IN THE MATTER OF

T&N PLC

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

Docket C-3312. Complaint, Nov. 8, 1990—Decision, Nov. 8, 1990

This consent order requires, among other things, a Manchester, England, manufacturer to divest within twelve months certain thinwall engine bearing assets and certain tri-metal heavywall engine bearing assets to a Commission-approved acquirer or acquirers; and if required by the acquirers, requires the respondent to supply certain input material to the acquirers for five years. If neither the respondent nor the trustee successfully divests either set of assets, the order requires the divestiture of J.P. Industries' McConnelsville, Ohio, facility, in addition to certain thinwall engine bearing assets.

Appearances

For the Commission: *Allee A. Ramadhan* and *Ernest A. Nagata.*

For the respondent: *Richard E. Carlton, Sullivan & Cromwell,* New York, N.Y.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent T&N plc ("T&N"), a corporation subject to the jurisdiction of the Commission, proposes to acquire substantially all of the common stock of J.P. Industries, Inc. ("JPI") in violation of the provisions of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b) of the FTC Act, 15 U.S.C. 45(b), stating its charges as follows:

I. DEFINITIONS

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

(A) "*T&N*" means T&N plc, its predecessors, subsidiaries, divisions, groups and affiliates controlled by T&N, and their respective directors, officers, employees, agents, and representatives, and their respective successors and assigns.

(B) "*JPI*" means JP Industries, Inc., its predecessors, subsidiaries, divisions, groups and affiliates controlled by JPI, and their respective directors, officers, employees, agents, and representatives, and their respective successors and assigns.

(C) "*Plain engine bearings*" or "*bearings*" mean engine bearings characterized by having interfacing surfaces with relative motion of a sliding nature that provide support to a shaft rotating over a thin film of oil. Plain engine bearings include half bearings, bushings and thrust washers.

(D) "*Thinwall engine bearings*" means bearings with a wall thickness of one-quarter of an inch or less. Such bearings are utilized in automotive and light truck as well as heavy duty diesel engine applications.

(E) "*Tri-metal heavywall engine bearings*" means copper lead bearings with an overlay plating of lead tin or lead tin copper that have a wall thickness of greater than one-quarter of an inch.

II. The Respondent

2. Respondent T&N plc is a corporation organized under the laws of the United Kingdom, with its principal offices located at Bowdon House, Ashburton Road West, Trafford Park, Manchester M17 1RA, England.

3. T&N at all times relevant herein has been and is now engaged in commerce as the term "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affects commerce as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. 44.

III. The Acquisition

4. On March 27, 1990, T&N and JPI entered into an agreement and plan of merger in which T&N agreed to purchase substantially all of JPI's common stock through T&N Automotive Components Inc., an indirect, wholly-owned subsidiary of T&N. The total value of the proposed acquisition is approximately $190 million.

IV. Relevant Markets

5. For purposes of this complaint, the relevant lines of commerce

within which to assess the effects of T&N's proposed acquisition of JPI are the manufacture and sale of thinwall engine bearings and the design, manufacture and sale of tri-metal heavywall engine bearings.

6. For purposes of this complaint, the relevant geographic market within which to assess the effects of T&N's proposed acquisition of JPI is the United States.

V. Market Structure

7. The manufacture and sale of thinwall engine bearings in the United States is highly concentrated, whether measured by the Herfindahl-Hirschmann Index or by two-firm and four-firm concentration ratios.

8. The design, manufacture, and sale of tri-metal heavywall engine bearings in the United States is highly concentrated, whether measured by the Herfindahl-Hirschmann Index or by two-firm and four-firm concentration ratios.

VI. Entry Conditions

9. Entry into the manufacture and sale of thinwall engine bearings in the United States is very difficult and time-consuming.

10. Entry into the design, manufacture, and sale of tri-metal heavywall engine bearings in the United States is very difficult and time-consuming.

VII. Competition

11. T&N and JPI are actual competitors in the relevant markets.

VIII. Effects

12. The effect of the acquisition may be substantially to lessen competition in the relevant markets described in paragraphs 5 and 6 in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the FTC Act, 15 U.S.C. 45, by, among other things:

(A) Eliminating substantial actual competition between T&N and JPI;

(B) Significantly enhancing the likelihood of successful anticompetitive interdependent conduct, nonrivalrous behavior, and actual or tacit collusion among firms in the relevant markets;

(C) Eliminating substantial potential competition between T&N and JPI; and

(D) Eliminating JPI as a substantial independent competitive force.

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

IX. Violation Charges

14. The agreement and plan of merger violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and the acquisition, if consummated, would violate Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

Commissioner Azcuenaga dissenting.

Decision and Order

The Federal Trade Commission having initiated an investigation of respondent's proposed acquisition of J.P. Industries, Inc., and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Clayton Act and the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law had 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 respondent has violated the said Acts, and that the complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, and makes the following jurisdictional findings and enters the following order:

1. Respondent T&N is a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom with

its principal executive offices at Bowdon House, Ashburton Road West, Trafford Park, Manchester M17 1RA, England.

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 purposes of this order the following definitions shall apply:

1. "*T&N*" means T&N plc, a corporation organized, existing, and doing business under and by virtue of the laws of the United Kingdom with its principal offices at Bowdon House, Ashburton Road West, Trafford Park, Manchester M17 1RA, England, its predecessors, subsidiaries, divisions, groups and affiliates controlled by T&N (including, after the acquisition, JPI), and their respective directors, officers, employees, agents, and representatives, and their respective successors and assigns.

2. "*JPI*" means J.P. Industries, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Michigan with its principal offices at 325 East Eisenhower Parkway, Ann Arbor, Michigan, its predecessors, subsidiaries, divisions, groups and affiliates controlled by JPI, and their respective directors, officers, employees, agents, and representatives, and their respective successors and assigns.

3. "*Plain engine bearings*" means engine bearings characterized by having interfacing surfaces with relative motion of a sliding nature that provide support to a shaft rotating over a thin film of oil. Plain engine bearings include half bearings, bushings and thrust washers.

4. "*Vandervell*" means Vandervell Limited, a corporation organized, existing, and doing business under and by virtue of the laws of the United Kingdom, which is a wholly-owned subsidiary of T&N engaged in the manufacture of plain engine bearings at a factory located in Maidenhead, England.

5. "*Vandervell America*" or "*VanAm*" means the business of selling plain engine bearings for U.S. gasoline and diesel applications into the U.S. aftermarket now carried on by Vandervell America, Inc. of Tucker, Georgia, a wholly-owned subsidiary of T&N.

6. "*AE Auto Parts*" means AE Auto Parts Limited, a corporation organized, existing, and doing business under and by virtue of the laws of the United Kingdom, which is a wholly-owned subsidiary of T&N engaged in the sale of a range of automotive and diesel truck components into the aftermarket from a facility located in Bradford, England.

7. "*Glacier*" means The Glacier Metal Co. Ltd., a corporation organized, existing, and doing business under and by virtue of the laws of the United Kingdom, which is a wholly-owned subsidiary of T&N engaged in the manufacture and sale of plain engine bearings.

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

9. "*Aftermarket*" means the sale of parts to replace used, worn or damaged parts in gasoline and diesel engines, excluding sales of bearings to original equipment manufacturers.

10. "*Thinwall engine bearing assets*" means the assets and information that T&N will divest relating to the manufacture and sale of thinwall engine bearings. Those assets consist of the following:

(a) All assets relating to the sale, marketing and distribution of bearings for U.S. gasoline engine applications manufactured by Vandervell directed to the U.S. aftermarket that are based at VanAm's facility in Tucker, Georgia, including, but not limited to, all customer lists, inventory (to be repackaged in plain boxes), and assignment of the building lease and all agreements with sales agencies and fee warehouses, excluding any trademarks or trade names;

(b) All tooling that is or has been located at Vandervell's factory in Maidenhead, England that is or has been used for the manufacture of bearings for U.S. gasoline applications (including, but not limited to, the 486 primary part numbers in current use and 76 primary part numbers that have been withdrawn from the U.S., all of which are listed in Appendix A) and/or, at the acquirer's option, all specifications relating to such tooling;

(c) Specifications for tooling used for the manufacture of bearings for U.S. diesel applications at Glacier's facility in Kilmarnock, Scotland that are sold and/or offered for sale in the U.S. aftermarket through VanAm, either directly or as agent for AE Auto Parts (the part numbers of which are listed in Appendix B);

(d) An agreement by T&N to manufacture and supply bearings in the quantities ordered for the applications described in subparagraphs I.10.(b) (excluding the 76 primary part numbers that have been

withdrawn from the U.S.) and I.10.(c) for a period of up to two (2) years (but in no event after Vandervell has transferred to the acquirer that tooling necessary to manufacture a given part number) at current transfer prices between AE Auto Parts Limited and VanAm plus freight and duty plus an annual increase equal to any increase in the United Kingdom Index of Producer Prices for the previous year;

(e) At the option of the acquirer, an agreement by T&N to supply, for a period of at least five (5) years, cast copper lead, sintered copper lead or aluminum strip (whichever the acquirer may choose to buy) used or to be used within the 5-year period by T&N to manufacture the bearings described in subparagraphs I.10.(b) and I.10.(c) for sale into the U.S. aftermarket, such strip to be used by the acquirer to manufacture bearings using the former Vandervell tooling or tooling made by or for the acquirer to the specifications described in subparagraphs I.10.(b) and I.10.(c), and such strip to be supplied by T&N at (i) the average price (excluding freight and duty) prevailing in other arm's-length sales of strip to third parties in the previous year plus an increase equal to any increase in the United States or United Kingdom Index of Producer Prices, whichever is applicable, since the end of that year, or (ii) a negotiated price not to exceed T&N's fully allocated cost of manufacturing strip plus 10%, whichever of the two is lower, plus freight and duty.

