule A Assets.

R. "Foodmaster Agreement" means the Agreement of Purchase and Sale of Assets and Assignments of Leases between Shaw's Holdings Inc. and Foodmaster Super Markets, Inc. executed on May 26, 1999, along with amended provisions as set forth in the June 9, 1999, letter from Verne Powell, Shaw's Holdings, Inc. to Lawrence A. Sperber, Attorney for Foodmaster Supermarkets, Inc., and the two letters from Verne Powell to John A. DeJesus, Foodmaster Super Market, Inc., dated June 14, 1999, for the divestiture by Respondents to Foodmaster of the Schedule B Assets.

S. "Relevant Areas" means the county or counties that include the following incorporated cities and towns in Massachusetts:

1. Waltham area that includes Waltham, Auburndale, Watertown, Newton, West Newton, Weston, and Lexington;

2. Quincy-Dorchester that includes Quincy, N. Quincy, Milton, Dorchester, Boston, S. Boston, Braintree, and Weymouth;

3. Norwood area that includes Norwood, Walpole, Westwood, Dedham, Wrentham, and Sharon;

4. Milford area that includes Milford, Hopedale, Mendon, and Upton;

5. Salem-Lynn area that includes Salem, Lynn, Peabody, Swampscott, Danvers, Nahant, and Marblehead;

6. Norwell area that includes Norwell, Hanover, Rockland, Pembroke, Hanson, Scituate, Halifax, Hingham, Weymouth, Cohasset, and Hull; and

7. Hudson-Stow area that includes Stow, Hudson, Sudbury, Marlborough, and Bolton.

T. "Third Party Consents" means all consents from any other person, including all landlords, that are necessary to effect the complete transfer to the Acquirer(s) of the Assets To Be Divested.

II.

IT IS FURTHER ORDERED that:

A. Respondents shall divest, absolutely and in good faith, the Schedule A Assets to Victory, in accordance with the Victory Agreement (which agreement shall not be construed to vary or contradict the terms of this Order), no later than:

1. twenty (20) days after the date on which the Acquisition is consummated, or

2. four (4) months after the date on which Respondents sign the Agreement Containing Consent Order,

whichever is earlier.

Provided, however, that if Respondents have divested the Schedule A Assets to Victory pursuant to the Victory Agreement prior to the date the Order becomes final, and if, at the time the Commission determines to make the Order final, the Commission

notifies Respondents that Victory is not an acceptable Acquirer or that the Victory Agreement is not an acceptable manner of divestiture, then Respondents shall immediately rescind the transaction with Victory and shall divest the Schedule A Assets within three (3) months of the date the Order becomes final, absolutely and in good faith, at no minimum price, to an Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

B. Respondents shall divest, absolutely and in good faith, the Schedule B Assets to Foodmaster, in accordance with the Foodmaster Agreement (which agreement shall not be construed to vary or contradict the terms of this Order), within ten (10) days of the date on which the Order becomes final.

Provided, however, that if Respondents have divested the Schedule B Assets to Foodmaster pursuant to the Foodmaster Agreement prior to the date the Order becomes final, and if, at the time the Commission determines to make the Order final, the Commission notifies Respondents that Foodmaster is not an acceptable Acquirer or that the Foodmaster Agreement is not an acceptable manner of divestiture, then Respondents shall immediately rescind the transaction with Foodmaster and shall divest the Schedule B Assets within three (3) months of the date the Order becomes final, absolutely and in good faith, at no minimum price, to an Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

C. Respondents shall obtain all required Third Party Consents prior to the closing of each of the respective divestiture agreements, or any other agreement pursuant to which the Assets To Be Divested are divested to an Acquirer.

D. The purpose of the divestitures is to ensure the continuation of the Schedule A Assets and Schedule B Assets as ongoing viable enterprises engaged in the Supermarket business and to remedy the lessening of competition resulting from the Acquisition alleged in the Commission's complaint.

III.

IT IS FURTHER ORDERED that:

A. Respondents shall divest either the Schedule C or Schedule D Assets to an Acquirer, only in a manner that receives the prior approval of the Commission, absolutely and in good faith and at no minimum price, within three (3) months from the date on which Respondents sign the Agreement Containing Consent Order.

B. The purpose of the divestiture is to ensure the continuation of the divested supermarket(s) as ongoing viable enterprises engaged in the Supermarket business and to remedy the lessening of competition resulting from the Acquisition alleged in the Commission's complaint.

IV.

IT IS FURTHER ORDERED that:

A. If Respondents have not divested the Assets To Be Divested within the time periods required by Paragraphs II and III of this Order, absolutely and in good faith and with the Commission's prior approval, the Commission may appoint a trustee to divest those assets that Respondents have failed to divest. 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 IV.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 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 receipt of written notice by the staff of the Commission to Respondents of the identity of any 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 Assets To Be Divested.

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 each divestiture required by this Order.

4. The trustee shall have twelve (12) months from the date the Commission or court approves the trust agreement described in Paragraph IV.B.3. to accomplish the divestitures, 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 the period for no more than two (2) additional periods.

5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the Assets To Be Divested or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestitures. 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 divestitures shall be made to an Acquirer or Acquirers that receive Commission approval and in a manner approved by the Commission; provided, however, if the trustee receives bona fide offers for an asset to be divested from more than one acquiring entity, and if the Commission determines to approve more than one

such acquiring entity, the trustee shall divest such asset to the acquiring entity or entities selected by J Sainsbury from among those approved by the Commission; provided further, however, that J Sainsbury shall select such entity within five (5) 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 divestitures 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 J Sainsbury, 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 Assets To Be Divested.

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 IV.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 each divestiture required by this Order.

11. In the event that the trustee determines that he or she is unable to divest the Assets To Be Divested in a manner consistent with the Commission's purpose as described in Paragraphs II and III, the trustee may divest additional ancillary assets of Respondents and effect such arrangements as are necessary to satisfy the requirements of this Order.

12. The trustee shall have no obligation or authority to operate or maintain the Assets To Be Divested.

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

V.

IT IS FURTHER ORDERED that Respondents shall maintain the viability, marketability, and competitiveness of the Assets To Be Divested pending their divestiture, and shall not cause the wasting or deterioration of the Assets To Be Divested, nor shall they cause the Assets To Be Divested to be operated in a manner inconsistent with applicable laws, nor shall they sell, transfer, encumber or otherwise impair the viability, marketability

or competitiveness of the Assets To Be Divested. Respondents shall comply with the terms of this Paragraph until such time as Respondents have divested the Assets To Be Divested pursuant to the terms of this Order. Respondents shall conduct or cause to be conducted the business of the Assets To Be Divested in the regular and ordinary course and in accordance with past practice (including regular repair and maintenance efforts) and shall use their best efforts to preserve the existing relationships with suppliers, customers, employees, and others having business relations with the Assets To Be Divested in the ordinary course of business and in accordance with past practice. Respondents shall not terminate the operation of any of the Assets To Be Divested. Respondents shall continue to maintain the inventory of each of the Assets To Be Divested at levels and selections (*e.g.*, stock-keeping units) consistent with those maintained by such Respondent(s) at such Supermarket in the ordinary course of business consistent with past practice. Respondents shall use best efforts to keep the organization and properties of each of the Assets To Be Divested intact, including current business operations, physical facilities, working conditions, and a work force of equivalent size, training, and expertise associated with the Supermarket. Included in the above obligations, Respondents shall, without limitation:

1. maintain operations and departments and not reduce hours at each of the Assets To Be Divested;

2. not transfer inventory from any of the Assets To Be Divested other than in the ordinary course of business consistent with past practice;

3. make any payment required to be paid under any contract or lease when due, and otherwise pay all liabilities and satisfy all obligations, in each case in a manner consistent with past practice;

4. maintain the books and records of each of the Assets To Be Divested;

5. not display any signs or conduct any advertising (*e.g.*, direct mailing, point-of-purchase coupons) that indicates that any Respondent is moving its operations to another location, or that indicates any of the Assets To Be Divested will close;

6. not remove the trade marks, trade dress, service marks, or trade names of Respondents at any of the Assets To Be Divested;

7. not conduct any "going out of business," "close-out," "liquidation" or similar sales or promotions at or relating to any of the Assets To Be Divested; and

8. not change or modify in any material respect the existing advertising practices, programs and policies for any of the Assets To Be Divested, other than changes in the ordinary course of business consistent with past practice for Supermarkets of the Respondents not being closed or relocated.

VI.

IT IS FURTHER ORDERED that, for a period of ten (10) years from the date this Order becomes final, J Sainsbury shall not, directly or indirectly, through subsidiaries, partnerships, or otherwise, without providing advance written notification to the Commission:

A. Acquire any ownership or leasehold interest in any facility that has operated as a Supermarket, within six (6) months prior to the date of such proposed acquisition, in the county or counties that include the Relevant Areas.

B. Acquire any stock, share capital, equity, or other interest in any entity that owns any interest in or operates any Supermarket, or owned any interest in or operated any

Supermarket within six (6) months prior to such proposed acquisition, in the county or counties that include the Relevant Areas.

Provided, however, that advance written notification shall not apply to the construction of new facilities by J Sainsbury or the acquisition of or leasing of a facility that has not operated as a Supermarket within six (6) months prior to J Sainsbury's offer to purchase or lease.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of J Sainsbury and not of any other party to the transaction. J Sainsbury shall provide the Notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), J Sainsbury shall not consummate the transaction until twenty (20) days after substantially complying with such request. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Provided, however, that prior notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

VII.

IT IS FURTHER ORDERED that, for a period of ten (10) years from the date this Order becomes final:

A. J Sainsbury shall neither enter into nor enforce any agreement that restricts the ability of any person (as defined in Section 1(a) of the Clayton Act, 15 U.S.C. § 12(a)) that acquires any Supermarket, any leasehold interest in any Supermarket, or any interest in any retail location used as a Supermarket on or after January 1, 1998, in the county or counties that include the Relevant Areas to operate a Supermarket at that site if such Supermarket was formerly owned or operated by J Sainsbury.

B. J Sainsbury shall not remove any fixtures or equipment from a property owned or leased by J Sainsbury in the county or counties that include the Relevant Areas that is no longer in operation as a Supermarket, except (1) prior to and as part of a sale, sublease, assignment, or change in occupancy of such Supermarket; or (2) to relocate such fixtures or equipment in the ordinary course of business to any other Supermarket owned or operated by J Sainsbury.

VIII.

IT IS FURTHER ORDERED that:

A. Within thirty (30) days after the date Respondents signed the Agreement Containing Consent Order and every thirty (30) days thereafter until Respondents have fully complied with the provisions of Paragraphs II, III, and IV of this Order, Respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Paragraphs II, III, and IV of this Order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II, III, and IV of the Order, including a description of all substantive contacts or negotiations for

divestitures and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

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

IX.

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 Respondents that may affect compliance obligations arising out of the Order.

X.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, upon written request with five (5) days' 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 inspect the facilities and to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondents relating to any matters contained in this Order; and

B. Without restraint or interference from Respondents, to interview officers, directors, or employees of Respondents in the presence of counsel.

XI.

IT IS FURTHER ORDERED, that if (i) Respondents have fully complied with all terms of Paragraphs VI through X of this Order; (ii) Respondents within forty-five (45) days after final issuance of this Order by the Commission have submitted a complete application in support of the divestiture of the Assets To Be Divested pursuant to Paragraphs II and III of this Order, as the case may be (including the buyer, manner of divestiture and all other matters subject to Commission approval); and (iii) the Commission has approved the divestiture and has not withdrawn its acceptance; but (iv) Respondents have certified to the Commission within ten (10) days after the Commission=s approval of the divestiture that the Commonwealth of Massachusetts, notwithstanding timely and complete application by Respondents to the Commonwealth of Massachusetts, has failed to approve the divestiture under an Applicable Consent Decree of the particular assets or businesses whose divestiture is also required under this Order, then with respect to the particular divestiture that remains unconsummated, the time in which the divestiture is required under this Order to be completed shall be extended for sixty (60) days. During such sixty (60) day period, Respondents shall exercise utmost good faith and best efforts to resolve the concerns of the Commonwealth of Massachusetts.

By the Commission, Commissioner Leary not participating.

Schedule A

The Schedule A Assets consist of all assets, leases, properties, government permits, customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the Supermarket business operated at the following locations in eastern Massachusetts, excluding the trade marks, trade dress, service marks, or trade names of Respondents:

J Sainsbury store No. 193, operating under the "Shaw's Supermarket" trade name, located at 836 Main Street, Waltham, MA 02154;

J Sainsbury store No. 196, operating under the "Shaw's Supermarket" trade name, located at 475 Hancock Street, North Quincy, MA 02171;

J Sainsbury store No. 122, operating under the "Shaw's Supermarket" trade name, located at 435 Walpole Street, Route 1A, Norwood, MA 02062;

Star Markets store No. 169, operating under the "Star Markets" trade name, located at 7 Medway Road, Milford, MA 01757; and

Star Markets store No. 128, operating under the "Star Markets" trade name, located at 4 Washington Street and Pond Road, Norwell, MA 02106.

Schedule B

The Schedule B Assets consist of all assets, leases, properties, government permits, customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the Supermarket business operated at the following locations in eastern Massachusetts, excluding the trade marks, trade dress, service marks, or trade names of Respondents:

Star Markets store No. 144, operating under the "Star Markets" trade name, located at 50 Boston Street, Lynn, MA 01904 and

Star Markets store No. 129, operating under the "Star Markets" trade name, located at 38 Paradise Road, Swampscott, MA 01907.

Schedule C

The Schedule C Assets consist of all assets, leases, properties, government permits, customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the Supermarket business operated at the following locations in eastern Massachusetts, excluding the trade marks, trade dress, service marks, or trade names of Respondents:

Star Markets store No. 152, operating under the "Star Markets" trade name, located at 155 Great Road, Route 117, Stow, MA 01775 and

Star Markets store No. 118, operating under the "Star Markets" trade name, located at 3509 Boston Post Road, Route 20, Sudbury, MA 01776.

Schedule D

The Schedule D Assets consist of all assets, leases, properties, government permits, customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the Supermarket business operated at the following location in eastern Massachusetts, excluding the trade marks, trade dress, service marks, or trade names of Respondents:

J Sainsbury store No. 338, operating under the "Shaw's Supermarket" trade name, located at 10 Technology Drive, Route 85, Hudson, MA 01749.