(f) Specifications for appropriate machining and overlay electroplating equipment to the extent such equipment is not already in the possession of the acquirer; and

(g) Manufacturing know-how (to the extent the acquirer does not already possess it) with respect to tooling, machining, electroplating and quality control necessary to make commercially saleable engine bearings for the part numbers identified in subparagraphs I.10.(b) and I.10.(c).

11. "*Tri-metal heavywall engine bearings*" means copper lead bearings with an overlay plating of lead tin or lead tin copper that have a wall thickness of greater than one-quarter of an inch.

12. "*Tri-metal heavywall engine bearing assets*" means the assets and information that T&N will divest relating to the manufacture and sale of tri-metal heavywall engine bearings. Those assets consist of the following:

(a) At the option of the acquirer, an agreement to supply for a period of at least five (5) years sintered copper lead slab for the manufacture by the acquirer of the tri-metal heavywall bearings

referred to in subparagraph I.12.(d), such slab to be supplied at (i) the average price (excluding freight and duty) prevailing in other arm's-length sales of slab to third parties in the previous year plus an increase equal to any increase in the United Kingdom Index of Producer Prices since the end of that year, or (ii) a negotiated price not to exceed T&N's fully allocated cost of manufacturing slab plus 10%, whichever of the two is lower, plus freight and duty;

(b) At the option of the acquirer, either or both (i) centrifugal casting equipment substantially equal in design, manufacturing capability and production capacity to the centrifugal casting equipment currently used to cast tri-metal heavywall bearings at T&N's Ilminster facility (if T&N opts to purchase centrifugal casting equipment for the acquirer, then such equipment shall be sold at T&N's cost of acquiring the equipment); and/or (ii) an agreement to supply rough castings for the tri-metal heavywall bearings referred to in subparagraph I.12.(d), to be machined into finished bearings by the acquirer; if the acquirer opts to buy rough castings rather than or in addition to centrifugal casting equipment, those rough castings shall be sold to the acquirer at a negotiated price not to exceed T&N's fully allocated cost of manufacturing rough castings plus 10% plus freight and duty for a period of at least five (5) years;

(c) Specifications for appropriate machining and overlay electroplating equipment to the extent such equipment is not already in the possession of the acquirer; and

(d) Manufacturing know-how and T&N's proprietary design information, if any (to the extent not already in the possession of the acquirer), customer details and tooling (and/or, at the acquirer's option, specifications for such tooling) for (i) any tri-metal heavywall engine bearings that are, or within the past five (5) years have been, supplied to the same United States customer by both T&N and JPI (to the extent that can be ascertained from T&N's and JPI's existing business records); or (ii) any tri-metal heavywall engine bearings as to which either T&N or JPI is in the process of acquiring tooling needed to meet an outstanding U.S. purchase order if those tri-metal heavywall engine bearings are, or within the past five (5) years have been, supplied to the same United States customer by the other company (to the extent that can be ascertained from T&N's and JPI's existing business records). Where a customer has authority to prevent T&N from providing customer details and tooling to an acquirer pursuant to this order, T&N shall use its best efforts to secure

authority from the customer to provide such customer details and tooling to the acquirer.

13. "*Fully allocated cost*" means the manufacturing cost of the product in question in the most recent twelve-month period plus allocated selling and marketing, research and development and administrative costs (allocated on the same basis as those costs are currently allocated to T&N's engine bearing business).

14. "*Transfer price*" means the price that is negotiated between a T&N manufacturing entity and a T&N sales entity based on the former's financial objectives, anticipated order load for the coming year and projected productivity improvements and on the latter's minimum required profit margin and ability to source the product more cheaply from sources outside the T&N group. The transfer price between Vandervell and AE Auto Parts for each of the applications described in subparagraph I.10.(b) is set out in Appendix A and the transfer price between Glacier and AE Auto Parts for each of the applications described in subparagraph I.10.(c) is set out in Appendix B.

15. "*McConnelsville facility*" means all of JPI's assets used in material production and manufacture and sale of engine bearings that are located in McConnelsville, Ohio.

II.

It is further ordered, That T&N shall comply with all the terms of the Asset Maintenance and Improvement Agreement executed on August 17, 1990 as Appendix C and made a part of this order. Said Agreement shall continue in effect until such time as T&N or the trustee has accomplished all divestitures required by paragraphs III, IV, VII and VIII of this order or until such time as the said Agreement provides.

III.

It is further ordered, That:

A. T&N shall divest the thinwall engine bearing assets within twelve (12) months from the date this order becomes final; *provided, however,* that if the Commission has not approved or disapproved of a proposed divestiture within one hundred and twenty (120) days of the date the application for such divestiture has been put on the public

record, the running of the divestiture period shall be tolled until the Commission approves or disapproves of the divestiture. The divestiture shall be only to an acquirer (or acquirers) that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture is to remedy the lessening of competition resulting from the acquisition of JPI by T&N as alleged in the Commission's complaint in this matter.

B. T&N shall, as soon as practicable, but no later than sixty (60) days after Commission approval of an acquirer, deliver to the acquirer all of the production technology, know-how, specifications and other information or documentation required to be divested pursuant to paragraph III of this order.

C. On reasonable notice to T&N from an approved acquirer, T&N shall provide technical assistance and know-how to the acquirer with respect to the manufacture and sale of engine bearings to be made using the divested assets. Such technical assistance shall include, but not be limited to, consultation with knowledgeable T&N employees and training at the acquirer's manufacturing facility. T&N may charge to said approved acquirer the reasonable costs T&N shall incur providing such technical assistance, including reimbursement, commensurate with the salary and benefits of the T&N personnel involved, for the time plus expenses of such T&N personnel. T&N shall continue providing such technical assistance for a period of time sufficient to satisfy the management of the acquirer of the thinwall engine bearing assets that it is capable of producing commercially saleable engine bearings utilizing the former Vandervell assets; *provided, however,* that T&N shall not be required to continue providing such technical assistance for more than two (2) years after an agreement of sale divesting the thinwall engine bearing assets is approved by the Commission.

IV.

It is further ordered, That:

A. T&N shall divest the tri-metal heavywall engine bearing assets within twelve (12) months from the date this order becomes final; *provided, however,* that if the Commission has not approved or disapproved of a proposed divestiture within one hundred and twenty (120) days of the date the application for such divestiture has been put on the public record, the running of the divestiture period shall be

tolled until the Commission approves or disapproves of the divestiture. The divestiture shall be only to an acquirer (or acquirers) that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture is to remedy the lessening of competition resulting from the acquisition of JPI by T&N as alleged in the Commission's complaint in this matter.

B. T&N shall, as soon as practicable, but no later than sixty (60) days after Commission approval of an acquirer, deliver to the acquirer the production technology, know-how, specifications and other information or documentation required to be divested pursuant to paragraph IV of this order.

C. On reasonable notice to T&N from an approved acquirer, T&N shall provide technical assistance and know-how to the acquirer with respect to the manufacture and sale of engine bearings to be made with the divested assets. Such technical assistance shall include, but not be limited to, consultation with knowledgeable T&N employees and training at the acquirer's manufacturing facility. T&N may charge to said approved acquirer the reasonable costs T&N shall incur providing such technical assistance, including reimbursement, commensurate with the salary and benefits of the T&N personnel involved, for the time plus expenses of such T&N personnel. T&N shall continue providing such technical assistance for a period of time sufficient to satisfy the management of the acquirer of the tri-metal heavywall bearing business that it is capable of producing commercially saleable engine bearings utilizing the assets to be divested; *provided, however,* that T&N shall not be required to continue providing such technical assistance and training for more than four (4) years after an agreement of sale divesting the tri-metal heavywall bearing business is approved by the Commission.

V.

It is further ordered, That if T&N has not divested the thinwall engine bearing assets as provided in paragraph III within twelve (12) months after the date this order becomes final (or within the divestiture period as it may be extended pursuant to subparagraph III.A), T&N shall consent to the appointment by the Commission of a trustee who shall have the power and authority to divest the thinwall engine bearing assets. However, if a trustee has already been

appointed to divest the tri-metal heavywall engine bearing assets pursuant to paragraph VI, such trustee shall have the power and authority to divest the thinwall engine bearing assets.

VI.

It is further ordered, That if T&N has not divested the tri-metal heavywall engine bearing assets as provided in paragraph IV within twelve (12) months after the date this order becomes final (or within the divestiture period as it may be extended pursuant to subparagraph IV.A), T&N shall consent to the appointment by the Commission of a trustee who shall have the power and authority to divest the tri-metal heavywall engine bearing assets. However, if a trustee has already been appointed to divest the thinwall engine bearing assets pursuant to paragraph V, such trustee shall have the power and authority to divest the tri-metal heavywall engine bearing assets.

VII.

It is further ordered, That:

A. 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, T&N 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 pursuant to paragraph V, VI, VII or VIII of this order shall preclude the Commission or the Attorney General from seeking civil penalties and other relief available to it, including a court-appointed trustee, pursuant to Section 5(*l*) of the FTC Act, or any other statute enforced by the Commission, for any failure by T&N to comply with this order.

B. If a trustee is appointed by a court or the Commission pursuant to paragraph V, VI or VII of this order, T&N shall consent to the following terms and conditions regarding the trustee's powers, authorities, duties and responsibilities:

(1) The Commission shall select the trustee, subject to the consent of T&N, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures.

(2) Within thirty (30) days after appointment of the trustee and

subject to the approval of the Commission and, in the case of a court-appointed trustee, of the court, T&N shall execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestitures.