Analysis of the Draft Complaint and Proposed Consent Order to Aid Public Comment

I. Introduction

The Federal Trade Commission ("Commission) has accepted for public comment from J Sainsbury plc, owner of Shaw's Supermarkets, Inc. ("Shaw's") and Star Markets Holdings, owner of Star Markets Company ("Star") (collectively "the Proposed Respondents") an Agreement Containing Consent Order ("the proposed consent order"). The Proposed Respondents have also reviewed a draft complaint contemplated by the Commission. The proposed consent order is designed to remedy likely anticompetitive effects arising from Shaw's proposed acquisition of all of the outstanding voting stock of Star.

II. Description of the Parties and the Proposed Acquisition

Shaw's Supermarkets, Inc., a Massachusetts corporation headquartered in Bridgewater, Massachusetts, is a wholly owned subsidiary of J Sainsbury plc, a United Kingdom company. Shaw's operates 126 supermarkets in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. All of Shaw's supermarkets operate under the "Shaw's" trade name. Shaw's total sales for its 1998 fiscal year were approximately $2.8 billion. Shaw's is the second largest supermarket chain operating in Greater Boston. After the merger, Shaw's will become the number one supermarket chain in Greater Boston, controlling almost 40% of all supermarket sales.

Star is a Massachusetts corporation headquartered in Cambridge, Massachusetts. Star operates 53 supermarkets in Massachusetts, forty-nine under the "Star" trade name and four under the "Wild Harvest" trade name. Star also operates a wholesale food business that serves mostly small independent supermarket customers throughout New England and New York State. Star's wholesale customer base includes 11 supermarkets that contractually use the "Star Markets" trade name though Star has no ownership interest in them. Star's revenues for fiscal year 1998 are more than $1billion, $966 million of which are from its retail operations. With its 53 supermarkets, Star is the third largest supermarket chains operating in Greater Boston. On November 25, 1998, J Sainsbury plc, Star Markets Holdings, Inc., Star Markets Company, Inc. and certain stockholders of Star Markets Holdings Inc., entered into a Stock Purchase Agreement for J Sainsbury plc to acquire all of the outstanding voting securities of Star Markets Holdings, Inc. The value of the transaction is approximately $490 million.

III. The Draft Complaint

The draft complaint alleges that the relevant line of commerce (*i.e.*, the product market) is the retail sale of food and grocery items in supermarkets. Supermarkets provide a distinct set of products and services for consumers who desire to one-stop shop for food and grocery products. Supermarkets carry a full line and wide selection of both food and nonfood products (typically more than 10,000 different stock-keeping units ("SKUs")), as well as an

extensive inventory of those SKUs in a variety of brand names and sizes. In order to accommodate the large number of nonfood products necessary for one-stop shopping, supermarkets are large stores that typically have at least 10,000 square feet of selling space.

Supermarkets compete primarily with other supermarkets that provide one-stop shopping for food and grocery products. Supermarkets base their food and grocery prices primarily on the prices of food and grocery products sold at nearby supermarkets. Most consumers shopping for food and grocery products at supermarkets are not likely to shop elsewhere in response to a small price increase by supermarkets.

Retail stores other than supermarkets that sell food and grocery products, such as neighborhood "mom & pop" grocery stores, limited assortment stores, convenience stores, specialty food stores (*e.g.*, seafood markets, bakeries, etc.), club stores, military commissaries, and mass merchants, do not effectively constrain prices at supermarkets. The retail format and variety of items sold at these other stores are significantly different than that of supermarkets. None of these other retailers offer a sufficient quantity and variety of products to enable consumers to one-stop shop for food and grocery products.

The draft complaint alleges that the relevant sections of the country (*i.e.*, the geographic markets) in which to analyze the acquisition are the areas in or near the following incorporated cities or towns in Massachusetts: a) Waltham area that includes Waltham, Auburndale, Watertown, Newton, West Newton, Weston, and Lexington; b) Quincy-Dorchester area that includes Quincy, N. Quincy, Milton, Dorchester, Boston, S. Boston, Braintree, and Weymouth; c) Norwood area that includes Norwood, Walpole, Westwood, Dedham, Wrentham, and Sharon; d) Milford area that includes Milford, Hopedale, Mendon, and Upton; e) Salem-Lynn area that includes Salem, Lynn, Peabody, Swampscott, Danvers, Nahant, and Marblehead; f) Norwell area that includes Norwell, Hanover, Rockland, Pembroke, Hanson,

Scituate, Halifax, Hingham, Weymouth, Cohasset, and Hull; g) Hudson-Stow area that includes Stow, Hudson, Sudbury, Marlborough, and Bolton; and h) Saugus-Melrose-Stoneham area that includes Saugus, Melrose, Stoneham, and Wakefield.

J Sainsbury through its Shaw's subsidiary and Star Markets are actual and direct competitors in the all of the relevant markets.

The draft complaint alleges that the post-merger markets would all be highly concentrated, whether measured by the Herfindahl-Hirschman Index (commonly referred to as "HHI") or four-firm concentration ratios. The acquisition would substantially increase concentration in each market. The post-acquisition HHIs in the geographic markets range from 2205 points to 5136 points.

The draft complaint further alleges that entry is difficult and would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant geographic markets.

The draft complaint also alleges that Shaw's acquisition of all of the outstanding voting securities of Star, if consummated, may substantially lessen competition in the relevant line of commerce 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 Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by eliminating direct competition between supermarkets owned or controlled by Shaw's and supermarkets owned and controlled by Star; by increasing the likelihood that Shaw's will unilaterally exercise market power; and by increasing the likelihood of, or facilitating, collusion or coordinated interaction among the remaining supermarket firms. Each of these effects increases the likelihood that the prices of food, groceries or services will increase, and the quality and selection of food, groceries or services will decrease, in the geographic markets alleged in the complaint.

IV. The terms of the Agreement Containing Consent Order ("the proposed consent order")

The proposed consent order will remedy the Commission's competitive concerns about the proposed acquisition. Under the terms of the proposed consent order Shaw's and Star must divest ten supermarkets, seven stores operating under the "Star Markets" trade name and three under the "Shaw's" trade name.

In the eight relevant markets, the Proposed Respondents will divest either all of the Shaw's or Star supermarkets to buyers who do not currently operate supermarkets in these markets. Divesting all of one party's assets in a particular market achieves the goals that the proposed consent order is designed to achieve -- ensuring that the merger will not increase concentration in any relevant market and maintaining the number of firms in the market that existed before the merger.

Seven of the supermarkets to be divested are being sold to two experienced up-front buyers, firms that the Commission has pre-evaluated for their competitive and financial viability. The Commission's evaluation process consisted of analyzing the financial condition of the proposed acquirers and the locations of their current supermarkets to ensure that divestitures to them would not increase concentration or decrease competition in the relevant markets, as well as, determining that these purchasers are well qualified to operate the divested stores. The remaining three supermarkets are to be divested by the Proposed Respondents within three months of the date on which they signed the proposed consent agreement, to an acquirer approved by the Commission and in a manner approved by the Commission. Public comments may address the suitability of the designated up-front buyers to acquire supermarkets under the proposed consent order.

The following is a discussion of the two up-front buyers, Victory Super Markets ("Victory") and Foodmaster Super Markets, Inc. ("Foodmaster"). Victory, headquartered in Massachusetts and founded by the DiGeronimo family in 1923, will acquire five supermarkets from Shaw' -- Shaw's Supermarket stores No. 193 in Waltham, No. 196 in North Quincy, and No. 122 in Norwood; and Star Markets stores No. 169 in Milford, and No. 128 in Norwell, MA. Foodmaster, headquartered in Chelsea, Massachusetts, will acquire two supermarkets from Shaw's -- Star Markets No. 144 in Lynn and No. 129 in Swampscott.

The proposed consent order further requires Shaw's and Star to divest three additional supermarkets, Star Markets No. 152 in

Stow, Star markets No. 118 in Sudbury, and Star Markets No. 173 in Saugus to a proposed buyer that will be selected by Shaw's and approved by the Commission within three months of the date on which the Proposed Respondents sign the proposed consent agreement.

Paragraph II.A. of the proposed consent order requires that the divestiture to Victory must occur no later than the earlier of (1) 20 days from when the merger is consummated, or (2) four months after the Commission accepts the agreement for public comment.[(1)] Paragraph II. B. of the proposed consent agreement requires that Shaw's divest the two supermarkets to Foodmaster within ten days of the date on which the proposed consent order becomes final. If Shaw's consummates the divestitures to Victory and Foodmaster during the public comment period, and if, at the time the Commission decides to make the order final, the Commission notifies Shaw's that Victory or Foodmaster is not an acceptable acquirer or that the asset purchase agreement with Victory or Foodmaster is not an acceptable manner of divestiture, then Shaw's must immediately rescind the transaction in question and divest those assets to another buyer within three months of the date the order becomes final. At that time, Shaw's must divest those 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. In the event that any Commission-approved buyer is unable to take or keep possession of any of the supermarkets identified for divestiture, a trustee that the Commission may appoint has the power to divest any assets that have not been divested to satisfy the requirements of the proposed consent order.

The proposed consent order also enables the Commission to appoint a trustee to divest any supermarkets or sites identified in the order that Shaw's and Star have not divested to satisfy the requirements of the proposed consent order. In addition, the proposed order enables the Commission to seek civil penalties against Shaw's for non-compliance with the proposed consent order.

Among other requirements related to maintaining operations at the supermarkets identified for divestiture, the proposed consent

order also specifically requires the Proposed Respondents to: (1) maintain the viability, competitiveness and marketability of the assets to be divested; (2) not cause the wasting or deterioration of the assets to be divested; (3) not sell, transfer, encumber, or otherwise impair their marketability or viability; (4) maintain the supermarkets consistent with past practices; (5) use best efforts to preserve existing relationships with suppliers, customers, and employees; and (6) keep the supermarkets open for business and maintain the inventory at levels consistent with past practices.

The proposed consent order also prohibits Shaw's from acquiring, without providing the Commission with prior notice, any supermarkets, or any interest in any supermarkets, located in the county or counties that include the incorporated cities and towns in Massachusetts: Waltham, Auburndale, Watertown, Newton, West Newton, Weston, Lexington, Quincy, N. Quincy, Milton, Dorchester, Boston, S. Boston, Braintree, Hopedale, Mendon, Upton, Salem, Lynn, Peabody, Swampscott, Danvers, Nahant, Marblehead, Norwell, Hanover, Rockland, Pembroke, Hanson, Scituate, Halifax, Hingham, Cohasset, Hull, Stow, Hudson, Sudbury, Marlborough, Bolton, Saugus, Melrose, Wakefield, and Stoneham for ten years. These are the areas for which the supermarkets to be divested draw customers. The provisions regarding prior notice are consistent with the terms used in prior Orders. The proposed consent order does not, however, restrict the Proposed Respondents from constructing new supermarkets in the above listed areas; nor does it restrict the Proposed Respondents from leasing facilities not operated as supermarkets within the previous six months.

The proposed consent also prohibits Shaw's, for a period of ten years, from entering into or enforcing any agreement that restricts the ability of any person acquiring any location used as a supermarket, or interest in any location used as a supermarket on or after January 1, 1998, to operate a supermarket at that site if that site was a formerly owned or operated by Shaw's or Star Markets in any of the areas listed in the paragraph above. In

addition, the Proposed Respondents are prohibited from removing fixtures or equipment from a store or property owned or leased by Shaw's in any of the cities or town listed above that is no longer operated as a supermarket, except (1) prior to a sale, sublease, assignment, or change in occupancy or (2) to relocate such fixtures or equipment in the ordinary course of business to any other supermarket owned or operated by the Proposed Respondents.

The Proposed Respondents are required to file compliance reports with the Commission, the first of which is due within thirty days of the date on which Proposed Respondents signed the proposed consent, and every thirty days thereafter until the divestitures are completed, and annually for ten years.

The proposed consent order also has a provision relating to the settlement agreement negotiated by the State of Massachusetts. If the State of Massachusetts fails to approve any divestiture that has not been completed, even though the parties are in compliance with the other provisions of the proposed consent agreement, the time period in which the divestiture must be completed will be extended 60 days during which the parties must exercise utmost good faith and best efforts to resolves the concerns of that particular state.

V. Opportunity for Public Comment

The proposed consent order has been placed on the public record for 60 days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After 60 days, the Commission will again review the proposed consent order and the comments received and will decide whether it should withdraw from the agreement or make the proposed consent order final.

By accepting the proposed consent order subject to final approval, the Commission anticipates that the competitive problems alleged in the complaint will be resolved. The purpose of this analysis is to invite public comment on the proposed consent order, including the proposed sale of supermarkets to Victory and Foodmaster, in order to aid the Commission in its determination of whether to make the proposed consent order final. This analysis is not intended to constitute an official interpretation of the proposed consent order nor is it intended to modify the terms of the proposed consent order in any way.

1. Acceptance of the proposed consent agreement for public comment terminates the HSR waiting period and enables Shaw's to immediately acquire all of the outstanding voting securities of Star Markets.

IN THE MATTER OF

NINE WEST GROUP INC.

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

Docket C-3937; File No. 9810386
Complaint, April 11, 2000--Decision, April 11, 2000

This consent order prohibits Respondent Nine West Group Inc. from fixing controlling or maintaining the retail price of women's footwear. It also prohibits Respondent from pressuring, or coercing any dealer to adhere, adopt, or maintain any set retail price. Respondent is also prohibited from securing any commitments or assurances regarding the resale price. For a period of ten years, Respondent is also prohibited from notifying a dealer in advance that they are subject to a temporary or partial suspension of supply if the dealer sells Nine West shoes below a designated price. Respondent must also, for a period of five years, display conspicuously on any list, book, catalogue, advertising, or promotional material where it has suggested a retail price to a dealer a required statement explaining that while it may suggest a price, dealers remain free to determine at which price to advertise and sell Nine West products. Respondent must also send a letter to dealers with a similar explanation.

Participants

For the Commission: *Alan B. Loughnan, Theodore Zang, Ann Weintraub, Barbara Anthony, Daniel P. Ducore, Kenneth Kelly,* and *Gregory Vistnes.*

For the Respondents: *Ron Rolfe, Cravath, Swaine & Moore,* and *Kevin Arquit, Rogers & Wells.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C. § 41 *et seq*.), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Nine West Group Inc. (hereinafter "Respondent" or "Nine West"), has violated the provisions of Section 5 of the Federal Trade Commission Act, 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 this complaint stating its charges as follows:

RESPONDENT

1. Respondent Nine West Group Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at Nine West Plaza, 1129 Westchester Avenue, White Plains, New York 10604-3529, and includes its parent, Jones Apparel Group, Inc., and their affiliates, subsidiaries, divisions and organizational units of any kind, their successors and assigns and their present officers, directors, employees, agents, representatives and other persons acting on their behalf.