(3) Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the assets covered by paragraphs III and IV of this order. The trustee shall have twelve (12) months from the date of appointment to accomplish the divestitures. If, however, at the end of the twelve-month period the trustee has submitted a plan of divestiture or believes that divestiture can be accomplished within a reasonable time, the divestiture period may be extended by the Commission or, for a court-appointed trustee, by the court; *provided, however*, that the Commission or the court may only extend the divestiture period for an additional period not to exceed one (1) year.

(4) The trustee shall have full and complete access to the personnel, books, records and facilities of T&N. T&N shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. T&N shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by T&N 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.

(5) Subject to T&N's absolute and unconditional obligation to divest at no minimum price and the purpose of the divestitures as stated in paragraphs III and IV, the trustee shall use his or her best efforts to negotiate the most favorable price and terms available with each acquiring entity for the divestiture of the thinwall engine bearing assets and the tri-metal heavywall engine bearing assets. Divestiture of the thinwall engine bearing assets and the tri-metal heavywall engine bearing assets shall be made in the manner set out in paragraphs III and IV; *provided, however*, that if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by T&N from among those approved by the Commission.

(6) The trustee shall serve, without bond or other security, at the cost and expense of T&N on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have authority to employ, at the cost and expense of T&N, such

consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the sale and all expenses incurred. After approval by the Commission or the court of the account of the trustee, including fees for his or her services, all remaining monies shall be paid to T&N 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 covered by this order.

(7) T&N shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, or liabilities to which the trustee may become subject, arising in any manner out of, or in connection with, the trustee's duties under this order, unless the Commission or a court of competent jurisdiction determines that such losses, claims, damages, or liabilities arose out of the misfeasance, gross negligence, or willful or wanton acts or bad faith of the trustee.

(8) If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraphs V and VI.

(9) The Commission and, 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 divestitures required by this order.

(10) The trustee shall report in writing to T&N and the Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

VIII.

It is further ordered, That:

A. If divestiture of the thinwall engine bearing assets has not been accomplished by T&N within the twelve (12) months provided in paragraph III (including any extension of that divestiture period pursuant to subparagraph III.A) or the divestiture of the tri-metal heavywall engine bearing assets has not been accomplished by T&N within the twelve (12) months provided in paragraph IV (including any extension of that divestiture period pursuant to subparagraph IV.A), and the divestiture of either the thinwall engine bearing assets or the heavywall engine bearing assets has not been accomplished by

the trustee within the additional twelve (12) months provided in paragraph VII (including any extension of that divestiture period by the Commission or the court pursuant to subparagraphs VII.B.3 and VII.B.4), then the McConnelsville facility and the thinwall engine bearing assets shall be divested.

B. T&N shall have nine (9) months after expiration of the divestiture period provided in paragraph VII in which to accomplish divestiture of the McConnelsville facility and the thinwall engine bearing assets; *provided, however*, that if the Commission has not approved or disapproved of a proposed divestiture within sixty (60) days of the date the application for such divestiture has been put on the public record, the running of the divestiture period shall be tolled until the Commission approves or disapproves of the divestiture. The divestiture shall be only to an acquirer (or acquirers) that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

C. If T&N has not divested the McConnelsville facility and the thinwall engine bearing assets within nine (9) months after expiration of the divestiture period provided in paragraph VII (including any extension of that divestiture period pursuant to subparagraph VIII.B), T&N shall consent to the appointment by the Commission of a secondary trustee who shall have the power and authority to divest the McConnelsville facility and the thinwall engine bearing assets.

D. If a secondary trustee is appointed by the Commission pursuant to subparagraph VIII.C of this order, T&N shall consent to the following terms and conditions regarding the secondary trustee's powers, authorities, duties and responsibilities:

(1) The Commission shall select the secondary trustee, who shall be the original trustee appointed pursuant to paragraph VII of this order, unless the original trustee failed to act diligently in the sale of the thinwall engine bearing assets or the tri-metal heavywall engine bearing assets. If a new trustee is selected, such trustee shall be subject to the consent of T&N, which consent shall not be unreasonably withheld, and the new trustee shall be a person with experience and expertise in acquisitions and divestitures.

(2) Within thirty (30) days after appointment of the secondary trustee and subject to the approval of the Commission, T&N shall execute a trust agreement that transfers to the secondary trustee all rights and powers necessary to permit the secondary trustee to effect

the divestiture of the McConnelsville facility and the thinwall engine bearing assets.

(3) Subject to the prior approval of the Commission, the secondary trustee shall have the exclusive power and authority to divest the McConnelsville facility and the thinwall engine bearing assets. The secondary trustee shall have fifteen (15) months from the date of appointment to accomplish the divestiture. If, however, at the end of the fifteen-month period the secondary trustee has submitted a plan of divestiture or believes that divestiture can be accomplished within a reasonable time, the divestiture period may be extended by the Commission; *provided, however,* that the Commission may only extend the divestiture period for an additional period not to exceed one (1) year.

(4) The secondary trustee shall have full and complete access to the personnel, books, records and facilities of T&N. T&N shall develop such financial or other information as such secondary trustee may reasonably request and shall cooperate with the secondary trustee. T&N shall take no action to interfere with or impede the secondary trustee's accomplishment of the divestiture. Any delays in divestiture caused by T&N shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission.

(5) Subject to T&N's absolute and unconditional obligation to divest the McConnelsville facility and the thinwall engine bearing assets at no minimum price, the secondary trustee shall use his or her best efforts to negotiate the most favorable price and terms available with the acquiring entity for the divestiture of the McConnelsville facility and the thinwall engine bearing assets. If the secondary 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 secondary trustee shall divest to the acquiring entity or entities selected by T&N from among those approved by the Commission.

(6) The secondary trustee shall serve, without bond or other security, at the cost and expense of T&N on such reasonable and customary terms and conditions as the Commission may set. The secondary trustee shall have authority to employ, at the cost and expense of T&N, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are reasonably necessary to carry out the secondary

trustee's duties and responsibilities. The secondary trustee shall account for all monies derived from the sale and all expenses incurred. After approval by the Commission of the account of the secondary trustee, including fees for his or her services, all remaining monies shall be paid to T&N and the secondary trustee's power shall be terminated. The secondary trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the secondary trustee's divesting the McConnelsville facility and the thinwall engine bearing assets.

(7) T&N shall indemnify the secondary trustee and hold the secondary trustee harmless against any losses, claims, damages, or liabilities to which the secondary trustee may become subject, arising in any manner out of, or in connection with, the secondary trustee's duties under this order, unless the Commission or a court of competent jurisdiction determines that such losses, claims, damages, or liabilities arose out of the misfeasance, gross negligence, or willful or wanton acts or bad faith of the secondary trustee.

(8) If the secondary trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in subparagraphs VIII.C and VIII.D.

(9) The Commission may, on its own initiative or at the request of the secondary trustee, issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture of the McConnelsville facility and the thinwall engine bearing assets.

(10) The secondary trustee shall report in writing to T&N and the Commission every sixty (60) days concerning the secondary trustee's efforts to accomplish divestiture of the McConnelsville facility and the thinwall engine bearing assets.

IX.

It is further ordered, That, pending divestiture of the thinwall engine bearing assets, the tri-metal heavywall engine bearing assets and the McConnelsville facility, T&N shall take such action as is necessary to maintain the viability and marketability of the assets covered in paragraphs III, IV and VIII of this order and shall not cause or permit the destruction, removal, or impairment of any such asset it may be required to divest except in the ordinary course of business and except for ordinary wear and tear.

X.

It is further ordered, That T&N shall, within sixty (60) days from the date this order becomes final and every sixty days thereafter until the divestitures required by this order are accomplished, submit in writing to the Commission a verified written report setting forth in detail the manner and form in which T&N intends to comply, is complying, and has complied with the terms of this order and such additional information relating thereto as may from time to time reasonably be required by the Commission. All such compliance reports shall include, among other things that may be required from time to time, a full description of all contacts or negotiations with anyone relating to the divestiture of the thinwall engine bearing assets, the tri-metal heavywall engine bearing assets and, if required by this order, the McConnelsville facility, including the names and addresses of all parties contacted, copies of all written communications to and from such parties, and all internal memoranda, reports and recommendations concerning the divestitures pursuant to the provisions of this order.

XI.

It is further ordered, That, for a period of ten (10) years from the date on which this order becomes final, T&N shall not, directly or indirectly, acquire any stock, share capital, assets or equity interest in any concern, corporate or noncorporate, engaged in the design, manufacture or sale in or to the United States of any engine bearings without the prior approval of the Commission, if such concern:

A. Is incorporated in one of the United States or organized under the laws of the United States or has its principal offices within the United States; or

B. At the time of the acquisition designs or manufactures plain engine bearings in the United States; or

C. Had net sales of thinwall plain engine bearings in or to the United States of one and one-half (1.5) million dollars or more in any of the three (3) calendar years preceding the date of the acquisition, or had net sales of tri-metal heavywall engine bearings in or to the United States of three hundred thousand (300,000) dollars or more in any of the three (3) calendar years preceding the date of the acquisition.

Provided, however, that nothing in this paragraph shall prohibit T&N from acquiring used machinery or equipment associated with or related to the manufacture of plain engine bearings from an entity that continues, to substantially the same extent as before the acquisition, in the business of manufacturing such bearings and selling them in or to the United States; and *provided, further,* that nothing in this paragraph shall prohibit T&N from purchasing from any such entity any plain engine bearings for resale in the United States in the ordinary course of business.

On the anniversary of the date on which this order becomes final, and on every anniversary thereafter for the following nine (9) years, T&N shall file with the Commission a verified written report of its compliance with this paragraph.

XII.