2. Respondent is now, and for some time has been, engaged in the offering for sale, sale, and distribution of women's footwear to retail dealers located throughout the United States, including many of the nation's largest retail chains.

JURISDICTION

3. Respondent is a "corporation" within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

4. Respondent maintains and has maintained a substantial course of business, including the acts or practices alleged in the complaint, which are in or affecting commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

RESPONDENT'S ACTS IN COMBINATION WITH CERTAIN OF ITS DEALERS

5. In connection with the sale and distribution of Nine West branded products, Respondent, in combination, agreement and understanding with certain of its dealers, beginning in January 1988 and continuing thereafter until at least July 31, 1999, engaged in unlawful contracts, combinations, or agreements, in unreasonable restraint of interstate trade and commerce.

6. The combinations and contracts consisted of continuing agreements, understandings or concert of action among Respondent and certain of its dealers, the substantial terms of which were to fix, raise, maintain or stabilize the retail prices at which Nine West products were advertised and sold to the consuming public.

7. For the purpose of forming, effectuating and furthering the unlawful contracts, combinations or agreements, the Respondent and certain of its dealers did, among other things, the following:

a. Various Nine West divisions adopted pricing policies governing the retail sale of Nine West products and distributed "off limits" or "non-promote" lists of shoes, including shoes that could not be promoted outside of defined periods of time, called "clearance windows" or "breakdates." In doing so, Nine West did seek acquiescence in and threatened and initiated enforcement actions to enforce those policies. Retailers communicated to Nine West their agreement to adhere to these pricing policies.

b. Nine West shared revisions of its pricing policies, such as updated "off limits" or "non-promote" lists, with certain of its dealers prior to implementation of such revised policies for the purpose of soliciting input as to shoes that should, or should not, be included on the revised lists.

c. Nine West added or removed shoes from the coverage of its pricing policies at the request of its dealers.

d. Nine West added/extended or removed/limited "clearance windows" or "breakdates" for shoes covered by its pricing policies at the request of its dealers.

e. Nine West negotiated individualized exemptions from the coverage of its pricing policies for certain of its dealers. Nine West often conditioned its agreement in these cases on the condition that the dealer would not advertise the newly-negotiated retail price.

f. Nine West received complaints from dealers regarding other dealers' violation of Nine West's pricing policies. Nine West responded to violations of its pricing policies by some of its dealers in a number of different ways. For example, Nine West suspended shipments to violating dealers for a limited period, with the tacit understanding that shipments would resume if Nine West discovered no further violation of the policy in the interim, or if the dealer promised not to violate the policy again in the future. Dealers communicated to Nine West their acquiescence to Nine West's pricing policies.

EFFECTS

8. The purpose, effect, tendency, or capacity of the acts and practices described in Paragraphs 5, 6, and 7 has been to restrain trade unreasonably and to hinder competition in the sale of women's footwear in the United States, and to deprive consumers of the benefits of competition in the following ways, among others:

a. Prices to consumers of Nine West products have been increased, or have been prevented from falling; and

b. Price competition among retail dealers with respect to the sale of Nine West products has been restricted.

VIOLATION ALLEGED

9. The aforesaid acts and practices constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. These acts and practices are continuing and will continue in the absence of the relief requested.

IN WITNESS THEREOF, the Federal Trade Commission on this eleventh day of April, 2000, issues its complaint against said Respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of Nine West Group Inc., hereinafter sometimes referred to as Respondent, and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Northeast Regional Office presented to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), containing an admission by Respondent 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 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 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 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Order:

1. Respondent Nine West Group Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware. The mailing address and principal place of business of Respondent Nine West Group is Nine West Plaza, 1129 Westchester Avenue, White Plains, New York 10604-3529.

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

ORDER

I.

IT IS ORDERED that for the purpose of this order, the following definitions shall apply:

(A) *"Nine West"* means Nine West Group Inc., its parent, Jones Apparel Group, Inc., and their affiliates, subsidiaries, divisions and other organizational units of any kind, that sold or sell Nine West Products as defined herein, their successors and assigns and their present officers, directors, employees, agents, representatives and other persons acting on their behalf. As used herein, "Nine West" shall not be construed to bring within the terms of this order any product that bears or is marketed in packaging that bears a trademark owned by Jones Apparel Group, Inc. or any of its predecessors, subsidiaries, units, divisions or affiliates other than Nine West Group Inc.

(B) *"Respondent"* means Nine West.

(C) "*Nine West Products"* means all women's footwear sold under brand labels owned by Nine West, including, but not limited to, the following: Amalfi, Bandolino, Calico, Capezio, cK/Calvin Klein, Easy Spirit, Enzo Angiolini, Evan-Picone, Joyce, Nine West, Pappagallo, Selby, Westies, and 9 & Co., that are offered for sale to consumers located in the United States of America and U.S. territories and possessions, or to dealers, by Nine West.

(D) *"Dealer"* means any person, corporation or entity not owned by Nine West, or by any entity owned or controlled by Nine West, that in the course of its business sells any Nine West Products in or into the United States of America.

(E) *"Resale price"* means any price, price floor, minimum price, maximum discount, price range, or any mark-up formula or margin of profit used by any dealer for pricing any product.

"Resale price" includes, but is not limited to, any suggested, established, or customary resale price.

II.

IT IS FURTHER ORDERED that Nine West, directly or indirectly, or through any corporation, subsidiary, division or other device, in connection with the manufacturing, offering for sale, sale or distribution of any Nine West Products in or into the United States of America in or affecting "commerce," as defined by the Federal Trade Commission Act, forthwith cease and desist from:

(A) Fixing, controlling, or maintaining the resale price at which any dealer may advertise, promote, offer for sale or sell any Nine West Products.

(B) Requiring, coercing, or otherwise pressuring any dealer to maintain, adopt, or adhere to any resale price.

(C) Securing or attempting to secure any commitment or assurance from any dealer concerning the resale price at which the dealer may advertise, promote, offer for sale or sell any Nine West Products.

(D) For a period of ten (10) years from the date on which this order becomes final, adopting, maintaining, enforcing or threatening to enforce any policy, practice or plan pursuant to which Respondent notifies a dealer in advance that: (1) the dealer is subject to warning or partial or temporary suspension or termination if it sells, offers for sale, promotes or advertises any Nine West Products below any resale price designated by Respondent; and (2) the dealer will be subject to a greater sanction if it continues or renews selling, offering for sale, promoting or advertising any Nine West Products below any such

designated resale price. As used herein, the phrase "partial or temporary suspension or termination" includes but is not limited to any disruption, limitation, or restriction of supply: (1) of some, but not all, Nine West Products; or (2) to some, but not all, dealer locations or businesses; or (3) for any delimited duration. As used herein, the phrase "greater sanction" includes but is not limited to a partial or temporary suspension or termination of greater scope or duration than the one previously implemented by Respondent, or a complete suspension or termination.

PROVIDED that nothing in this order shall prohibit Nine West from announcing resale prices in advance and unilaterally refusing to deal with those who fail to comply. PROVIDED FURTHER that nothing in this order shall prohibit Nine West from establishing and maintaining cooperative advertising programs that include conditions as to the prices at which dealers offer Nine West Products, so long as such advertising programs are not a part of a resale price maintenance scheme and do not otherwise violate this order.

III.

IT IS FURTHER ORDERED that, for a period of five (5) years from the date on which this order becomes final, Nine West shall clearly and conspicuously state the following on any list, advertising, book, catalogue, or promotional material where it has suggested any resale price for any Nine West Products to any dealer:

> ALTHOUGH NINE WEST MAY SUGGEST RESALE PRICES FOR PRODUCTS, RETAILERS ARE FREE TO DETERMINE ON THEIR OWN THE PRICES AT WHICH THEY WILL ADVERTISE AND SELL NINE WEST PRODUCTS.

IV.

IT IS FURTHER ORDERED that, within thirty (30) days after the date on which this order becomes final, Nine West shall mail by first class mail the letter attached as Exhibit A, together with a copy of this order, to each director, officer, dealer, distributor, agent, and sales representative engaged in the sale of any Nine West Products in or into the United States of America.

V.

IT IS FURTHER ORDERED that, for a period of two (2) years after the date on which this order becomes final, Nine West shall mail by first class mail the letter attached as Exhibit A, together with a copy of this order, to each new director, officer, dealer, distributor, agent, and sales representative engaged in the sale of any Nine West Products in or into the United States of America, within ninety (90) days of the commencement of such person's employment or affiliation with Nine West.

VI.

IT IS FURTHER ORDERED that Nine West shall notify the Commission at least thirty (30) days prior to any proposed changes in Nine West such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

VII.

IT IS FURTHER ORDERED that, within sixty (60) days after the date this order becomes final, and at such other times as the Commission or its staff shall request, Nine West shall file with the

Commission a verified written report setting forth in detail the manner and form in which Nine West has complied and is complying with this order.

VIII.

IT IS FURTHER ORDERED that this order shall terminate on April 11, 2020.

By the Commission.

EXHIBIT A

[NINE WEST LETTERHEAD]

Dear Retailer:

The Attorneys General of [x number] of States, and the Federal Trade Commission have conducted investigations into Nine West Group Inc.'s sales policies. To expeditiously resolve the investigations and to avoid disruption to the conduct of its business, Nine West Group Inc. has agreed, without admitting any violation of the law, to the entry of a Consent Order by the Federal Trade Commission and a Final Judgment and Consent Decree by the States prohibiting certain practices relating to resale prices. Copies of the Consent Order and the Final Judgment and Consent Decree are enclosed. This letter and the accompanying Orders are being sent to all of our dealers, sales personnel and representatives.

The Orders spell out our obligations in greater detail, but we want you to know and understand the following. Under both orders you can advertise and sell our products at any price you choose. While we may send materials to you which may contain

our suggested retail prices, you remain free to sell and advertise those products at any price you choose.

We look forward to continuing to do business with you in the future.

Sincerely yours,

_____

President of Sales and Marketing
Nine West Group Inc.

STATEMENT OF COMMISSIONERS ORSON SWINDLE AND THOMAS B. LEARY

We have voted to accept the consent agreement for public comment because we have reason to believe that the conduct engaged in by Nine West falls outside the limited zone of protection afforded by the *Colgate* doctrine,[1] and thus is per se illegal under current law. We do not mean to indicate agreement, however, with the artificial analysis mandated by the *Colgate* doctrine or with the overbroad per se condemnation of minimum resale price maintenance ("RPM"), which the *Colgate* doctrine mitigates to some degree.

We do not know what conclusion we might have reached had Nine West's behavior been analyzed under the rule of reason, because that question did not arise. Nevertheless, one can easily posit instances of minimum RPM that involve a mixture of

[1] *United States v. Colgate & Co*., 250 U.S. 300 (1919).

procompetitive and anticompetitive effects, like any other vertical restraint, and undercut the continuing validity of the per se rule against the practice. Several years ago, the Supreme Court took the beneficial step of reexamining and overruling the doctrine that condemned maximum RPM as per se illegal.[2] When an appropriate case arises, we believe that the Court should continue this healthy trend by reassessing the even hoarier per se treatment of minimum RPM.[3]

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission ("the Commission") has accepted, subject to final approval, an agreement from Nine West Group Inc. ("Nine West") to a proposed consent order. The agreement settles charges by the Commission that Nine West violated Section 5 of the Federal Trade Commission Act by entering into vertical agreements that restricted retail price competition in the sale of women's shoes. Nine West is a major manufacturer and seller of women's shoes and sells shoes under the "Easy Spirit," "Enzo Angiolini," "Bandolino," "cK/Calvin Klein," "Pappagallo," "Selby," "Amalfi," "Calico," "Evan-Picone," "Westies" "Capezio," "Joyce,"and "9 & Co." labels. Jones Apparel Group, Inc., purchased Nine West in July of 1999, and is a signatory to the consent agreement, but none of the conduct alleged in the complaint occurred after the purchase.

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[2] *State Oil Co. v. Khan*, 522 U.S. 3 (1997), *overruling Albrecht v. Herald Co*., 390 U.S. 145 (1968).

[3] *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

The proposed consent order has been placed on the public record for thirty days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

The purpose of this analysis is to invite public comment on the proposed order. This analysis is not intended to constitute an official interpretation of the agreement and proposed order or to modify their terms in any way. Further**,** the proposed consent order has been entered into for settlement purposes only and does not constitute an admission by Nine West that the law has been violated as alleged in the complaint.

The Complaint

Nine West Group is a Delaware corporation with its principal place of business in White Plains, New York. Nine West sells women's footwear to retail outlets throughout the United States, including many of the nation's largest department stores.

The complaint alleges that beginning in January 1988 and continuing until at least July 31, 1999, Nine West entered into agreements with certain retailers that fixed, raised, and stabilized retail prices to consumers. Nine West adopted pricing policies that determined which shoes the retailer could not discount or promote outside of specified times. Nine West did not merely announce these policies and terminate a retailer that did not adhere to them, which would have been lawful, but instead Nine West sought agreement from these dealers on future pricing. For example, Nine West suspended shipments and said it would resume them only if the dealer promised not to violate the policy again. Nine West also coerced compliance by threatening to

withhold discounts or advertising funds if the dealer refused to comply with a pricing policy. Retailers communicated to Nine West that they would adhere to the pricing policies.

The Proposed Consent Order

The proposed consent order is designed to prevent Nine West from agreeing with its dealers to set prices. Paragraph II of the order prohibits Nine West from fixing, controlling, or maintaining the retail price of women's footwear. It also prohibits Nine West from coercing or pressuring any dealer to maintain, adopt, or adhere to any resale price. Nine West also may not secure or attempt to secure commitments or assurances from any dealer concerning resale prices. Finally, Paragraph II prohibits Nine West, for a period of ten years, from notifying a dealer in advance that the dealer is subject to a temporary suspension of supply (e.g., no shoes shipped for six months) or a partial suspension (e.g., no orders of Easy Spirit loafers) if the dealer sells Nine West shoes below a designated price.

Paragraph III of the order requires that for a period of five years from the date on which the order becomes final, Nine West shall clearly and conspicuously include a statement on any list, advertising, book, catalogue, or promotional material where it has suggested any resale price for any Nine West product to any dealer. The required statement explains that while Nine West may suggest resale prices for its products, dealers remain free to determine on their own the prices at which they will sell and advertise Nine West's products.

Paragraph IV of the order requires Nine West to mail a letter (see attachment A) to its retailers with a copy of the Commission's order. The letter states that while Nine West may send materials to them with suggested retail prices, they are free to sell and advertise at a price they chose. Paragraph V requires that the same letter with a copy of the Commission's order be sent to new employees of Nine West.

Paragraph VI of the order requires Nine West to notify the Commission at least thirty days prior to any proposed changes in the corporation, such as dissolution or sale. Paragraph VII consists of standard Commission reporting and compliance procedures. Finally, Paragraph VIII contains a standard "sunset provision," under which the terms of the order terminate twenty years after the date of issuance.

IN THE MATTER OF

MICHAEL T. BERKLEY, D.C., AND MARK A. CASSELLIUS, D.C.

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

Docket C-3936; File No. 9910278
Complaint, April 11, 2000--Decision, April 11, 2000

This consent order addresses practices used by Respondents Michael T. Berkley, D.S. and Mark A. Cassellius, two chiropractors with a principle practice in La Crosse, Wisconsin. The order prohibits Respondents from fixing prices for any chiropractic services. The order also prohibits Respondents from: (1) engaging in collective negotiations on behalf of any chiropractors; (2) orchestrating concerted refusals to deal; or (3) fixing prices, or any other terms, on which chiropractors deal. In addition, they are prohibited from encouraging, advising, or pressuring any person to engage in any action that would be prohibited if the person were subject to the order. Respondents may engage in conduct that is reasonably necessary to operate (a) any "qualified risk-sharing joint arrangement," or, (b) any "qualified clinically integrated joint arrangement

Participants

For the Commission: *Nicholas J. Franczyk, David A. O'Toole, Evan Siegel, Daniel P. Ducore, Elizabeth Schneirov, J. Elizabeth Callison,* and *Gregory S. Vistnes.*

For the Respondents: *Beth J. Kushner, von Briesen Purtell & Roper, S.C., Jon Axelrod, DeWitt, Ross & Stevens,* and *Joseph J. Connell, Parke O'Flaherty.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 et seq., and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the individuals named above, hereinafter "Respondents," have violated and are violating Section 5 of the Federal Trade Commission Act, 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 this complaint, stating its charges as follows:

RESPONDENTS

PARAGRAPH ONE: Respondent Michael T. Berkley, D.C., is a chiropractor licensed and doing business under and by virtue of the laws of the State of Wisconsin, with his principal place of business at 322 Cameron Avenue, La Crosse, Wisconsin 54601. At all times during which the acts and practices described in Paragraphs Ten through Thirteen below took place, respondent Berkley was a member of the board of directors of the Wisconsin Chiropractic Association ("WCA").

PARAGRAPH TWO: Respondent Mark A. Cassellius, D.C., is a chiropractor licensed and doing business under and by virtue of the laws of the State of Wisconsin, with his principal place of business at 2045 32nd Street South, La Crosse, Wisconsin 54601. At all times during which the acts and practices described in Paragraphs Ten through Thirteen below took place, respondent Cassellius was the president of the Southwest District of the WCA.

JURISDICTION

PARAGRAPH THREE: The acts and practices of respondents, including those herein alleged, are in or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

THE MARKET FOR CHIROPRACTIC SERVICES

PARAGRAPH FOUR: Except to the extent that competition has been restrained as alleged herein, the respondents have been, and are now, in competition among themselves and with other

providers of chiropractic goods and services in and around La Crosse, Wisconsin.

PARAGRAPH FIVE: Professional services performed by chiropractors include, among other things, spinal and extra spinal manipulations. Prior to January 1, 1997, chiropractors generally billed for these services using a single billing code (A2000 for Medicare and 97260 for most private insurance) regardless of the number of spinal or extra spinal regions adjusted. Beginning on January 1, 1997, the Health Care Financing Administration and many private insurance companies began accepting four new chiropractic manipulative treatment ("CMT") codes (98940, 98941, 98942, and 98943) in place of the old single billing code. The new CMT codes reflected more detailed or precise descriptions of the manipulation services: 98940 (adjustment of 1-2 regions); 98941 (adjustment of 3-4 regions); 98942 (adjustment of 5 regions); and 98943 (adjustment of at least one extra spinal region).

PARAGRAPH SIX: Chiropractors often contract with health insurance firms and other third-party payers. Such contracts typically establish the terms and conditions under which the chiropractors will render services to the subscribers of the third-party payers, including terms and conditions of compensation and of cost containment. In many cases, chiropractors entering into such contracts agree to reductions in their compensation and to various cost containment procedures, including procedures for reviewing the utilization of medical resources by chiropractors and for dealing with chiropractors who have overutilized such resources. By lowering their costs in this manner, third-party payers are able to reduce the cost of medical care for their subscribers. The extensive use of such methods of lowering costs can be described as "managed care."

PARAGRAPH SEVEN: Absent agreements among competing chiropractors on the price and other terms upon which they will provide services to third-party payers, competing chiropractors decide individually whether to enter into contracts

with third-party payers, and on the terms and conditions under which they are willing to enter into such contracts.

THE WCA TRAINING SEMINARS

PARAGRAPH EIGHT: The WCA organized and conducted seminars at eight different locations throughout the State of Wisconsin, including La Crosse, Wisconsin, to train chiropractors and their staffs on the new CMT codes (the "CMT Seminars "), including how to price the codes, and urged chiropractors not to make any decisions on their fees for the new CMT codes before attending one of the training seminars.

PARAGRAPH NINE: During the CMT Seminars, the WCA, through its Executive Director, Russell A. Leonard: (1) told the chiropractors that the new CMT codes had the same values as osteopathic manipulative treatment ("OMT ") codes; (2) represented that the market place expected the prices for the new CMT codes to be about the same as the prices for the OMT codes; (3) provided current statewide price data for the OMT codes and urged the chiropractors to call osteopaths in their own areas to determine their local charges; (4) urged chiropractors to question any third-party payer that reimbursed a lesser amount for the CMT codes than for the OMT codes and to notify the WCA; and (5) during at least some of the seminars, represented that it had surveyed numerous chiropractors and determined that private insurance companies were paying CMT code claims at the prices the chiropractors chose to charge.

ANTICOMPETITIVE CONDUCT

PARAGRAPH TEN: Beginning in late January 1997, and continuing until at least June 1997, respondents and other unnamed persons conspired to fix prices for chiropractic services and to conduct a boycott of the Gundersen Lutheran Health Plan

("Gundersen"), a third-party payer doing business in and around La Crosse County, Wisconsin, to obtain higher reimbursement for chiropractic services.

PARAGRAPH ELEVEN: In furtherance of the conspiracy described in Paragraph Ten:

A. Respondents organized at least two meetings of La Crosse County area chiropractors on or about February 13, 1997 and May 15, 1997. During these meetings the chiropractors discussed their displeasure with Gundersen's reimbursement rates for chiropractic services and the fact that they had learned at the WCA seminars that the new CMT codes presented an opportunity to charge significantly more for their services. Respondents surveyed the attendees to determine their average billed charges for the new CMT codes. The chiropractors agreed to negotiate reimbursement rates equal to at least 85% of average billed charges for services provided to Gundersen, significantly more than Gundersen's reimbursement rates. The chiropractors voted and determined that the majority of them were willing to terminate their agreements with Gundersen if it did not address their demands.

B. Respondent Berkley, acting on behalf of the La Crosse County area chiropractors, notified Gundersen that the chiropractors had met to discuss their displeasure with Gundersen's reimbursement, determined that the majority of them were willing to terminate their agreements with Gundersen if it did not address their concerns, and proposed that Gundersen increase its reimbursement rates to reflect at least 85% of average billed charges. Inherent in these negotiations was the threat that if Gundersen did not agree to the terms and conditions acceptable to the area chiropractors, Gundersen would be unable to obtain agreements with them.

PARAGRAPH TWELVE: On or about June 17, 1997, Gundersen, fearing the loss of a significant number of its chiropractic providers, acceded to the chiropractors' demands and

revised its fee schedule to reflect a 20% increase on all fee schedule procedures effective July 1, 1997.

PARAGRAPH THIRTEEN: The respondents have not integrated their businesses in any economically significant way, nor have they created any efficiencies that might justify the acts and practices described in Paragraphs Ten through Twelve.

ANTICOMPETITIVE EFFECTS

PARAGRAPH FOURTEEN: The acts and practices of the respondents as described in this complaint have had the purpose, tendency, effect, and capacity to restrain trade unreasonably and hinder competition in the provision of chiropractic goods and services in and around La Crosse County, Wisconsin, in the following ways, among others:

A. to restrain competition among chiropractors;

B. to deprive consumers of the benefits of competition among chiropractors;

C. to fix or increase the prices that consumers pay for chiropractic services;

D. to fix the terms and conditions upon which chiropractors would deal with third- party payers, including terms of chiropractic compensation, thereby raising the price to consumers of medical insurance coverage issued by third-party payers; and

E. to deprive consumers of the benefits of managed care.

PARAGRAPH FIFTEEN: The aforesaid acts and practices of the respondents are to the prejudice and injury of the public and constitute unfair methods of competition in or affecting commerce

in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. The acts and practices of the respondents, as herein alleged, are continuing and will continue or recur in the absence of the relief requested.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eleventh day of April, 2000 , issues its complaint against said respondents.

By the Commission.

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 Midwest Region proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said 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 thirty (30) days, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Michael T. Berkley, D.C., is a chiropractor licensed and doing business under and by virtue of the laws of the State of Wisconsin, with his principal place of business located at 322 Cameron Avenue, La Crosse, Wisconsin 54601.

2. Respondent Mark A. Cassellius, D.C., is a chiropractor licensed and doing business under and by virtue of the laws of the State of Wisconsin, with his principal place of business located at 2045 32nd Street South, La Crosse, Wisconsin 54601.

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

ORDER

I.

IT IS ORDERED that, for the purposes of this order, the following definitions shall apply:

A. "Payer" means any person that purchases, reimburses for, or otherwise pays for all or part of any health care services for itself or for any other person. "Payer" includes, but is not limited to, any health insurance company; preferred provider organization; prepaid hospital, medical, or other health service

plan; health maintenance organization; government health benefits program; employer or other person providing or administering self-insured health benefits programs; and patients who purchase health care for themselves.

B. "Person" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, partnerships, and governments.

C. "Provider" means any person that supplies health care services to any other person, including, but not limited to, chiropractors, physicians, hospitals, and clinics.

D. "Reimbursement" means any payment, whether cash or non-cash, or other benefit received for the provision of chiropractic goods and services.

E. "Qualified risk-sharing joint arrangement" means an arrangement to provide physician services in which: (1) all physicians participating in the arrangement share substantial financial risk from their participation in the arrangement through: (a) the provision of services to payers at a capitated rate, (b) the provision of services for a predetermined percentage of premium or revenue from payers, (c) the use of significant financial incentives (e.g., substantial withholds) for its participating physicians, as a group, to achieve specified cost-containment goals, or (d) the provision of a complex or extended course of treatment that requires the substantial coordination of care by physicians in different specialties offering a complementary mix of services, for a fixed, predetermined payment, where the costs of that course of treatment for any individual patient can vary greatly due to the individual patient's condition, the choice, complexity, or length of treatment, or other factors; (2) any agreement on prices or terms of reimbursement entered into by the arrangement is reasonably necessary to obtain significant efficiencies through the joint arrangement; and (3) the arrangement does not restrict the ability, or facilitate the refusal,

of physicians participating in the arrangement to deal with payers individually or through any other arrangement.

F. "Qualified clinically integrated joint arrangement" means an arrangement to provide physician services in which: (1) all physicians participating in the arrangement participate in active and ongoing programs of the arrangement to evaluate and modify the practice patterns of, and create a high degree of interdependence and cooperation among, the physicians participating in the arrangement, in order to control costs and ensure quality of the services provided through the arrangement; (2) any agreement on prices or terms of reimbursement entered into by the arrangement is reasonably necessary to obtain significant efficiencies through the joint arrangement; and (3) the arrangement does not restrict the ability, or facilitate the refusal, of physicians participating in the arrangement to deal with payers individually or through any other arrangement.

II.

IT IS FURTHER ORDERED that each respondent, directly or indirectly, or through any corporate or other device, in connection with the provision of chiropractic goods and services in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, forthwith cease and desist from:

A. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding, express or implied, with any person or among any persons, to fix, establish, raise, stabilize, maintain, adjust, or tamper with any fee, fee schedule, price, pricing formula, discount, or other aspect or term of

the fees charged or to be charged for any chiropractic goods or services.

B. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding to:

1. Negotiate on behalf of any other chiropractor with any payer or provider;

2. Deal or refuse to deal with, boycott or threaten to boycott, any payer or provider; or

3. Determine any terms, conditions, or requirements upon which chiropractors deal with any payer or provider, including, but not limited to, terms of reimbursement.

C. Encouraging, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited if the person were subject to this order.

PROVIDED that nothing in this order shall be construed to prohibit any agreement or conduct by any respondent that is reasonably necessary to form, facilitate, manage, operate, or participate in:

(a) A qualified risk-sharing joint arrangement; or

(b) A qualified clinically integrated joint arrangement, if the applicable respondent has provided the prior notification(s) as required by this paragraph (b). Such prior notification must be filed with the Secretary of the Commission at least thirty (30) days prior to forming; facilitating; managing; operating; participating in; or taking any action, other than planning, in furtherance of any joint arrangement requiring such notice ("first waiting period"), and shall include for such arrangement the

identity of each participant, the location or area of operation, a copy of the agreement and any supporting organizational documents, a description of its purpose or function, a description of the nature and extent of the integration expected to be achieved and the anticipated resulting efficiencies, an explanation of the relationship of any agreement on reimbursement to furthering the integration and achieving the expected efficiencies, and a description of any procedures proposed to be implemented to limit possible anticompetitive effects resulting from such agreement(s). If, within the first waiting period, a representative of the Commission makes a written request for additional information, the applicable respondent shall not form; facilitate; manage; operate; participate in; or take any action, other than planning, in furtherance of such joint arrangement until thirty (30) days after substantially complying with such request for additional information or shorter waiting period as may be granted by letter from the Bureau of Competition.

III.

IT IS FURTHER ORDERED that each respondent shall:

A. Within thirty (30) days after the date this order becomes final, distribute a dated and signed notification letter in the form set forth in Appendix A to this order along with a copy of the complaint and order in this matter to each current agent, representative, or employee of the respondent whose activities are affected by this order, or who has responsibilities with respect to the subject matter of this order.