It is further ordered, That for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to T&N made to its principal office, T&N shall permit access for any duly authorized representatives of the Commission:

A. During office hours and in the presence of T&N's counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of T&N relating to any matter contained in this order.

B. Upon five (5) days' notice to T&N and without restraint or interference from T&N, to interview officers or employees of T&N, who may have counsel present regarding such matters.

XIII.

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

Commissioner Azcuenaga dissenting.

APPENDIX A

486 Primary Part Numbers in Current Use US Gasoline Applications—Aftermarket

(Not Published Herein)

APPENDIX B

US Diesel Applications Manufactured by Glacier Kilmarnock for Sales into US Aftermarket

AE AUTO PARTS PT. NO.	1990 TRANSFER PRICE (EX WORKS) STERLING (EXCL. : FREIGHT & DUTY)	MIN. BATCH QUANTITY
CASE		
M5355B	26.80	500
CATERPILLAR		
M5347SB	7.37	1400
M5360SB	14.25	750
M5384SB	15.02	1500
M5385SB	19.06	500
M5404SB	31.15	300
M7267SB	21.61	1170
M7318SB	53.79	250
M7356SB	10.15	1000
M7383SB	43.45	210
B4458SB	11.49	1750
B6422SB	17.10	1160
B6548SC	30.49	180
B8106SB	9.84	310
B8111SC	40.52	140
C5063SA	15.01	560
C50685A	5.50	400
S6599L	2.69	500
W2260SA	3.15	1000
W2288SA	4.32	500
19 ITEMS		
CUMMINS		
M4237LC	5.20	4500
M5275LC	6.35	3000
M7401LC	37.70	1500
M7401LC/TW	51.09	1500

AE AUTO PARTS PT. NO.	1990 TRANSFER PRICE (EX WORKS) STERLING (EXCL. : FREIGHT & DUTY)	MIN. BATCH QUANTITY
B6461LC	6.06	2500
B6494LC	11.96	330
B6534LC	11.73	375
B6576LC	33.57	400
B8098LC	7.99	1875
B8104LC	17.35	140
C5069S	6.41	1000
S6628L	19.34	400
W2202SA	7.81	375
W4009A	13.50	560
14 ITEMS		
NAVISTAR		
M1013LC	1.90	4500
M5149SA	10.70	1250
M7372SB	45.29	400
B1080LC	1.55	6000
B1081LC	2.16	1250
B4205SA	5.29	310
B4297SA	2.66	1250
B6547LC	11.14	210
C1010S	1.34	1000
S1509L	0.65	2000
S4565L	1.54	375
S6607L	2.73	250
12 ITEMS		
MACK TRUCK		
M7367LC	42.74	500
B6527LC	17.84	125
2 ITEMS		

SUMMARY

	ITEMS
CASE	1
CATERPILLAR	19
CUMMINS	14
NAVISTAR	12
MACK	2
	48

PART NUMBERING SYSTEM.

PREFIX M = MAIR BEARINGS SET
B = CONNECTING ROD BEARING SET
C = CAMSHAFT BUSH SET
S = SMALL END BUSH SET
W = THRUST WASHER SET

APPENDIX C

ASSET MAINTENANCE AND IMPROVEMENT AGREEMENT

This Asset Maintenance and Improvement Agreement (the "Agreement") is by and between T&N plc ("T&N") and the Federal Trade Commission (the "Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively, "the Parties").

Premises

Whereas, T&N commenced a tender offer for all of the outstanding stock of J.P. Industries, Inc. ("JPI") on March 30, 1990, with the intent of effecting a merger of T&N Automotive Components Inc., an indirect, wholly-owned subsidiary of T&N, into JPI (the "Acquisition"); and

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

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

Whereas, the Commission is concerned that if an understanding is not reached, preserving the thinwall engine bearing assets and the McConnelsville facility pending divestiture of the thinwall engine bearing assets, the tri-metal heavywall engine bearing assets, and, if required by the Consent Order, the McConnelsville facility, divestiture resulting from any proceeding challenging the legality of the Acquisition might not be possible or might be a less than effective remedy; and

Whereas, the Commission is concerned that if the Acquisition is

consummated, it will be necessary to preserve the Commission's right to seek to restore viable competitors in the design, manufacture and sale of engine bearings and to preserve the Commission's ability to require the divestiture of the thinwall engine bearing assets, as defined in paragraph I.10 of the Consent Order; the tri-metal heavywall engine bearing assets, as defined in paragraph I.12 of the Consent Order; and the McConnelsville facility, as defined in I.15 of the Consent Order; and

Whereas, the purpose of this Agreement is to:

(1) Preserve the thinwall engine bearing assets, including preservation of T&N's Vandervell America ("VanAm") subsidiary as a viable independent business, and continue the state of competition between T&N and JPI in the sale of thinwall engine bearings in the United States aftermarket pending divestiture of the thinwall engine bearing assets;

(2) Maintain and make necessary improvements to the McConnelsville facility to preserve it as a viable independent business and continue the state of competition between T&N and JPI in the sale of tri-metal heavywall engine bearings in the United States pending divestiture of the tri-metal heavywall engine bearing assets or, if required by the Consent Order, the divestiture of the McConnelsville facility;

(3) Remedy any anticompetitive effects of the Acquisition; and

(4) Preserve VanAm and the McConnelsville facility as ongoing concerns engaged in the same business in which they are presently engaged in the event that divestiture of the thinwall engine bearing assets and the tri-metal heavywall engine bearing assets is not achieved as required in the Consent Order; and

Whereas, T&N's entering into this Agreement shall in no way be construed as an admission by T&N that the Acquisition is illegal or anticompetitive; and

Whereas, T&N understands that no act or transaction contemplated by this Agreement shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Agreement.

Now, therefore, upon an understanding that the Commission has not yet determined whether the Acquisition will be challenged, and in consideration of the Commission's agreement that, unless the Commission determines to reject the Consent Order, it will not seek further relief from T&N with respect to the Acquisition (except that the

Commission may exercise any and all rights to enforce this Agreement and the Consent Order to which it is annexed and made a part thereof and, in the event the divestitures required in paragraphs III and IV of the Consent Order are not accomplished, to seek divestiture of the thinwall engine bearing assets and the McConnelsville facility), the Parties agree as follows:

1. T&N agrees to execute and be bound by the attached Consent Order. T&N and the Commission further agree that each word defined in the Consent Order shall have the same definition in this Agreement.

2. T&N agrees that from the date this Agreement is accepted until the earlier of the dates listed in subparagraphs 2.(a) and 2.(b), it will comply with the provisions of paragraphs 3 through 7 of this Agreement:

(a) Three (3) business days after the Commission withdraws its acceptance of the Consent Order pursuant to the provisions of Section 2.34 of the Commission's Rules; or

(b) The day after all of the divestitures required by the Consent Order have been completed.

3. T&N shall hold VanAm separate and apart on the following terms and conditions:

(a) T&N shall take all reasonable measures to preserve the viability and marketability of VanAm and shall continue to operate VanAm's business as it is presently operated. In addition, T&N shall maintain and preserve all of the intangible rights and other assets of VanAm. Without limiting any of T&N's obligations under the Consent Order or this Agreement, T&N agrees to observe the limitations and restrictions set forth in the remaining subparagraphs of this paragraph 3.

(b) T&N shall refrain from taking any actions that may cause any material adverse change in the financial condition of VanAm.

(c) T&N shall maintain separate records as to the sales and cost of goods sold of each of the products of VanAm and on an aggregate basis for VanAm as a whole.

(d) T&N shall refrain from, directly or indirectly, selling, disposing of, or causing to be transferred any assets, property or business of VanAm, except that T&N may sell or otherwise dispose of manufactured products in the ordinary course of business, and may sell or otherwise dispose of assets, property or business of VanAm pursuant to paragraphs III, VII and VIII of the Consent Order.

(e) T&N shall refrain from mortgaging or pledging the assets of

VanAm pursuant to any loan transaction, except in connection with divestiture of the thinwall engine bearing assets pursuant to the Consent Order.

(f) T&N shall refrain from causing VanAm to guarantee any debts or obligations pursuant to any loan transaction, except in connection with divestiture of the thinwall engine bearing assets pursuant to the Consent Order.

4. T&N shall hold the McConnelsville facility separate and apart on the following terms and conditions:

(a) T&N shall take all reasonable measures to preserve the viability of the McConnelsville facility as an independent competitor, shall maintain all of the intangible rights and other assets of the McConnelsville facility and may make such improvements in the McConnelsville facility as T&N deems appropriate. Without limiting any of T&N's obligations under the Consent Order or this Agreement, T&N agrees to observe the limitations and restrictions set forth in the remaining subparagraphs of this paragraph 4.

(b) Except as otherwise provided in this Agreement, T&N (other than the T&N members of the Management Committee and the technical experts appointed to assist them in improving the McConnelsville facility) shall not receive or have access to, or the use of, any of the material confidential information of the McConnelsville facility that is not in the public domain, except (i) as required by law; (ii) to the extent that such information is necessarily exchanged in the course of evaluating the Acquisition, defending investigations or litigation, or negotiating an agreement to divest the tri-metal heavywall engine bearing assets or the McConnelsville facility pursuant to the Consent Order; and (iii) to the extent that such information would be available to T&N in the normal course of business absent the Acquisition. ("*Material confidential information,*" as used throughout this Agreement, means competitively sensitive or proprietary information not independently known to T&N from sources other than the McConnelsville facility, and includes, but is not limited to, customer lists, unpublished price lists, marketing methods, patents, technologies, processes, other trade secrets and non-public financial and accounting books and records.) *Provided, however,* that T&N may obtain such financial information from the McConnelsville facility as is necessary for T&N to prepare and file financial reports, including balance sheets, and tax reports to relevant government entities, shareholders of T&N and T&N's Chairman and

Board of Directors; *provided further, however,* that (i) for purposes of financial reports to T&N's Chairman and Board of directors, T&N shall seek and obtain only the following items on an aggregated basis: revenues; cost of goods sold; general and administrative expenses; income before interest; interest expense; income before taxes; tax expense; and net income; (ii) information required for the preparation of such financial reports or tax reports shall be provided or disclosed only to designated individuals within T&N's controller and tax departments responsible for the preparation of such reports; and (iii) T&N shall use such information only for the preparation and filing of such financial reports and tax reports and not for any other purpose whatsoever.

(c) Designated individuals within T&N's controller department shall have access to such information as may be necessary to make or comply with covenants, representations or warranties in connection with existing agreements with any financial institution or with any third party in an existing arm's-length transaction.

(d) T&N shall prevent any communication between employees of the McConnelsville facility and T&N concerning material confidential information of the McConnelsville facility (as such information is defined and subject to the exceptions listed in subparagraph 4.(b)) and concerning T&N's competitively sensitive information not independently known to employees of the McConnelsville facility from sources other than T&N, including, but not limited to, customer lists, unpublished price lists, marketing methods and nonpublic financial and accounting books and records. This Agreement shall be published to the employees of the McConnelsville facility and to those employees of T&N involved in the design, manufacture or sale of tri-metal heavywall engine bearings.

(e) T&N shall refrain from taking any actions that may cause any material adverse change in the business or financial condition of the McConnelsville facility.

(f) T&N shall refrain from, directly or indirectly, selling, disposing of, or causing to be transferred any assets, property or business of the McConnelsville facility, except that T&N may sell or otherwise dispose of assets in the ordinary course of business, and may sell or otherwise dispose of assets, property or business pursuant to paragraphs IV, VII and VIII of the Consent Order.

(g) T&N shall refrain from mortgaging or pledging the assets of the McConnelsville facility pursuant to any loan transaction, except in

connection with the divestiture of the tri-metal heavywall engine bearing assets or the McConnelsville facility pursuant to the Consent Order.

(h) T&N shall refrain from causing the McConnelsville facility to guarantee any debts or obligations pursuant to any loan transaction, except in connection with the divestiture of the tri-metal heavywall engine bearing assets or the McConnelsville facility pursuant to the Consent Order.

(i) Consistent with the provisions of this paragraph 4, T&N shall exercise such direction and control over the McConnelsville facility as is necessary to assure compliance with this Agreement, including such steps as may be necessary or appropriate to preserve the value of the business of the McConnelsville facility.

(j) Except for the T&N members of the Management Committee and the technical experts appointed to assist them in improving the McConnelsville facility, T&N shall not permit any director, officer, employee, agent or representative of T&N, other than present employees of JPI, to be a member of the Management Committee or an employee of the McConnelsville facility.

(k) T&N shall not cause any change in the composition of the management of the McConnelsville facility, except that members of the Management Committee may fill vacancies as they occur, remove employees for poor performance or for cause, and make additions or changes in the management necessary to improve the McConnelsville facility.

(l) Except in connection with divestiture of the tri-metal heavywall bearing assets or the McConnelsville facility to be made in conformity with the Consent Order, all material transactions out of the ordinary course of business and not otherwise precluded by this paragraph 4 shall be subject to a majority vote of the Management Committee.

(m) T&N shall create a five-person Management Committee once it has acquired JPI. T&N shall select the members of the Management Committee; *provided, however,* that such Management Committee shall consist of no more than two current directors, officers, employees, or agents of T&N not having operating responsibilities with respect to T&N's Vandervell Limited or The Glacier Metal Co. Ltd. subsidiaries, and no fewer than two current directors, officers, employees or agents of JPI, of which one shall be the general manager of the McConnelsville facility who is not now an employee of T&N. T&N may appoint up to two technical experts to assist the T&N

members of the Management Committee in improving the McConnelsville facility. Subject to the exceptions in subparagraph 4.(b), the T&N members of the Management Committee and the technical experts appointed to assist them shall not disclose any material confidential information received under this Agreement to T&N or use it to obtain any advantage for T&N in its other businesses. All members of the Management Committee and the technical experts appointed to assist the T&N members shall enter into a confidentiality agreement prohibiting disclosure of confidential information to T&N or the use of such information to obtain any advantage for T&N in its other businesses. The T&N members of the Management Committee shall participate in matters which come before the Management Committee for the limited purposes of making improvements in the McConnelsville facility and carrying out T&N's responsibility to assure that the McConnelsville facility is maintained in such a manner as will permit its divestiture as an ongoing, viable asset. Except as permitted by this Agreement, the T&N members of the Management Committee shall not participate in, or attempt to influence the votes of the other members of the Management Committee with respect to, any matter that would involve a conflict of interest if T&N and the McConnelsville facility were separate and independent entities.

(n) Nothing herein shall prevent the Management Committee or T&N from negotiating or entering into agreements to dispose of assets located at the McConnelsville facility pursuant to the terms of the Consent Order, provided that any disposition of assets in connection with the divestiture of the tri-metal heavywall engine bearing assets or the McConnelsville facility shall be made only in accordance with the terms of the Consent Order.

(o) T&N and the McConnelsville facility shall not transfer physical assets between them (except for the purchase and sale of commercial products at arm's length in the ordinary course of business), nor engage in any joint activity, except as such physical asset transfer or joint activity is necessary to ensure compliance with this Agreement. The McConnelsville facility shall continue to prepare separate periodic statements of revenue, expenses and profitability, and shall provide the Commission's Bureau of Competition with quarterly and annual operating statements.

(p) Earnings and profits of the McConnelsville facility shall be retained separately in the McConnelsville facility to the extent necessary to provide the McConnelsville facility with sufficient

working capital to operate at its current rate, or if that rate of operation is increased, at such increased rate. T&N shall provide the McConnelsville facility with working capital in addition to the retained earnings and profits if necessary to operate the McConnelsville facility at its current rate, or if that rate of operation is increased, at such increased rate.

5. Should the Federal Trade Commission seek in any proceeding to compel T&N to divest the thinwall engine bearing assets or the McConnelsville facility, or to seek any other injunctive or equitable relief, T&N shall not raise any objection based upon the expiration of the applicable waiting period under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 or the fact that the Commission has permitted the Acquisition. T&N also waives all rights to contest the validity of this Agreement.

6. For the purpose of determining or securing compliance with this Agreement, subject to any legally recognized privilege, and upon written request with reasonable notice to T&N made to its principal office, T&N shall permit any duly authorized representative or representatives of the Commission:

(a) During the office hours of T&N and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of T&N relating to compliance with this Agreement.

(b) Upon five (5) days' notice to T&N and without restraint or interference from it, to interview officers or employees of T&N, who may have counsel present, regarding any such matters.

7. In the event the Commission has not finally issued the Consent Order within one hundred twenty (120) days of its publication in the Federal Register, T&N may, at its option, terminate this Agreement by delivering written notice of termination to the Commission, which termination shall be effective ten (10) days after the Commission's receipt of such notice, and this Agreement shall thereafter be of no further force and effect. If this Agreement is so terminated, the Commission may take such action as it deems appropriate, including, but not limited to, an action pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b). Termination of this Agreement shall in no way operate to terminate the Consent Order that T&N has entered into in this matter.

8. This Agreement shall not be binding until it has been approved by the Commission.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I dissent from the Commission's decision to accord final approval to this consent order. It seems unlikely that requiring divestiture of the minimal and unusual package of assets identified in the order will ensure competition in the relevant markets. In addition, certain provisions of the order, such as those controlling transfer pricing and supply agreements, are overly regulatory and may lead to numerous enforcement problems.

IN THE MATTER OF

UNITED STATES SALES CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE TEXTILE FIBER PRODUCTS IDENTIFICATION ACT AND THE FEDERAL TRADE COMMISSION ACT

Docket C-3313. Complaint, Nov. 21, 1990—Decision, Nov. 21, 1990

This consent order prohibits, among other things, a California mail order company from failing to disclose in future mail-order catalogs and promotional materials that the textile fiber products offered are processed or manufactured in the United States, imported, or both.

Appearances

For the Commission: *Robert E. Easton.*

For the respondent: *Daniel H. Carlin, Loeb & Loeb,* New York, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that United States Sales Corporation (formerly United States Sales Corp.), a corporation, hereinafter referred to as respondent, has violated the provisions of the Federal Trade Commission Act and the Textile Fiber Products Identification Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby alleges:

PARAGRAPH 1. Respondent United States Sales Corporation (formerly United States Sales Corp.) is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its office and principal place of business presently located at 8550 Balboa Boulevard, Northridge, California.

It also does business under the name of United States Purchasing Exchange.

All stock in respondent is owned by Ronald D. Goldman and Theodore J. Slavin who are officers of said corporation.

PAR. 2. Respondent is now, and for some time past has been, engaged, by means of mail order catalogs, in the advertising, offering

for sale, sale and distribution of a variety of products in commerce including textile wearing apparel and other textile fiber products.