B. For a period of five (5) years after the date this order becomes final, and within thirty (30) days of the date the person assumes such position, distribute a dated and signed notification letter in the form set forth in Appendix A to this order along with a copy of the complaint and order in this matter to each new agent, representative, or employee of the respondent whose activities are affected by this order, or who has responsibilities with respect to the subject matter of this order.

IV.

IT IS FURTHER ORDERED that each respondent shall, for a period of ten (10) years after the date this order becomes final:

A. Notify the Commission within thirty (30) days of the discontinuance of his present business or employment and of each affiliation with a new business or employment. Each notice of affiliation with any new business or employment shall include his new business address and telephone number, current home address, and a statement describing the nature of the business or employment and the duties and responsibilities.

B. Provide a copy of the complaint and order in this matter to each new employer within seven (7) days of his employment where the duties and responsibilities of such employment are subject to the provisions of this order.

V.

IT IS FURTHER ORDERED that each respondent shall, within thirty (30) days after the date on which this order becomes final, distribute by first-class mail a copy of this order and the accompanying complaint to each payer or provider who, at any time since January 1, 1997, has communicated any desire, willingness, or interest in contracting for chiropractic goods and services with the respondent.

VI.

IT IS FURTHER ORDERED that:

A. Within sixty (60) days after the date this order becomes final, each respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which he intends to comply, is complying, and has complied with Paragraphs II, III and V of this order.

B. One (1) year from the date this order becomes final, annually for the next five (5) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, each respondent shall file a verified written report with theCommission setting forth in detail the manner and form in which he has complied and is complying with Paragraphs II through IV of this order.

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this order, upon written request, each respondent shall permit any duly authorized representative of the Commission:

A. Access, during normal office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, calendars, and other records and documents in the possession or under the control of respondent relating to any matter contained in this order.

B. Upon five business days' notice to a respondent, and without restraint or interference from that respondent, to interview that respondent or any employee or representative of that respondent.

VIII.

IT IS FURTHER ORDERED that this order shall terminate on April 11, 2020.

By the Commission.

Appendix A

[Michael T. Berkley, D.C./Mark A. Cassellius, D.C., Letterhead]

Dear Agent, Representative, Employee, or Third Party Payer:

[Michael T. Berkley, D.C./Mark A. Cassellius, D.C.] has entered into an agreement with the Federal Trade Commission to settle charges that he and other unnamed persons conspired to fix prices for chiropractic services and to conduct a boycott of the Gundersen Lutheran Health Plan to obtain higher reimbursement for chiropractic manipulation services. As part of the settlement agreement, Dr. [Berkley/Cassellius] is required to send this notification letter and a copy of the complaint and order to each of his agents, representatives, and employees who have responsibilities with respect to the subject matter of the order, and to each third-party payer who, at any time since January 1, 1997, has communicated any desire, willingness, or interest in contracting for chiropractic goods and services with Dr. [Berkley/Cassellius]. The agreement is for settlement purposes only and does not constitute an admission by Dr. [Berkley/Cassellius] that the law has been violated as alleged in

the complaint, or that the facts as alleged in the complaint, other than jurisdictional facts, are true.

Under the terms of the order, Dr. [Berkley/Cassellius] is prohibited from:

- Fixing prices or encouraging others to fix prices for any chiropractic goods and services.

- Organizing, participating in, or enforcing any agreement (1) to negotiate on behalf of any chiropractor with any payer or provider; (2) to deal or refuse to deal with, boycott or threaten to boycott, any payer or provider; and (3) to determine the terms or conditions upon which chiropractors will deal with any payer or provider.

- Encouraging or assisting any person to take any action that, if taken by Dr. [Berkley/Cassellius], would violate the order.

A copy of the complaint and order is enclosed.

/s/
[Michael T. Berkley, D.C./Mark A. Cassellius, D.C.]

Enclosures

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement from Michael T. Berkley, D.C., and Mark A. Cassellius, D.C, to a proposed consent order. The agreement settles charges by the Federal Trade Commission that Drs. Berkley and Cassellius have violated Section 5 of the Federal Trade Commission Act by conspiring between themselves and with other chiropractors to fix prices for chiropractic services and to boycott the Gundersen Lutheran Health Plan ("Gundersen") to obtain higher reimbursement rates for services. The proposed consent order has been placed on the public record for thirty days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the agreement and proposed order final.

The purpose of this analysis is to facilitate public comment on the proposed order. The analysis is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms. Further, the proposed consent order has been entered into for settlement purposes only and does not constitute an admission by Drs. Berkley and Cassellius that the law has been violated as alleged in the complaint.

The Complaint

Drs. Berkley and Cassellius are chiropractors with their principal places of business in La Crosse, Wisconsin. Except to the extent that competition has been restrained as alleged in the complaint, Drs. Berkley and Cassellius have been, and are now, in competition with each other and with other chiropractors in and around La Crosse, Wisconsin.

Since at least January 1997, and continuing until at least June 1997, Drs. Berkley and Cassellius conspired among themselves and with other chiropractors to fix prices for chiropractic services and to boycott Gundersen, a third-party payer doing business in and around La Crosse County, Wisconsin. The purpose of the boycott was, among other things, to obtain higher reimbursement from Gundersen for chiropractic services. Drs. Berkley and Cassellius organized at least two meetings of La Crosse area chiropractors to discuss their concerns about Gundersen. A central concern raised at these meetings was Gundersen's purportedly low reimbursement rates. During these meetings, the chiropractors agreed that Gundersen should increase its reimbursement rates and determined that a majority of the chiropractors were willing to leave the Gundersen network if it did not address their concerns. Dr. Berkley, acting on behalf of the group of chiropractors, communicated to Gundersen the chiropractors' concerns and the implicit threat of a boycott. The threatened boycott was successful: Gundersen, fearing the loss of a substantial number of chiropractic providers and the disruption of its network, acceded to the chiropractors' demands and increased its reimbursement rates by 20%.

Drs. Berkley and Cassellius and the other unnamed chiropractors have not integrated their practices in any economically significant way, nor have they created any efficiencies that might justify this conduct. Had they done either of these, under some circumstances, the agreement on price might not have been unlawful. Their actions have harmed consumers by increasing the prices that are paid for chiropractic services and by depriving consumers of the benefits of competition among chiropractors.

The Proposed Consent Order

The proposed consent order is designed to prevent the illegal concerted action alleged in the complaint. Paragraph II.A prohibits Drs. Berkley and Cassellius from fixing prices for any chiropractic goods or services. Paragraph II.B prohibits them from: (1) engaging in collective negotiations on behalf of any chiropractors; (2) orchestrating concerted refusals to deal; or (3) fixing prices, or any other terms, on which chiropractors deal. Paragraph II.C prohibits Drs. Berkley and Cassellius from encouraging, advising, or pressuring any person to engage in any action that would be prohibited if the person were subject to the order.

Paragraph II. includes a proviso allowing Drs. Berkley and Cassellius to engage in conduct (including collectively determining reimbursement and other terms of contracts with payers) that is reasonably necessary to operate (a) any "qualified risk-sharing joint arrangement," or, provided Drs. Berkley and Cassellius have complied with the order's prior notification requirements, (b) any "qualified clinically integrated joint arrangement."

For the purposes of the order, a "qualified risk-sharing joint arrangement" must satisfy three conditions. First, all physicians participating in the arrangement must share substantial financial risk from their participation in the arrangement. The order lists ways in which physicians might share financial risk, tracking the types of financial risk sharing set forth in the *Statements of Antitrust Enforcement Policy in Health Care*, *Statement 8 on Physician Network Joint Ventures* issued jointly by the FTC and the Department of Justice on August 28, 1996 (4 Trade Reg. Rep. (CCH) ¶ 13,153 at 20,814). For example, physician participants can agree to provide services to a health plan at a "capitated" rate (a fixed payment per enrollee regardless of the amount of services provided to an enrollee). Second, any agreement on prices or terms of reimbursement entered into by the arrangement must be reasonably necessary to obtain significant efficiencies through the

joint arrangement. For example, a joint arrangement for billing services alone would not be sufficient, because the agreement on prices would not be necessary to achieve the benefits of the billing services. Third, the arrangement must be non-exclusive, i.e., physicians can also deal with payers individually or through other arrangements.

For purposes of the order, a "qualified clinically integrated joint arrangement" is one in which physicians undertake cooperative activities to achieve efficiencies in the delivery of clinical services without necessarily sharing substantial financial risk. The cooperation may include:

> (1) establishing mechanisms to monitor and control utilization of health care services that are designed to control costs and assure quality of care; (2) selectively choosing network physicians who are likely to further these efficiency objectives; and (3) the significant investment of capital, both monetary and human, in the necessary infrastructure and capability to realize the claimed efficiencies.

Id. at 20,817.

In order for a qualified clinically integrated joint arrangement formed by Drs. Berkley and Cassellius to fall within the proviso, they must comply with the order's requirements for prior notification. The prior notification mechanism will allow the Commission to evaluate a specific proposed arrangement and assess its likely competitive impact. This requirement will help guard against the recurrence of acts and practices that have restrained competition and consumer choice.

Paragraph III. requires that Drs. Berkley and Cassellius distribute a notification letter and copies of the complaint and order to all current and future agents, representatives, and

employees whose activities are affected by the order, or who have responsibilities with respect to the subject matter of the order. Paragraph IV. requires that Drs. Berkley and Cassellius notify the Commission of any change in their employment and would require them to provide copies of the complaint and consent order to any new employer for which their new duties and responsibilities are subject to any provisions in the order.

Paragraph V. requires that Drs. Berkley and Cassellius distribute a copy of the complaint and order to each payer or provider who, at any time since January 1, 1997, has communicated any desire, willingness, or interest in contracting for chiropractic goods and services with either of them.

Paragraphs VI. and VII. consist of standard Commission reporting and compliance procedures. Finally, Paragraph VIII. contains a standard twenty year "sunset" provision under which the terms of the order terminate twenty years after the date of issuance.

IN THE MATTER OF

RHODIA, ET AL.

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

Docket C-3930; File No. 9910237
Complaint, March 13, 2000--Decision, April 18, 2000

This consent order addresses the acquisition by Respondents Rhodia, of Albright & Wilson PLC, a wholly owned subsidiary of Donau Chemie AG. Respondent is required to divest to Potash Corporation of Saskatchewan A&W's United States pure phosphoric acid business, including A&W's interest in the Joint Venture, as well as joint venture manufacturing assets, including the Aurora pure phosphoric acid plant and the Cincinnati plant. The order also requires Respondents to provide PCS with technology A&W has developed for manufacturing pure phosphoric acid and for using it in certain applications. The order also requires respondents to divest other assets related to A&W's pure phosphoric acid business, including customer lists, contracts, and other intangible assets. The Order to Maintain Assets requires that respondents preserve the A&W assets they are required to divest as a viable and competitive operation until those assets are transferred, and to conduct the A&W pure phosphoric acid business in the ordinary course of business. Furthermore, the Order to Maintain Assets includes an obligation on respondents to build and maintain a sufficient inventory of pure phosphoric acid to ensure there is no shortage of supply during the period that the business is being transferred.

Participants

For the Commission: *Robert S. Tovsky, Randall Conner, Gorav Jindal, Jeanine Balbach, Steven Wilensky, Emily Byers, Morris A. Bloom, John O'Hara Horsley, Richard Liebeskind, Daniel P. Ducore, Thomas R. Isso, Louis Silva,* and *Gregory Vistnes.*

For the Respondents: *Michael N. Sohn* and *Cathy A. Hoffman, Arnold & Porter, Steven C. Sunshine, Shearman & Sterling*, *George S. Cary, Cleary, Gottlieb, Steen & Hamilton*, and *Raymond A. Jacobsen* and *Joel R. Grosberg, McDermott, Will & Emery.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that Rhodia has entered into an agreement to acquire Albright & Wilson PLC, a wholly-owned subsidiary of Donau Chemie AG, and that the acquisition, if consummated, would result in a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and Section 7 of the Clayton Act, 15 U.S.C. § 18, 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:

A. THE RESPONDENTS

1. Respondent Rhodia is a corporation organized, existing, and doing business under and by virtue of the laws of France, with its executive offices located at 26, quai Alphonse Le Gallo, 92512 Boulogne-Billancourt Cédex, France. Rhodia, among other things, engages in the development, manufacture and sale of pure phosphoric acid and phosphate salts, primarily in Europe and North America.

2. Respondent Donau Chemie AG is a corporation organized, existing and doing business under and by virtue of the laws of Austria, with its office and principal place of business located at Am Heumarkt 10, A-1037, Vienna, Austria. In April 1999, Donau acquired Albright & Wilson through a cash tender offer valued at approximately $720 million.

3. Respondent Albright & Wilson PLC 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 210-222 Hagley Road West, Oldbury, West Midlands, B68 ONN, England. Albright & Wilson, among other things, engages in the worldwide development, manufacture and sale of pure phosphoric acid and phosphate salts.

4. At all times relevant herein, Respondents Rhodia, Donau and Albright & Wilson have been and are now engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, 15 U.S.C. § 12, and are corporations whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

B. THE PROPOSED ACQUISITIONS

5. On March 30, 1999, Rhodia and Donau executed two agreements, including a Heads of Agreement and a Call Option Agreement. Pursuant to these agreements, Donau acquired, through a cash tender offer supported by Rhodia, all of the outstanding voting securities of Albright & Wilson, and granted Rhodia an option to acquire from Donau the ownership of the Albright & Wilson voting securities. Rhodia currently intends to exercise its option to acquire Albright & Wilson, for an aggregate exercise price exceeding $700 million.

C. RELEVANT MARKET

6. The relevant line of commerce in which to analyze the effects of Rhodia's proposed acquisition of Albright & Wilson is the manufacture, marketing and sale of pure phosphoric acid. There are no economic substitutes for pure phosphoric acid.

7. Pure phosphoric acid is a syrupy tribasic acid that is used in a wide variety of applications. It is used in food applications, such as cola beverages and pet food, and in technical applications, such as cleaning compounds, metal surface treatments, and water

treatment products. Pure phosphoric acid is sold directly to end users, and also is used as an input to create phosphate salts, such as sodium tripolyphosphate.

8. Pure phosphoric acid is produced in the United States primarily by two different methods. The older method is the thermal process, in which producers add water to elemental phosphorus. The newer method is the solvent extraction process, in which producers use solvents to remove impurities from impure, or "green," phosphoric acid. The solvent extraction process has a cost advantage over the thermal process because it is much less energy-intensive.

9. A small but significant and non-transitory price increase would not affect the current level of consumption of pure phosphoric acid in any of the significant end-use applications.

10. The relevant geographic market in which to analyze the effects of Rhodia's proposed acquisition of Albright & Wilson is the United States. The level of imports of pure phosphoric acid has been small compared to the overall market, and has not been highly responsive to changes in United States prices. In fact, prices in the United States have historically been much higher than prices in other parts of the world.

11. There are several reasons why imports of pure phosphoric acid into the United States have been limited. One reason is that transportation costs account for a significant portion of the delivered cost of phosphoric acid. Another reason is that many of the overseas producers employ the older, higher-cost thermal process to produce pure phosphoric acid. Other reasons why imports have been limited include access to distribution and the cost of terminal storage for product imported from overseas. In addition, agreements between producers in the United States and various overseas producers have had the effect of limiting the level of competition from these overseas producers.

12. The overseas producers that have been most active in making sales of pure phosphoric acid in the United States have been those that employ the solvent extraction process. Nevertheless, the level of sales by these companies has been low. Moreover, these overseas producers of pure phosphoric acid have faced significant duties that have limited their ability to sell pure phosphoric acid in the United States. These duties have increased costs for the overseas producers, and also have chilled sales by the overseas producers in the United States.

D. MARKET STRUCTURE

13. The United States market for pure phosphoric acid is highly concentrated. Four manufacturers, including Rhodia, Albright & Wilson, FMC and Solutia, currently account for approximately 95% of the local production capacity that can supply United States customers, and 95% of sales of pure phosphoric acid. Albright & Wilson's share of direct sales to customers is close to 28%, and Rhodia's share is approximately 11%. The proposed acquisition would increase the Herfindahl-Hirschman Index for United States sales of pure phosphoric acid by over 630 points, from over 2300 to over 2940.

14. Rhodia produces pure phosphoric acid using the solvent extraction process at a plant in Geismar, Louisiana, which has an annual capacity of approximately 100,000 metric tons. It produces pure phosphoric acid via the thermal process at plants in Nashville, Tennessee and Morrisville, Pennsylvania. The Nashville plant has an annual capacity of over 38,000 metric tons and the Morrisville plant has an annual capacity of over 100,000 metric tons. Rhodia utilizes the production capacity of the Geismar plant at a much higher rate than the two thermal acid plants. Rhodia also produces phosphate salts in several different plants. Rhodia sells purified phosphoric acid directly to end-customers, and also uses it in the manufacture of phosphate salts.

15. In 1998, Rhodia had total sales to customers in the United States of over 50 million pounds of pure phosphoric acid. Rhodia also consumes large amounts of pure phosphoric acid internally in the manufacture of phosphate salts.

16. Albright & Wilson produces pure phosphoric acid via the solvent extraction process at one plant in the United States, in Aurora, North Carolina, which is part of a joint venture with Potash Corporation of Saskatchewan ("PCS"). The capacity of this plant is approximately 155,000 metric tons per year. It produces pure phosphoric acid via the thermal acid process at a plant in Charleston, South Carolina, which has a capacity of approximately 14,000 metric tons per year. Albright & Wilson also produces pure phosphoric acid at a plant in Mexico, which has a capacity of approximately 180,000 metric tons per year. A&W utilizes the production capacity of the Aurora plant at a higher rate than the capacity of the Charleston thermal acid plant.

17. In 1998, Albright & Wilson had total sales to customers in the United States of over 150 million pounds of pure phosphoric acid. Its North American sales of pure phosphoric acid totaled over 400 million pounds. Albright & Wilson also consumed large amounts of its pure phosphoric acid production internally, to produce a wide range of phosphate salts.

18. Besides Rhodia, Albright & Wilson, FMC and Solutia, two other companies that produce pure phosphoric acid in North America for sale in the United States are Earth Sciences and Simplot. Earth Sciences and Simplot have each been producing pure phosphoric acid for the last two to three years, using processes to manufacture pure phosphoric acid different from the other North American producers. Both of these companies have very limited production capacity and sales compared to the other four producers, and are unlikely to grow their sales substantially in the foreseeable future.

E. CONDITIONS OF ENTRY

19. *De novo* entry or fringe expansion into the relevant market would require a substantial sunk investment and a significant period of time, such that new entry would be neither timely, likely, nor sufficient.

20. The minimum viable scale of a pure phosphoric acid production facility likely precludes new entry. The prevailing pure phosphoric acid technology demands large-scale production, relative to market size, in order to operate efficiently. This technology has but a single use -- the production of pure phosphoric acid. It cannot economically be shifted toward another use. Therefore, all returns on investment must be derived from pure phosphoric acid sales. Because economic entry would require that a new producer capture a significant market share from existing producers, and because the costs of such entry would be sunk, such entry is inherently risky.

F. MARKET CHARACTERISTICS THAT FACILITATE COORDINATED INTERACTION

21. The characteristics of the market for pure phosphoric acid facilitate coordinated interaction among producers, to the detriment of the purchasers of this product. Among such characteristics are:

a. The United States market for pure phosphoric acid is highly concentrated;

b. Pure phosphoric acid is a highly homogeneous product that is purchased primarily on the basis of price;

c. Reliable pricing information is available from customers, and from other producers due to the practice of publicly announcing price increases in advance of their implementation;

d. There is a strong tendency toward coordination among producers of pure phosphoric acid. Producers recognize the market to be an oligopoly in which competitive rivalry is low; and

e. Producers tend to refrain from bidding against their competitors at accounts that they recognize to be important to the other producers, and, furthermore, undertake strategic retaliation at specific accounts as a means to discipline and deter future competition.

G. EFFECTS OF THE PROPOSED ACQUISITION

22. The effect of the acquisition may be substantially to lessen competition and to tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, 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. It will substantially increase concentration in the market for pure phosphoric acid;

b. It will significantly enhance the likelihood of coordinated interaction in the relevant market among the competitors in the manufacture and sale of pure phosphoric acid;

c. It will increase the likelihood that purchasers of pure phosphoric acid in the relevant geographic market will be forced to pay higher prices. In fact, Rhodia's documents project higher pure phosphoric acid prices as a result of the proposed acquisition of Albright & Wilson.

H. VIOLATIONS CHARGED

23. The acquisition agreements between Rhodia and Donau, as described in Paragraph 5, violate Section 5 of the FTC Act, as amended, 15 U.S.C.§ 45.

24. The acquisition of Albright & Wilson by Rhodia, if consummated, would violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this thirteenth day of March, 2000, issues its complaint against said Respondents.

By the Commission, Commissioner Thompson dissenting.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Rhodia of Albright & Wilson PLC, a subsidiary of Donau Chemie AG, hereinafter referred to as "Respondents," and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("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 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 Agreement Containing Consent Orders and to place such 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 Maintain Assets:

1. Rhodia is a corporation organized, existing and doing business under and by virtue of the laws of France, with its office and principal place of business located at 26, quai Alphonse Le Gallo, 92512 Boulogne-Billancourt Cédex, France.

2. Donau is a corporation organized, existing and doing business under and by virtue of the laws of Austria, with its office and principal place of business located at Am Heumarkt 10, A-1037, Vienna, Austria.

3. Albright & Wilson 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 210-222 Hagley Road West, Oldbury, West Midlands, B68 ONN, England.

4. 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 to Maintain Assets, the following definitions shall apply:

A. "Rhodia" means Rhodia, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Rhodia, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Albright & Wilson" means Albright & Wilson PLC, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Albright & Wilson, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Donau" means Donau Chemie AG, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Donau, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "Commission" means the Federal Trade Commission.

E. "Respondents" means Rhodia, Albright & Wilson, and Donau, respectively and collectively.

F. "Acquisition" means the Proposed Acquisition by Rhodia of Albright & Wilson as described in the March 30, 1999 Heads of Agreement and March 30, 1999 Call Option Agreement between Rhodia and Donau.

G. "PCS" means Potash Corporation of Saskatchewan Inc., its subsidiaries, divisions, groups, and affiliates controlled by PCS, including, but not limited to, PCS Phosphate Company, Inc.

H. "Purified Acid Joint Venture" or "Joint Venture" means the joint venture between Albright & Wilson and PCS, established pursuant to the July 29, 1988, General Partnership Agreement between Albright & Wilson Americas Inc. and Texasgulf, Inc., as amended.

I. "Aurora Plant" means the Joint Venture's plant in Aurora, North Carolina which manufactures purified phosphoric acid.

J. "Cincinnati Plant" means the Joint Venture's manufacturing plant in Cincinnati, Ohio which manufactures phosphate salts and blends of phosphoric acid.

K. "Joint Venture Phosphoric Acid" means the phosphoric acid that is produced at the Aurora Plant and sold by the Purified Acid Joint Venture, including all grades and types of phosphoric acid that are or have been produced and sold by the Joint Venture.

L. "Cincinnati Products" means the phosphoric acid blends and phosphate salts produced at the Cincinnati Plant.

M. "Albright & Wilson Phosphate Salts" means phosphate salts that currently are or have been manufactured and/or sold by Albright & Wilson.

N. "Joint Venture Products" Means Joint Venture Phosphoric Acid and Cincinnati Products.

O. "Albright & Wilson Interest" means the interest in the Purified Acid Joint Venture that is owned or controlled by Albright & Wilson.

P. "PCS Divestiture Agreement" means the agreements between Rhodia, Albright & Wilson, PCS and the Joint Venture by which Albright & Wilson has agreed to sell and PCS has agreed to acquire the Assets To Be Divested.

Q. "Intellectual Property" means any form of intellectual property relating to the research, development, manufacture or sale of Joint Venture Products, including, but not limited to, trademarks, patents, trade secrets, research materials, technical information, management information systems, software, inventions, test data, technological know-how, licenses, registrations, submissions, approvals, technology, specifications, designs, drawings, processes, recipes, protocols, formulas, customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, quality control data, books, records, and files.

R. "Assets To Be Divested" means the assets, properties, business and goodwill, tangible and intangible, of the Joint Venture or of Albright & Wilson that relate to Joint Venture Products, including, but not limited to:

1. the Albright &Wilson Interest;

2. the Aurora Plant and the Cincinnati Plant, including all machinery, furniture, fixtures, tools and other tangible personal property;

3. all other assets, properties, business and goodwill, tangible and intangible, owned, leased or possessed by Albright &

Wilson relating to Joint Venture Phosphoric Acid, including, but not limited to:

a. a royalty-free, non-exclusive license to all rights, title, and interest in and to Intellectual Property;

b. all rights, title, and interest in and to inventories of products, raw materials (to the extent requested by the acquirer), supplies and parts, including work-in-process and finished goods, relating to the research, design, development, manufacture, marketing or sale of Joint Venture Phosphoric Acid;

c. all rights, title, and interest in and to agreements, express or implied, relating to the research, design, development, manufacture, distribution, marketing or sale of Joint Venture Phosphoric Acid, regardless of whether such agreements relate exclusively to such purposes, including, but not limited to, warranties, guarantees, and contracts with joint venture partners, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors, consignees, and customers; provided that, to the extent that any agreements relating to the sale of Joint Venture Phosphoric Acid also relate to the sale of phosphate salts, Respondents are not required to divest those portions of such agreements that relate to the sale of Albright & Wilson Phosphate Salts;

d. all rights, title and interest in and to permits and approvals relating to the research, design, development, manufacture, distribution, marketing or sale of Joint Venture Phosphoric Acid, regardless of whether such permits and approvals relate exclusively to such purposes, to the extent permitted by law;

e. all customer and vendor lists, catalogs, sales promotion literature and advertising materials relating to the research, design, development, manufacture, distribution, marketing, or sale of Joint Venture Phosphoric Acid;

f. all equipment, vehicles and transportation facilities related to Joint Venture Phosphoric Acid, except to the extent that such assets relate exclusively to the marketing or sale of Albright & Wilson Phosphate Salts;

g. all storage capacity related to Joint Venture Phosphoric Acid;

h. all rights, title and interest in and to owned or leased real property, together with appurtenances, licenses and permits related to Joint Venture Phosphoric Acid;

i. all rights under warranties and guarantees, express or implied, related to Joint Venture Phosphoric Acid;

j. all books, records, and files related to Joint Venture Phosphoric Acid; and

k. all items of prepaid expense related to Joint Venture Phosphoric Acid;

4. all other assets, properties, business and goodwill, tangible and intangible, owned, leased or possessed by Albright & Wilson relating to Cincinnati Products, including, but not limited to:

a. a royalty-free, non-exclusive license to all rights, titles, and interest in and to Intellectual Property;

b. all rights, title, and interest in and to inventories of products, raw materials (to the extent requested by the Acquirer), supplies and parts, including work-in-process and finished goods, relating to the research, design, development or manufacture of Cincinnati Products; provided, however, that Respondents are not required to divest inventories of finished and packaged Albright & Wilson Phosphate Salts;

c. all rights, title, and interest in and to agreements, express or implied, relating to the research, design, development or manufacture of Cincinnati Products, regardless of whether such agreements relate exclusively to such purposes, including, but not limited to, warranties, guarantees, and contracts with joint venture partners, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors, consignees, and customers;

d. all rights, title and interest in and to permits and approvals relating to the research, design, development or manufacture of Cincinnati Products, regardless of whether such permits and approvals relate exclusively to such purposes, to the extent permitted by law;

e. all equipment, vehicles and transportation facilities related to Cincinnati Products, except to the extent that such assets are used exclusively in the marketing or sale of Albright & Wilson Phosphate Salts;

f. all storage capacity related to Cincinnati Products, except to the extent that such assets are used exclusively in the marketing or sale of Albright & Wilson Phosphate Salts;

g. all rights, titles and interests in and to owned or leased real property, together with appurtenances, licenses and permits related to Cincinnati Products, except to the extent that such assets are used exclusively in the marketing or sale of Albright & Wilson Phosphate Salts;

h. all rights under warranties and guarantees, express or implied, related to Cincinnati Products;

i. all books, records, and files related to Cincinnati Products, except to the extent that such assets are used exclusively in the marketing or sale of Albright & Wilson Phosphate Salts; and

j. all items of prepaid expense related to Cincinnati Products.

S. "Support Services" means those services provided by Albright & Wilson to the Assets To Be Divested, as requested by the Commission-approved acquirer, including, but not limited to, accounting and administrative Support Services, customer order entry, freight and transportation scheduling, information services, product storage and handling services, and product support.

II.

IT IS FURTHER ORDERED that:

A. The purpose of this Order is to: (i) preserve the Assets To Be Divested as a viable, competitive, and ongoing business; (ii) assure that no material confidential information is exchanged between the respective businesses of Rhodia and Albright & Wilson; and (iii) prevent interim harm to competition.