PAR. 3. In September, 1984 Congress amended the Textile Fiber Products Identification Act (15 U.S.C. 70) (hereafter referred to as the Textile Act) to require that catalogs disclose whether textile fiber products offered for sale are imported or domestically produced or both. The amendment states:

> (i) For the purpose of this Act, a textile fiber product shall be considered to be falsely or deceptively advertised in any mail order catalog or mail order promotional material which is used in the direct sale or direct offering for sale of such textile fiber product, unless such textile fiber product description states in a clear and conspicuous manner that such textile fiber product is processed or manufactured in the United States of America, or imported, or both. (15 U.S.C. 70b(i))

PAR. 4. The Commission, pursuant to authority under the Textile Act and to make such rules and regulations as may be necessary and proper for the enforcement of the Textile Act (15 U.S.C. 70e), promulgated a rule effective April 17, 1985 relating to country of origin in mail order advertising. Rule 34 states:

> When a textile fiber product is advertised in any mail order catalog or mail order promotional material, the description of such product shall contain a clear and conspicuous statement that the product was either made in U.S.A., or imported, or both. Other words or phrases with the same meaning may be used. The statement of origin required by this section shall not be inconsistent with the origin labeling of the product being advertised. (16 CFR 303.34, as amended)

PAR. 5. Pursuant to Section 3(f) of the Textile Act, 15 U.S.C. 70(a), violation of that Act and the Federal Trade Commission rules issued thereunder is an unfair method of competition and an unfair and deceptive act or practice under the Federal Trade Commission Act.

PAR. 6. Respondent's aforesaid textile fiber products have been advertised or offered for sale in mail order catalogs or mail order promotional material without a clear and conspicuous statement that the products are processed or manufactured in the United States of America, or imported, or both.

PAR. 7. Respondent's sale, offering for sale and advertising of textile fiber products in commerce were, and are, in violation of the Textile Act and the Federal Trade Commission rules and regulations promulgated thereunder, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices in commerce, in violation of the Federal Trade Commission Act.

Commissioner Starek not participating.

Decision and Order

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that 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 comment filed thereafter by an interested person pursuant to Section 2.34 of its Rules, 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 United States Sales Corporation (formerly United States Sales Corp.) is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its office and principal place of business presently located at 8550 Balboa Boulevard, Northridge, California.

It also does business under the name of United States Purchasing Exchange.

All stock in respondent is owned by Ronald D. Goldman and Theodore J. Slavin who are officers of said corporation.

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

It is ordered, That respondent United States Sales Corporation (formerly United States Sales Corp.), a corporation, its successors and assigns, trading under its own name or as United States Purchasing Exchange or under any other name or names, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale or sale by mail order catalog or mail order promotional material of any textile fiber product (as this term is defined in the Textile Fiber Products Identification Act (15 U.S.C. 70)) do forthwith cease and desist from:

Offering for sale, selling or advertising any such textile fiber product in any mail order catalog or mail order promotional material which is used in the direct sale or direct offering for sale of any such textile fiber product, without stating in the description of such textile fiber product in a clear and conspicuous manner that such textile fiber product is processed or manufactured in the United States of America, or imported, or both.

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

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondent herein shall within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

Commissioner Starek not participating.

IN THE MATTER OF

ATLANTIC RICHFIELD COMPANY, ET AL.

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

Docket C-3314. Complaint, Nov. 26, 1990—Decision, Nov. 26, 1990

This consent order requires, among other things, ARCO Chemical Company, a subsidiary of Atlantic Richfield Company and a producer of urethane polyether polyols and propylene glycol, to divest, within twelve months of this order, to a Commission-approved acquirer: the propylene glycol assets and businesses of Union Carbide; and the urethane polyether polyol assets and businesses in the United States and Canada which ARCO acquired from Texas Chemical Company in 1987. The consent order also requires ARCO, for ten years, to secure prior Commission approval before making certain acquisitions.

Appearances

For the Commission: *Rhett R. Krulla* and *Marc G. Schildkraut.*

For the respondents: *Richard Porter, Steptoe & Johnson,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Atlantic Richfield Company, a corporation, ARCO Chemical Company, a corporation, (collectively "ARCO"), have entered into an agreement with Union Carbide Corporation, a corporation, and Union Carbide Chemicals and Plastics Company Inc., a corporation, (collectively "Union Carbide"), that violates said Acts, 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:

DEFINITIONS

PARAGRAPH 1. For purposes of this complaint, "*propylene oxide*" means the chemical intermediate product, also known as propane

oxide or methyl oxirane, which has the chemical formula $O\text{-}CH_3CH\text{-}CH_2$.

PAR. 2. For purposes of this complaint, "*Urethane polyether polyol*" means a low molecular weight alkalene-oxide polymer, produced from propylene oxide and useful as a reactant with isocyanates or polyisocyanates in producing polyurethanes.

PAR. 3. For purposes of this complaint, "*propylene glycol*" means the product produced by hydration of propylene oxide and includes monopropylene glycol, which has the chemical formula $CH_3\text{-}CHOHCH_2\text{-}OH$; dipropylene glycol; and tripropylene glycol.

THE RESPONDENTS

PAR. 4. Respondent Atlantic Richfield Company is a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its principal office and place of business at 515 South Flower Street, Los Angeles, California.

PAR. 5. Atlantic Richfield Company is a major integrated petroleum company engaged, principally in the United States, through its divisions and subsidiaries, in the exploration, development and production of petroleum and natural gas; the purchase and sale of petroleum; the mining and sale of coal; refining and transportation of petroleum and petroleum products; the manufacture and sale of intermediate chemical and specialty products, including propylene oxide, styrene monomer, tertiary butyl alcohol and polystyrenic foams and resins; and the manufacture, refining and marketing of basic commodity chemicals, including ethylene, propylene, methanol and aromatics. On December 31, 1988, Atlantic Richfield Company owned 83.3 percent of the common stock of ARCO Chemical Company.

PAR. 6. Atlantic Richfield Company's net income in 1988 was $1,583 million on sales of $18.3 billion.

PAR. 7. Respondent ARCO Chemical Company is a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its principal office and place of business at 3801 West Chester Pike, Newtown Square, Pennsylvania. ARCO Chemical Company is a majority-owned subsidiary of Atlantic Richfield Company.

PAR. 7. ARCO Chemical Company is a leading multinational manufacturer and marketer of intermediate chemicals and specialty products used in a broad range of consumer goods. ARCO Chemical Company is a leading manufacturer, both in the United States and in

the world, of propylene oxide and derivatives thereof, including urethane polyether polyol and propylene glycol.

PAR. 8. ARCO Chemical Company's net income in 1988 was $494 million on sales and other operating revenues of $2,688 million. Propylene oxide and its derivatives accounted for 36 percent and 39 percent of ARCO Chemical Company's total sales and other operating revenues in 1988 and 1989, respectively.

PAR. 9. Respondent Union Carbide Corporation is a corporation organized, existing and doing business under and by virtue of the laws of New York, with its principal office and place of business at 39 Old Ridgebury Road, Danbury, Connecticut.

PAR. 10. Union Carbide Corporation is a holding company with its core businesses operated through subsidiaries responsible respectively for chemicals and plastics, industrial gases, and carbon products industry segments.

PAR. 11. Union Carbide Corporation's net income in 1988 was $662 million on net sales of $8,324 million. The Chemicals and Plastics industry segment accounted for 66 percent of Union Carbide Corporation's sales in 1988 and 76 percent of its operating profit.

PAR. 12. Respondent Union Carbide Chemicals and Plastics Company Inc. is a corporation organized, existing and doing business under and by virtue of the laws of New York, with its principal office and place of business at 39 Old Ridgebury Road, Danbury, Connecticut. Union Carbide Chemicals and Plastics Company Inc. is a wholly-owned subsidiary of Union Carbide Corporation.

PAR. 13. Union Carbide Chemicals and Plastics Company Inc. is diversified manufacturer or ethylene, propylene, and olefin derivatives; chemicals and polymers; and specialty chemicals.

PAR. 14. Union Carbide Chemicals and Plastics Company Inc.'s net income in 1988 was $643 million on net sales of $5,539 million.

PAR. 15. At all times relevant herein, each of the respondents or their predecessors have been engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12; and have been corporations 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.

THE ACQUISITION

PAR. 16. On September 27, 1989, ARCO and Union Carbide entered into an agreement for the acquisition by ARCO of Union Carbide's

urethane polyether polyols and propylene glycol assets and businesses ("the Acquisition"). The purchase price for the Acquisition is about $220 million.

THE RELEVANT MARKETS

PAR. 17. For purposes of this complaint, the relevant lines of commerce in which to evaluate the effects of the acquisition are:

(a) The manufacture and sale of propylene oxide;
(b) The manufacture and sale of urethane polyether polyol; and
(c) The manufacture and sale of propylene glycol.

PAR. 18. For purposes of this complaint, the relevant geographic market is the United States and Canada.

PAR. 19. In 1989, approximately 3 billion pounds of propylene oxide was produced in the United States and Canada. The propylene oxide market is highly concentrated, whether measured by the Herfindahl-Hirschmann Index ("HHI") or by two-firm concentration ratios.

PAR. 20. In 1989, approximately 2 billion pounds of urethane polyether polyol was produced in the United States and Canada. The urethane polyether polyol market is highly concentrated, whether measured by the HHI or by eight-firm, four-firm, and two-firm concentration ratios.

PAR. 21. In 1989, approximately 870 million pounds of propylene glycol was produced in the United States and Canada. The propylene glycol market is highly concentrated, whether measured by the HHI or by four-firm and two-firm concentration ratios.

PAR. 22. It is difficult to enter into the manufacture and sale of propylene oxide, urethane polyether polyol, and propylene glycol. Actions by ARCO relating to acquisitions and technology have made entry more difficult.

PAR. 23. At the time of the Acquisition described above, ARCO and Union Carbide in combination with others were perceived potential and actual potential competitors in the manufacture and sale of propylene oxide in the United States and Canada.

PAR. 24. At the time of the Acquisition described above, ARCO and Union Carbide were actual competitors in the manufacture and sale of urethane polyether polyols and of propylene glycol in the United States and Canada.