B. Respondents shall take such actions as are necessary to maintain the viability, competitiveness, and marketability of the Assets To Be Divested; Respondents shall not sell, transfer, or encumber the Assets To Be Divested or other assets related to the Assets To Be Divested; and Respondents shall not cause or permit the destruction, removal, wasting, or deterioration, or otherwise impair the viability, competitiveness, or marketability of the Assets To Be Divested or other assets related to the Assets To Be Divested, except for ordinary wear and tear.

C. Respondents shall conduct or cause to be conducted the business of the Assets To Be Divested in the regular and ordinary course and in accordance with past practice (including regular repair and maintenance efforts) and shall use their best efforts to preserve existing relationships with suppliers, customers, employees, and others having business relations with the Assets to Be Divested.

D. Prior to the transfer of the Assets To Be Divested, Respondents shall ensure that a sufficient inventory of Joint Venture Phosphoric Acid is maintained and built up, consistent with past and/or projected demand, so as to assure that no shortages of such products occur at any time.

E. Except as required by law, and except to the extent necessary information is exchanged in the course of evaluating the Acquisition, defending investigations or litigation, obtaining legal advice, negotiating agreements to divest assets, or complying with the Decision & Order or this Order to Maintain Assets, Rhodia shall not receive or have access to any competitively sensitive or proprietary information that relates to the Assets To Be Divested, including, but not limited to, customer lists, price lists, marketing methods, patents, technologies, processes or other trade secrets, not independently known to Rhodia from sources other than Albright & Wilson.

III.

IT IS FURTHER ORDERED that Respondents shall maintain facilities and a work force sufficient to provide Support Services to the Assets To Be Divested. Such Support Services shall be equivalent to those currently supplied by Albright & Wilson to the Joint Venture. Respondents shall provide all employees providing Support Services as of January 1, 2000, to the Assets To Be Divested with incentives to continue in their employment positions and shall not terminate them (except for cause) or transfer them to other duties during the period covered by this Order to Maintain Assets. Such incentives shall include, but not be limited to:

A. continuation of all employee benefits offered by Albright & Wilson until the transfer of functions provided for in the Commission-approved divestiture agreement is completed; and

B. a bonus, equal to five (5) percent of the employee's annual salary (including any other bonuses except for the portion of any bonus payable solely as a result of Albright & Wilson's guaranteed bonus program) as of the date this Order to Maintain Assets is issued by the Commission to those Albright & Wilson employees identified in Schedule A of this Order to Maintain Assets, hereto attached, that continue their employment with Albright & Wilson until the completion of the transfer of functions provided for in the Commission-approved divestiture agreement described in the Consent Agreement and Decision and Order.

Provided, however, that Respondents' obligations under this Paragraph III shall cease as to any employee or Support Service upon notice from the buyer of the Assets To Be

Divested that an employee or a Support Service is no longer required.

IV.

IT IS FURTHER ORDERED that:

A. Respondents shall not make employment offers to any individual listed in Schedule A to the Decision & Order for a period of one (1) year after this Order has been issued if such individual has accepted an employment offer from the Commission-approved acquirer. Respondents may make employment offers fifteen (15) days after this Order to Maintain Assets has been issued to any individual listed in Schedule A of the Decision & Order who has not accepted an employment offer from the Commission-approved acquirer.

B. Respondents shall not interfere with the employment by the Commission-approved acquirer of the individuals listed in Schedule A to the Decision & Order; shall not offer any incentive to such employees to decline employment with the Commission-approved acquirer or to accept other employment with the Respondents; and shall remove any impediments that may deter such employees from accepting employment with the Commission-approved acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with the Respondents that would affect the ability of those individuals to be employed by the Commission-approved acquirer. Provided, however, that any such waiver is limited to employment with the Commission-approved acquirer.

C. No later than the date on which a divestiture agreement is signed with the proposed acquirer, Respondents shall provide the proposed acquirer with a complete list of all non- clerical employees of Albright & Wilson who have been or were engaged in the research, development, manufacture or sale of Joint Venture Phosphoric Acid, or the research, development

or manufacture of Cincinnati Products, at any time during the period from January 1, 1999, until the date of such divestiture agreement. Such list shall state each such individual's name, position, address, current or last known business telephone number and a description of the duties and work performed by the individual in connection with Joint Venture Products.

D. Respondents shall provide the proposed acquirer the opportunity to enter into employment contracts with those non clerical employees described in Paragraph IV.C., above, and shall remove any impediments that may deter such employees from accepting employment with the Commission-approved acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with the Respondents that would affect the ability of those individuals to be employed by the Commission-approved acquirer. Provided, however, that any such waiver is limited to employment with the Commission-approved acquirer.

V.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in Respondents, such as dissolution, assignment, or 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.

VI.

IT IS FURTHER ORDERED that for the purposes of determining or securing compliance with this Order to Maintain Assets, 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 the Respondents relating to compliance with this Order to Maintain Assets; 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 Maintain Assets 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 C.F.R. § 2.34; or

B. When the Assets To Be Divested have been divested and the transition period provided for in the Commission-approved divestiture agreement has been completed.

By the Commission, Commissioner Thompson dissenting.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition by Respondent Rhodia of Albright & Wilson PLC ("Albright & Wilson") from Donau Chemie AG ("Donau"), and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, 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 Maintain Assets, 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 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Order:

1. Rhodia is a corporation organized, existing and doing business under and by virtue of the laws of France, with its office and principal place of business located at 26, quai Alphonse Le Gallo, 92512 Boulogne-Billancourt Cédex, France.

2. Donau is a corporation organized, existing and doing business under and by virtue of the laws of Austria, with its office and principal place of business located at Am Heumarkt 10, A-1037, Vienna, Austria.

3. Albright & Wilson 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 210-222 Hagley Road West, Oldbury, West Midlands, B68 ONN, England.

4. 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. "Rhodia" means Rhodia, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Rhodia, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Albright & Wilson" means Albright & Wilson PLC, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Albright & Wilson, and the

respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Donau" means Donau Chemie AG, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Donau, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "Commission" means the Federal Trade Commission.

E. "Respondents" means Rhodia, Albright & Wilson, and Donau, respectively and collectively.

F. "Acquisition" means the Acquisition by Rhodia of Albright & Wilson as described in the March 30, 1999, Heads of Agreement and March 30, 1999, Call Option Agreement between Rhodia and Donau.

G. "PCS" means Potash Corporation of Saskatchewan Inc., its subsidiaries, divisions, groups, and affiliates controlled by PCS, including, but not limited to, PCS Phosphate Company, Inc.

H. "Purified Acid Joint Venture" or "Joint Venture" means the joint venture between Albright & Wilson and PCS, established pursuant to the July 29, 1988, General Partnership Agreement between Albright & Wilson Americas Inc. and Texasgulf, Inc., as amended.

I. "Aurora Plant" means the Joint Venture's plant in Aurora, North Carolina which manufactures Joint Venture Phosphoric Acid.

J. "Cincinnati Plant" means the Joint Venture's manufacturing plant in Cincinnati, Ohio.

K. "Joint Venture Phosphoric Acid" means the phosphoric acid that is produced at the Aurora Plant and sold by the Purified Acid Joint Venture, including all grades and types of phosphoric acid that are or have been produced and sold by the Joint Venture.

L. "Cincinnati Products" means the phosphoric acid blends and phosphate salts produced at the Cincinnati Plant.

M. "Albright & Wilson Phosphate Salts" means phosphate salts that currently are or have been manufactured and/or sold by the Joint Venture or Albright & Wilson.

N. "Joint Venture Products" means Joint Venture Phosphoric Acid and Cincinnati Products.

O. "Albright & Wilson Interest" means the interest in the Purified Acid Joint Venture that is owned or controlled by Albright & Wilson.

P. "PCS Divestiture Agreement" means the agreements between Rhodia, Albright & Wilson, PCS and the Joint Venture by which Albright & Wilson has agreed to sell and PCS has agreed to acquire the Assets To Be Divested.

Q. "Intellectual Property" means any form of intellectual property relating to the research, development, manufacture or sale of Joint Venture Products, including, but not limited to, trademarks, patents, trade secrets, research materials, technical information, management information systems, software, inventions, test data, technological know-how, licenses, registrations, submissions, approvals, technology, specifications, designs, drawings, processes, recipes, protocols, formulas, customer lists, vendor lists, catalogs, sales promotion

literature, advertising materials, quality control data, books, records, and files.

R. "Assets To Be Divested" means the assets, properties, business and goodwill, tangible and intangible, of the Joint Venture or of Albright & Wilson that relate to Joint Venture Products, including, but not limited to:

1. the Albright &Wilson Interest;

2. the Aurora Plant and the Cincinnati Plant, including all machinery, furniture, fixtures, tools and other tangible personal property;

3. all other assets, properties, business and goodwill, tangible and intangible, owned, leased or possessed by Albright & Wilson relating to Joint Venture Phosphoric Acid, including, but not limited to:

   a. a royalty-free, non-exclusive license to all rights, title, and interest in and to Intellectual Property;

   b. all rights, title, and interest in and to inventories of products, raw materials (to the extent requested by the acquirer), supplies and parts, including work-in-process and finished goods, relating to the research, design, development, manufacture, marketing or sale of Joint Venture Phosphoric Acid;

   c. all rights, title, and interest in and to agreements, express or implied, relating to the research, design, development, manufacture, distribution, marketing or sale of Joint Venture Phosphoric Acid, regardless of whether such agreements relate

exclusively to such purposes, including, but not limited to, warranties, guarantees, and contracts with joint venture partners, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors, consignees, and customers; provided that, to the extent that any agreements relating to the sale of Joint Venture Phosphoric Acid also relate to the sale of phosphate salts, Respondents are not required to divest those portions of such agreements that relate to the sale of Albright & Wilson Phosphate Salts;

d. all rights, title and interest in and to permits and approvals relating to the research, design, development, manufacture, distribution, marketing or sale of Joint Venture Phosphoric Acid, regardless of whether such permits and approvals relate exclusively to such purposes, to the extent permitted by law;

e. all customer and vendor lists, catalogs, sales promotion literature and advertising materials relating to the research, design, development, manufacture, distribution, marketing, or sale of Joint Venture Phosphoric Acid;

f. all equipment, vehicles and transportation facilities related to Joint Venture Phosphoric Acid, except to the extent that such assets relate exclusively to the marketing or sale of Albright & Wilson Phosphate Salts;

g. all storage capacity related to Joint Venture Phosphoric Acid;

h. all rights, title and interest in and to owned or leased real property, together with appurtenances, licenses and permits related to Joint Venture Phosphoric Acid;

i. all rights under warranties and guarantees, express or implied, related to Joint Venture Phosphoric Acid;

j. all books, records, and files related to Joint Venture Phosphoric Acid; and

k. all items of prepaid expense related to Joint Venture Phosphoric Acid;

2. all other assets, properties, business and goodwill, tangible and intangible, owned, leased or possessed by Albright & Wilson relating to Cincinnati Products, including, but not limited to:

a. a royalty-free, non-exclusive license to all rights, title, and interest in and to Intellectual Property;

b. all rights, title, and interest in and to inventories of products, raw materials (to the extent requested by the acquirer), supplies and parts, including work-in-process and finished goods, relating to the research, design, development or manufacture of Cincinnati Products; provided, however, that Respondents are not required to divest inventories of finished and packaged Albright & Wilson Phosphate Salts;

c. all rights, title, and interest in and to agreements, express or implied, relating to the research, design, development or manufacture of Cincinnati Products, regardless of whether such agreements relate exclusively to such purposes, including, but not limited to, warranties, guarantees, and contracts with joint venture partners, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors, consignees, and customers;

d. all rights, title and interest in and to permits and approvals relating to the research, design, development or manufacture of Cincinnati Products, regardless of whether such permits and approvals relate exclusively to such purposes, to the extent permitted by law;

e. all equipment, vehicles and transportation facilities related to Cincinnati Products, except to the extent that such assets relate exclusively to the marketing or sale of Albright & Wilson Phosphate Salts;

f. all storage capacity related to Cincinnati Products, except to the extent that such assets are used exclusively in the marketing or sale of Albright & Wilson Phosphate Salts;

g. all rights, titles and interests in and to owned or leased real property, together with appurtenances, licenses and permits related to Cincinnati Products, except to the extent that such assets are used exclusively in the marketing or sale of Albright & Wilson Phosphate Salts;

h. all rights under warranties and guarantees, express or implied, related to Cincinnati Products;

i. all books, records, and files related to Cincinnati Products, except to the extent that such assets are used exclusively in the marketing or sale of Albright & Wilson Phosphate Salts; and

j. all items of prepaid expense related to Cincinnati Products.

S. "Trustee" means a trustee appointed pursuant to Paragraph III.A. of this Order.

II.

IT IS FURTHER ORDERED that:

A. Respondents shall divest the Assets To Be Divested to PCS pursuant to the PCS Divestiture Agreement no later than ten (10) days after Rhodia's consummation of the Acquisition. The purpose of the divestiture is to ensure the continued use of the Assets To Be Divested in the same business in which they were engaged at the time of the Acquisition and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint. Failure by Respondents to perform the divestiture agreement shall also constitute a violation of this Order.

Provided, however, that, if at that time the Commission determines to issue the Order, the Commission notifies Respondents that PCS is not an acceptable acquirer or that the PCS Divestiture Agreement is not an acceptable manner of divestiture, the Respondents shall, within one-hundred and twenty (120) days from the date on which this Order is issued by the Commission, divest the Assets To Be Divested to an

acquirer that is approved by the Commission, and in a manner approved by the Commission.

B. No later than the date on which a divestiture agreement is signed with the proposed acquirer, Respondents shall provide the proposed acquirer with a complete list of all non-clerical employees of Albright & Wilson who have been or were engaged in the research, development, manufacture or sale of Joint Venture Phosphoric Acid, or the research, development or manufacture of Cincinnati Products, at any time during the period from January 1, 1999, until the date of such divestiture agreement. Such list shall state each such individual's name, position, address, current or last known business telephone number and a description of the duties and work performed by the individual in connection with Joint Venture Products.

C. Respondents shall provide the proposed acquirer the opportunity to enter into employment contracts with the non-clerical employees described in Paragraph II.B.

D. Respondents shall provide the proposed acquirer with an opportunity to inspect the personnel files and other documentation relating to all non-clerical employees who have been engaged in the research, development, manufacture or sale of Joint Venture Phosphoric Acid or the research, development or manufacture of Cincinnati Products, to the extent permissible under applicable laws, at the request of the proposed acquirer no later than the date of the execution of the related divestiture agreement.