THE EFFECTS OF THE ACQUISITION

PAR. 25. The effect of the Acquisition may be substantially to lessen

competition in each of the relevant markets in the United States and Canada, 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, because, among other things, the acquisition:

(a) Eliminates substantial perceived potential and actual potential competition in the manufacture and sale of propylene oxide between ARCO and Union Carbide, between Union Carbide and others, and between ARCO and others in the United States and Canada;

(b) Increases the level of vertical integration and reduced the size of the merchant market for propylene oxide in the United States and Canada, making entry less likely and reducing the probability of eventual deconcentration of this market;

(c) Eliminates substantial actual competition, between ARCO and Union Carbide and between Union Carbide and others, in the manufacture and sale of urethane polyether polyol in the United States and Canada;

(d) Eliminates substantial actual competition, between ARCO and Union Carbide and between Union Carbide and others, in the manufacture and sale of propylene glycol in the United States and Canada; and

(e) Significantly enhances the likelihood of collusion or interdependent coordination among the remaining firms in the relevant markets.

THE VIOLATIONS CHARGED

PAR. 26. The Acquisition of the urethane polyether polyol and propylene glycol assets and businesses of Union Carbide by ARCO, individually or in combination with other acquisitions by ARCO, violates Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

PAR. 27. The Acquisition of the urethane polyether polyol and propylene glycol assets and businesses of Union Carbide by ARCO, individually or in combination with other acquisitions by ARCO, violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 28. ARCO's actions in deterring entry into the manufacture and sale of propylene oxide, urethane polyether polyol, and propylene glycol in the relevant geographic market violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

Commissioner Starek not participating.

DECISION AND ORDER

The Federal Trade Commission ("the Commission"), having initiated an investigation of the proposed acquisition by ARCO Chemical Company, a partially-owned subsidiary of Atlantic Richfield Company, (hereinafter collectively "ARCO"), of certain of the assets and businesses of Union Carbide Chemicals and Plastics Company Inc., a wholly-owned subsidiary of Union Carbide Corporation, (hereinafter collectively "Union Carbide"), which acquisition is more fully described at paragraph I.(A) below, and ARCO and Union Carbide having been furnished with a copy of a draft complaint that the Bureau of Competition has presented to the Commission for its consideration and which, if issued by the Commission, would charge ARCO and Union Carbide with violations of the Clayton Act and Federal Trade Commission Act; and

Respondents ARCO and Union Carbide, their attorneys, and counsel for the Commission having thereafter executed an agreement containing consent order, an admission by respondents of all the jurisdictional facts set forth in the aforesaid draft 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, 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:

A. Atlantic Richfield Company is a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its principal office and place of business at 515 South Flower Street, Los Angeles, California.

B. ARCO Chemical Company is a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its principal office and place of business at 3801 West Chester Pike, Newtown Square, Pennsylvania.

C. Union Carbide Corporation is a corporation organized, existing and doing business under and by virtue of the laws of New York, with its principal office and place of business at 39 Old Ridgebury Road, Danbury, Connecticut.

D. Union Carbide Chemicals and Plastics Company Inc., is a corporation organized, existing and doing business under and by virtue of the laws of New York, with its principal office and place of business at 39 Old Ridgebury Road, Danbury, Connecticut.

E. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of ARCO and Union Carbide, and the proceeding is in the public interest.

ORDER

I.

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

(A) "*Acquisition*" means the Asset Purchase Agreement entered into on September 27, 1989, by which ARCO agreed to acquire and Union Carbide agreed to convey certain rights and interests in, and title to, certain of the assets and businesses of Union Carbide.

(B) "*ARCO*" means Atlantic Richfield Company and ARCO Chemical Company, their predecessors, subsidiaries, divisions, groups and affiliates (including the Properties to Be Divested as hereinafter defined) controlled (the definition of "control", as used in this order, is the definition currently appearing at 16 CFR 801.1(b)) by Atlantic Richfield Company or ARCO Chemical Company, and their respective directors, officers, employees, agents, and representatives, and their respective successors and assigns.

(C) "*ARCO Group*" means individually and collectively ARCO; any joint venture in which ARCO is a participant relating to the manufacture, sale, or use of propylene oxide ("PO"), any PO coproduct, or any derivative of PO; each participant in any joint venture with ARCO relating to the manufacture, sale, or use of PO, any PO coproduct, or any derivative of PO; each customer of the ARCO Group that manufactures, purchases, or uses PO, any PO coproduct, or any derivative of PO; and each supplier of products or services to the ARCO Group relating to the development, manufacture, sale, or use of PO, any PO coproduct, or any derivative of PO.

(D) "*Properties to Be Divested*" means:

1. All of the propylene glycol Assets and Businesses of Union Carbide that ARCO agreed to acquire or acquired pursuant to the Acquisition (hereinafter "Paragraph I.(D)1 Properties"); and

2. All of the urethane polyether polyol Assets and Businesses in the United States and Canada, including their territories and possessions, that ARCO acquired from Texaco, together with all improvements or modifications made to those Assets and Businesses by ARCO (hereinafter "Paragraph I.(D)2 Properties").

(E) "*Assets and Businesses*" include but are not limited to all assets, properties, businesses and goodwill, tangible and intangible, utilized in the transportation, production, distribution or sale of propylene glycol or urethane polyether polyols, including, without limitation the following:

1. All machinery, fixtures, equipment, vehicles, transportation and storage facilities, furniture, tools, supplies, stores, spare parts, and other tangible personal property;

2. All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, management information systems, software, trademarks, patents, inventions, trade secrets, technology, know-how, specifications, designs, drawings, processes and quality control data;

3. Raw material and finished product inventories and goods in process;

4. All right, title and interest in and to owned or leased real property, together with appurtenances, licenses and permits;

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

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

7. All separately maintained, as well as relevant portions of not separately maintained books, records and files; and

8. All items of prepaid expense.

(F) "*Commission*" means the Federal Trade Commission.

(G) "*Dow*" means The Dow Chemical Company, its predecessors, subsidiaries, divisions, groups and affiliates controlled by Dow and their respective directors, officers, employees, agents, and representatives, and their respective successors and assigns.

(H) "*Texaco*" means Texaco Inc. and Texaco Chemical Company, their predecessors, subsidiaries, divisions, groups and affiliates controlled by Texaco and their respective directors, officers, employees, agents, and representatives, and their respective successors and assigns.

(I) "*Texaco Group*" means individually and collectively Texaco; any joint venture in which Texaco is a participant relating to the manufacture, sale, or use of PO, any PO coproduct, or any derivative of PO; each participant in any joint venture with Texaco relating to the manufacture, sale, or use of PO, any PO coproduct, or any derivative of PO; each customer of the Texaco Group that manufactures, purchases, or uses PO, any PO coproduct, or any derivative of PO; and each supplier of products or services to the Texaco Group relating to the development, manufacture, sale, or use of PO, any PO coproduct, or any derivative of PO.

(J) "*Union Carbide*" means Union Carbide Corporation and Union Carbide Chemicals and Plastics Company Inc., their predecessors, subsidiaries, divisions, groups and affiliates controlled by Union Carbide and their respective directors, officers, employees, agents, and representatives, and their respective successors and assigns.

(K) "*PO*" means propylene oxide.

(L) "*PO Entrant*" means any person other than ARCO or DOW who has obtained the permits from federal, state, provincial, county or municipal regulatory authorities necessary to commence construction, or who has commenced construction, of a commercial PO plant in the United States or Canada, including their territories and possessions.

(M) "*Polyols*" means polyether polyols, except that as used in definitions (N), (O), (P), (Q), and (R) and in Paragraph III below, Polyols means polyether polyols used as feedstock for Performance Polyols or used in conjunction with Performance Polyols.

(N) "*Urethane polyether polyol*" means Polyols useful as a reactant with isocyanates or polyisocyanates in producing polyurethanes. Urethane polyether polyol includes Performance Polyols.

(O) "*Polymer/Polyols*" means any composition comprising a polymer dispersed in, or mixed or otherwise combined with, a Polyol, said composition being useful in producing a polyurethane by reaction with an isocyanate or a polyisocyanate.

(P) "*Performance Polyols*" means Polymer/Polyols and/or any two-phase composition containing a Polyol that is an end-use performance substitute for a Polymer/Polyol as a reactant with isocyanates or polyisocyanates in producing polyurethanes.

(Q) "*UCC Patent Rights*" shall mean any patent or patent application in the United States or Canada, including their territories and possessions, assigned to or under which rights were granted to, ARCO pursuant to the Acquisition, claiming: 1) Performance Polyols; 2) a process for producing Performance Polyols; 3) Polyols; 4) a process for producing Polyols; 5) a process for producing polyurethanes using Polyols or Performance Polyols as starting materials; 6) or polyurethanes so produced and each patent identified in Appendix III of this order.

(R) "*UCC Technology*" shall mean general and specific information, assigned or under which rights were granted to ARCO pursuant to the Acquisition, relating to 1) Polyols; 2) Performance Polyols; 3) feedstocks for Performance Polyols and for use in conjunction with Performance Polyols (including the manufacture, use, and constitution of Polyols and further including process design information regarding Polyols); 4) the production of Performance Polyols; 5) the composition of Performance Polyols; 6) the use of Performance Polyols in making polyurethanes; and 7) the economic factors relating to the production of Performance Polyols and polyurethanes made therefrom; all such information being sufficiently detailed for the commercial production, sale, and use of Performance Polyols and the commercial production of polyurethane therefrom. UCC Technology shall include (but shall not be limited to) all technical information, data, specification, drawings, design and equipment specifications, manuals, engineering reports, manufacturing designs and reports, operating manuals, and polyurethane-forming formulations. UCC Technology shall exclude information to the extent disclosure of such information by Union Carbide is prohibited by a contract between Union Carbide and any polyurethane producer, unless said polyurethane producer consents to such disclosure.