E. Respondents shall provide the individuals identified in Schedule A of this Order, hereto attached, with financial incentives to accept employment with the Commission-approved acquirer at the time of the divestiture. Such incentives shall include, but not be limited to:

1. a bonus equal to fifteen (15) percent of the employee's annual salary (including any other bonuses except for the portion of any bonus payable solely as a result of Albright & Wilson's guaranteed bonus program) as of the date this Order is issued by the Commission for any individual who agrees to accept an offer of employment from the Commission-approved acquirer, payable by Respondents, as follows: 1) a ten (10) percent bonus upon the beginning of the employee's employment with the Commission-approved acquirer; and 2) a five (5) percent bonus upon the employee's completion of one year of employment with the Commission-approved acquirer; and

2. the severance payment to which Albright & Wilson employees would be entitled upon termination if, less than twelve (12) months after the date on which such employee commences employment with the Commission-approved acquirer, the Commission-approved acquirer terminates the employment of such employee for reasons other than cause. The amount of such severance payment shall be equal to the payment that such employee would have received had he or she remained in the employ of Albright & Wilson and been terminated at such time, less any severance payment actually paid by the Commission-approved acquirer.

F. Respondents shall not make employment offers to any individual listed in Schedule A of this Order for a period of one (1) year after this Order has been issued if such individual has accepted an employment offer from the Commission-approved acquirer. Respondents may make employment offers fifteen (15) days after this Order has been issued to any individual listed in Schedule A who has

not accepted an employment offer from the Commission-approved acquirer.

G. Respondents shall not interfere with the employment by the Commission-approved acquirer of the individuals listed in Schedule A; shall not offer any incentive to such employees to decline employment with the Commission-approved acquirer or to accept other employment with the Respondents; and shall remove any impediments that may deter such employees from accepting employment with the Commission-approved acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with the Respondents that would affect the ability of those individuals to be employed by the Commission-approved acquirer. Provided, however, that any such waiver is limited to employment with the Commission-approved acquirer.

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 Assets To Be Divested in accordance with Paragraph II.A. of this Order, the Commission may appoint a trustee to divest the Assets To Be Divested. In the event that the Commission or the Attorney General brings an action pursuant to § 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 § 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 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 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 identity of any 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 Assets To Be Divested.

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 Assets To Be Divested 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 the acquirer as set out in Paragraph II. of this Order; provided, however, if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the

acquiring entity 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 the 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 Assets To Be Divested.

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. The trustee shall have no obligation or authority to operate or maintain any assets relating to the research, development, manufacture or sale of Joint Venture Phosphoric Acid, or the research, development or manufacture of Cincinnati Products.

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

IV.

IT IS FURTHER ORDERED that within thirty (30) days of the date this Order is issued and every thirty (30) days thereafter until Respondents have fully complied with the provisions of Paragraphs II. or III. of this Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Paragraphs II. and III. of this Order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II. and III. of this Order, including a description of all substantive contacts or negotiations for divestiture and the identity of all parties

contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, all reports and recommendations concerning divestiture, and all transition services required to be rendered pursuant to the agreement approved by the Commission.

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, or 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.

VI.

IT IS FURTHER ORDERED that for the purposes of determining or securing compliance with this Order, 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 the Respondents relating to compliance with this Order; and

B. Upon five (5) days' notice to Respondents and without restraint or interference from Respondents, to interview

officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

VII.

IT IS FURTHER ORDERED that this Order shall terminate after Respondents have complied with the requirements of Paragraphs II. and III. of this Order.

By the Commission, Commissioner Thompson dissenting.

[Confidential Schedule A Redacted From Public Version]

DISSENTING STATEMENT OF COMMISSIONER MOZELLE W. THOMPSON

The Commission has determined to issue a final consent order in connection with Rhodia's acquisition of Albright & Wilson plc from Donau Chemie AG. The complaint narrowly defines the relevant market for pure phosphoric acid (PPA) as within the boundaries of the United States, and, consequently, the consent order does not require Rhodia to divest a PPA plant located in Mexico. For the following reasons, I disagree.

The North American PPA market has operated in an oligopolistic manner for the past twenty years or more. The major North American competitors have successfully engineered the highest PPA prices in the world through a variety of actions, including signaling prices, retaliating selectively to enforce high prices, controlling imports through agreements with a foreign

supplier, and eliminating domestic competitors through acquisition. Rhodia, a significant member of the North American oligopoly, now proposes to acquire Albright & Wilson. I believe such an acquisition would allow Rhodia to:

(1) Reinforce its world-wide dominant position among phosphates producers;

(2) Protect PPA prices and market share in North America; and

(3) Position itself to have the capacity to enforce market discipline in the North American market.

Evidence of Rhodia's view of the acquisition's impact on the North American market alone leads me to believe that the geographic scope of the PPA product market extends to all of North America, thus including Albright & Wilson's Mexican plant in the market. Other evidence, however, also demonstrates that North America is the relevant market. Accordingly, the Commission should have fully considered ordering the sale of Albright & Wilson's interests in both of its North American PPA plants to Potash Corporation and/or another purchaser not saddled with the incentives and history Rhodia carries.

Shipment Decisions and the Scope of the Geographic Market

The complaint apparently limits the scope of the geographic market because Albright & Wilson, the owner of a Mexican PPA plant and part owner of a North Carolina plant, does not currently ship Mexican PPA into the United States even though the evidence convinces me that the Mexican capacity could be used to supply customers in the United States. Although this private business decision from a multi-plant supplier creates a shipment

pattern that superficially supports finding a United States PPA market, one principle of geographic market analysis is that competition among geographically differentiated producers may be linked indirectly by the customers they can economically serve.

Despite the decision not to ship PPA into the United States from the Mexican plant, North American capacity is competitively linked ─ and North American PPA suppliers compete ─ because the Mexican plant's PPA is sold to customers in Mexico and Canada that U.S. domestic plants would otherwise supply. Moreover, Albright & Wilson's joint venture plant, as well as other competitors' U.S. plants, undoubtedly serve customers that Albright & Wilson's Mexican plant would otherwise serve, but for Albright & Wilson's decision concerning which of its plants would serve which North American customers.

Divestiture Policy and the Adequacy of the Ordered Relief

As a routine starting point, the Commission's ongoing policy concerns about merger relief generally leads us to consider requiring the complete divestiture of either one of the merging parties' overlapping businesses in the relevant market. This divestiture policy limits the potential adverse market consequences by maintaining the pre-acquisition market structure and by maximizing the potential that the purchaser would be viable and competitive.

I am concerned that we have not adhered to this policy here, where there is significant evidence that the market is acting noncompetitively, as well as compelling evidence supporting a challenge of the proposed acquisition. Rhodia is the dominant phosphates producer in the world, and it will become ─ even taking into account the majority's relief ─ the leader in the North American PPA market. Thus, Rhodia, through this acquisition, would gain additional North American capacity that could be used to enforce higher prices.

Although the relief set forth in the consent order — which requires Rhodia to sell the current Albright & Wilson joint venture interest in the North Carolina plant — does limit the potential adverse market impact, I still am concerned that the relief does not go far enough. In looking forward, if we allow Rhodia to acquire the Mexican plant and become the competitor controlling the greatest amount of capacity in North America, it could leverage the Mexican plant's capacity to discipline competitors' pricing. Thus, a settlement that allows Rhodia to become the North American market leader by acquiring Albright & Wilson's interest in either of its two North American plants should be fully and cautiously scrutinized by the Commission to determine whether further relief is warranted. By alleging a United States geographic market here, the majority has unfortunately isolated itself from a full consideration of the appropriate divestiture and, when evaluating future possible PPA plant acquisitions, the Commission would face the additional burden of justifying a market redefinition.

One could argue that Rhodia's ownership of the Mexican plant, while providing it the capacity to attain the leading position in North America, ironically may well slightly improve the market concentration data. But the limited evidence before me suggests that the majority neither fully explored nor evaluated the consequences of this concentration data or the options available to the Commission. These options include ordering the sale of all of the Albright & Wilson assets to Potash, a North American-only competitor, or ordering the sale of the joint venture interest in the North Carolina plant to Potash and the Mexican plant to another independent purchaser. These options — when evaluated with the limited information presented to the Commission — appear no worse than allowing Rhodia to own the Mexican plant, and, in fact, either of these options might prove superior to the majority's relief.

Thus, by basing a complaint on a narrow United States market and avoiding direct confrontation of the issue whether Rhodia should be allowed to purchase the Mexican plant, the majority permits Rhodia to acquire additional North American capacity and perhaps ensures that the PPA market will act noncompetitively in the future. In my view, the majority's unwillingness to make a minor correction now could squander a valuable opportunity to protect North American PPA consumers.

Analysis to Aid Public Comment

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Rhodia, Donau Chemie AG ("Donau"), and Albright & Wilson PLC ("A&W") (collectively "respondents"). The Consent Agreement is intended to resolve anticompetitive effects stemming from Rhodia's proposed acquisition of A&W. The Consent Agreement includes a proposed Decision and Order (the "Order"), that would require Rhodia to divest A&W's pure phosphoric acid business to Potash Corp. of Saskatchewan ("PCS"). For the last several years, A&W and PCS have been partners in a phosphates manufacturing joint venture (the "Joint Venture"), which includes, among other assets, a pure phosphoric acid production facility in Aurora, North Carolina, and a phosphates manufacturing plant in Cincinnati, Ohio. The Consent Agreement also includes an Order to Maintain Assets that requires respondents to preserve the assets they are required to divest as a viable, competitive, and ongoing operation until the divestiture is achieved.

The Order, if finally issued by the Commission, would settle charges that Rhodia's proposed acquisition of A&W may have substantially lessened competition in the United States market for pure phosphoric acid. The Commission has reason to believe that

Rhodia's proposed acquisition of A&W would have violated Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. The proposed complaint, described below, relates the basis for this belief.

The proposed Order has been placed on the public record for thirty (30) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will review the agreement and comments received and decide whether to withdraw its acceptance of the Consent Agreement or make final the proposed Order.

According to the Commission's proposed complaint, the relevant line of commerce in which to analyze the effects of Rhodia's proposed acquisition of A&W is pure phosphoric acid, and the relevant geographic market is the United States. Pure phosphoric acid is used as an input into a wide variety of consumer and industrial products, ranging from cola beverages to cleaning compounds and metal treatments. The proposed complaint alleges that the pure phosphoric acid market in the United States already is highly concentrated, and that the proposed acquisition of A&W by Rhodia would increase concentration in that market, as measured by the Herfindahl-Hirschman Index, by over 600 points, to a level close to 3000. The Commission's complaint further notes that Rhodia and A&W currently employ the low-cost solvent extraction process to produce pure phosphoric acid.

The proposed complaint also alleges that entry into the relevant market would not be timely, likely, or sufficient to deter or offset adverse effects of the acquisition on competition. Entry is difficult in this market because of the length of time it would take to build new construction facilities and enter the market; and because of the large minimum efficient scale of new production

facilities, which would require a new entrant to sell large volumes of pure phosphoric acid into the North American market, driving down market prices to a level that would render new entry unprofitable. Significant expansion by smaller producers also is unlikely.

The proposed complaint alleges that Rhodia's proposed acquisition of A&W would lessen competition by making coordinated interaction among the remaining producers more likely. The complaint describes how Rhodia's documents project that the combination of Rhodia and Albright & Wilson would lead to higher prices for pure phosphoric acid.

The proposed Order is designed to remedy the anticompetitive effects of the acquisition in the United States market for pure phosphoric acid, as alleged in the complaint, by requiring the divestiture to PCS of A&W's United States pure phosphoric acid business, including A&W's interest in the Joint Venture, as well as joint venture manufacturing assets, including the Aurora pure phosphoric acid plant and the Cincinnati plant. The Order would also require respondents to provide PCS with technology A&W has developed for manufacturing pure phosphoric acid and for using it in certain applications. PCS would be able to use that technology to build pure phosphoric acid plants both within and outside of the United States, and to license the technology to other firms that sought to build pure phosphoric acid plants. The proposed Order would also require respondents to divest other assets related to A&W's pure phosphoric acid business, including customer lists, contracts, and other intangible assets. The proposed divestiture does not require divestiture of A&W's pure phosphoric acid plant in Mexico, which does not export pure phosphoric acid to customers in the United States. A&W's Mexican plant produces pure phosphoric acid used primarily in home laundry detergents in Mexico, an application that no longer exists in the United States.

PCS, based in Saskatoon, Saskatchewan, is the world's third-largest producer of phosphoric acid for fertilizer. It also produces other fertilizer materials such as nitrogen and potash. PCS entered the phosphates business in 1995, through its acquisition of Texasgulf. A publicly-traded Canadian company, PCS in 1998 had an operating income of $446 million and a net income of $261 million on sales of $2.3 billion. PCS mines phosphate rock at Aurora, North Carolina, and also produces "green" phosphoric acid at that site. Slightly over 10% of PCS' green acid production at Aurora is used as a feedstock for the manufacture of pure phosphoric acid.

If the Commission, at the time that it accepts the Order for public comment, notifies respondents that it does not approve of the proposed divestiture to PCS, or the manner of the divestiture, the proposed Order provides that respondents would have 120 days to divest the A&W pure phosphoric acid business to a different acquirer. If respondents did not complete the divestiture in that period, a trustee would be appointed.

The proposed Order to Maintain Assets that is also included in the Consent Agreement requires that respondents preserve the A&W assets they are required to divest as a viable and competitive operation until those assets are transferred to the Commission-approved acquirer. It requires the respondents to maintain the viability and competitiveness of the assets, and to conduct the A&W pure phosphoric acid business in the ordinary course of business. Furthermore, the Order to Maintain Assets includes an obligation on respondents to build and maintain a sufficient inventory of pure phosphoric acid to ensure there is no shortage of supply during the period that the business is being transferred to the Commission-approved acquirer. The Order to Maintain Assets also requires respondents to provide necessary support services and maintain an adequate workforce for the A&W pure phosphoric acid business.

The Consent Agreement requires respondents to provide the Commission, within thirty (30) days of the date the Agreement is signed, with an initial report setting forth in detail the manner in which respondents will comply with the provisions relating to the divestiture of assets. The proposed Order further requires respondents to provide the Commission with a report of compliance with the Order within thirty (30) days following the date the Order becomes final and every thirty (30) days thereafter until they have complied with the terms of the Order.

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement and the proposed Order. This analysis is not intended to constitute an official interpretation of the Consent Agreement or the proposed Order or in any way to modify the terms of the Consent Agreement or the proposed Order.