(S) "*Viability and Competitiveness*" of the Properties to Be Divested means each such property is capable of operating independently at the same output as currently (at competitive prices) and is capable of functioning independently and competitively in the Urethane polyether polyol business or the propylene glycol business.

II.

It is ordered, That:

(A) Within twelve (12) months of the date this order becomes final,

ARCO shall divest, absolutely and in good faith, the Properties to Be Divested and shall also divest such additional ancillary Assets and Businesses and effect such arrangements that are necessary to assure the Viability and Competitiveness of the Properties to Be Divested. *Provided, however,* ARCO may retain free rights to practice under all patents and use all unpatented technology included within the Paragraph I.(D)2 Properties to Be Divested.

(B) ARCO shall divest the Properties to Be Divested pursuant to Paragraph I.(D)1 only with the prior consent of Union Carbide, which consent shall not unreasonably be withheld. The acquirer shall have the right to enforce all rights and privileges of ARCO set out in the Acquisition with respect to the Properties to Be Divested pursuant to Paragraph I.(D)1. Union Carbide shall provide the acquirer substantially the same services as it agreed to provide ARCO pursuant to the Acquisition for the Properties to Be Divested under Paragraph I.(D)1. In addition, Union Carbide shall provide to the acquirer upon the request of the acquirer, such additional services as may be necessary for the continued operation of such Properties to Be Divested at Union Carbide's South Charleston, West Virginia plant that cannot otherwise economically be obtained and that Union Carbide can economically provide. Union Carbide shall provide services to the acquirer for a period that Union Carbide has agreed to provide ARCO similar services pursuant to the Acquisition or is actually providing such services to ARCO at such facility. Union Carbide shall charge the acquirer the lesser of Union Carbide's costs consistent with Union Carbide's current practices or the charge at which ARCO contracted to purchase such services for such Properties to Be Divested.

(C) ARCO shall comply with all terms of the Agreement to Hold Separate, attached to this order and made a part hereof as Appendix I. Said Agreement shall continue in effect until such time as ARCO has divested all the Properties to Be Divested or until such other time as the Agreement to Hold Separate provides.

(D) ARCO shall divest the Properties to Be Divested only to an acquiring entity or entities that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. ARCO shall demonstrate the Viability and Competitiveness of the Properties to Be Divested in its application for approval of a proposed divestiture. The purpose of the divestiture of the Properties to Be Divested is to ensure the continuation of the assets as ongoing, viable businesses engaged in the manufacture and sale of

urethane polyether polyols and propylene glycol, and to remedy any lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

(E) ARCO shall take such action as is necessary to maintain the viability, competitiveness and marketability of the Properties to Be Divested and shall not cause or permit the destruction, removal or impairment of the Properties to Be Divested except in the ordinary course of business and except for ordinary wear and tear.

III.

It is further ordered, That, at the time of the divestiture of the Paragraph I.(D)2 properties required by this order, ARCO shall include with the Paragraph I.(D)2 Properties a paid-up, non-royalty bearing, perpetual, and non-exclusive license (a) under the UCC Patent Rights to make, use and sell Polyols and Performance Polyols in the United States and Canada, including their territories and possessions and (b) to use UCC Technology to make, use and sell Polyols and Performance Polyols in the United States and Canada, including their territories and possessions; and for a period of three (3) years following the divestiture required by this order, ARCO shall provide to the acquirer of the Paragraph I.(D)2 Properties, if the acquirer so requests, such additional know-how as may be necessary to manufacture and sell Performance Polyols. ARCO's grant shall be subject to, and the licensee shall take the license subject to, any preexisting rights granted by Union Carbide to other licensees other than ARCO as of the date the Agreement Containing Consent Order was signed.

IV.

It is further ordered, That, for a period of three (3) years following the divestiture of the Paragraph I.(D)2 properties required by this order, Union Carbide shall provide to ARCO, for transmittal by ARCO to the acquirer of the Paragraph I.(D)2 Properties pursuant to Paragraph III of this order, such know-how (not otherwise obtainable from ARCO) regarding UCC Patent Rights and UCC Technology in the possession of Union Carbide as may be necessary for the acquirer of the Paragraph I.(D)2 Properties to manufacture and sell Performance Polyols.

V.

It is further ordered, That, at the time of the divestiture of the Paragraph I.(D)2 properties required by this order, ARCO shall assign to the acquirer of the Paragraph I.(D)2 Properties, all of ARCO's rights and interests under all tolling agreements between ARCO and Texaco relating to the manufacture of Polyols at Texaco's Conroe, Texas, facility.

VI.

It is further ordered, That, for a period of five (5) years from the date of each divestiture required by this order, ARCO shall, at the acquirer(s)'s request, contract with the acquirer(s) to supply to the acquirer(s) PO, in such quantities as the acquirer(s) may request for use in the Properties to Be Divested, or for use in the manufacture of Performance Polyols under the license provided by ARCO pursuant to Paragraph III of this order subject only to the capacity constraints of ARCO's PO production facilities in the United States and preexisting contractual obligations. The price, terms, and conditions at which ARCO shall supply PO to the acquirer(s) of the Properties to Be Divested shall be no less favorable to the acquirer(s) than the price, terms, and conditions at which ARCO supplies PO to any other person in the United States or Canada, including their territories and possessions, that competes with the acquirer(s).

VII.

It is further ordered, That ARCO shall rescind all existing non-compete provisions contained in any agreements between ARCO and Texaco purporting to restrict Texaco's right to engage in the manufacture of urethane polyether polyol in the United States or Canada, including their territories and possessions, or the sale in any country of urethane polyether polyol manufactured in the United States or Canada, including their territories and possessions; and ARCO and Union Carbide shall rescind the provisions of any existing agreements between ARCO and Union Carbide purporting to restrict Union Carbide's right to engage in the manufacture of urethane polyether polyol or propylene glycol in the United States or Canada, including their territories and possessions, or the sale in any country of urethane polyether polyol or propylene glycol manufactured in the

United States or Canada, including their territories and possessions. ARCO shall take no action to enforce any such non-compete provision against Texaco or against Union Carbide.

VIII.

It is further ordered, That, once Texaco consents to take no action and assert no claim against the ARCO Group based on any conduct of ARCO or other persons working on PO technology with ARCO, and relating to such work, prior to the date the Agreement Containing Consent Order was signed, relating to any use, development, misappropriation, disclosure or license to others by the ARCO Group of any technology relating to the manufacture, sale, or use of PO or any coproducts of PO/TBA or PO/MBTE technology ARCO shall take no action and shall assert no claim against the Texaco Group based on any conduct of Texaco or other persons working on PO technology with Texaco, and relating to such work, prior to the date the Agreement Containing Consent Order was signed, relating to any use, development, misappropriation, disclosure or license to others by the Texaco Group of any technology relating to the manufacture, sale, or use of PO or any coproducts of PO/TBA or PO/MBTE technology. *Provided, however,* if, in the judgment of the Commission, Texaco unreasonably fails to consent to the assignment under Paragraph V of this order, ARCO's obligations under this Paragraph VIII of this order shall be suspended until Texaco consents to said assignment.

IX.

It is further ordered, That, notwithstanding any provision to the contrary, in any contract between ARCO and Texaco, between ARCO and Union Carbide, or between ARCO and the acquirer(s) of the Properties to Be Divested, for a period commencing on the date this order becomes final and continuing for ten (10) years, ARCO shall permit upon ninety (90) days notice, Texaco, Union Carbide, and the acquirer(s), without penalty or forfeiture of any kind, to purchase or otherwise receive any or all of their PO requirements in the United States or Canada, including their territories and possessions, from any PO Entrant, including but not limited to PO supplied by such PO Entrant via manufacture outside the United States or Canada, including their territories and possessions; and, to the extent of any

such purchases or receipts of PO by Texaco, Union Carbide, or the acquirer(s), ARCO shall relieve Texaco, Union Carbide, and the acquirer(s) of any contractual obligation to purchase such quantities of PO from ARCO.

X.

It is further ordered, That:

(A) If ARCO has not divested, absolutely and in good faith and with the Commission's approval, the Properties to Be Divested within twelve (12) months of the date this order becomes final, ARCO shall consent to the appointment by the Commission of a trustee to effectuate the obligations set out in Paragraphs II.(A) and II.(B) of this order. In the event 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, ARCO 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 ARCO to comply with this order.

(B) If a trustee is appointed by the Commission or a court pursuant to Paragraph X.(A) of this order, ARCO shall consent to the following terms and conditions regarding the trustee's powers, authorities, duties and responsibilities:

1. The Commission shall select the trustee, subject to the consent of ARCO, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures.

2. The trustee shall, subject to the prior approval of the Commission, have the exclusive power and authority to divest the Properties to Be Divested and to divest such additional ancillary Assets and Businesses of ARCO and to effect the additional obligations set out in Paragraphs II.(A) and II.(B) of this order.

3. The trustee shall have eighteen (18) months from the date of appointment to accomplish the divestiture. If, however, at the end of

the eighteen-month period the trustee has submitted a plan of divestiture or believes that divestiture can be accomplished within a reasonable time, the divestiture period may be extended by the Commission. *Provided, however,* the Commission may only extend the divestiture period two (2) times.

4. Subject to an appropriate confidentiality agreement, the trustee shall have full and complete access to the personnel, books, records and facilities related to the Properties to Be Divested, or any other relevant information, as the trustee may reasonably request. ARCO shall develop such financial or other information as such trustee may reasonably request and shall cooperate with any reasonable request of the trustee. ARCO shall take no action to interfere with or impede the trustee's accomplishment of the divestitures. Any delays in divestiture caused by ARCO shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or the court for a court-appointed trustee.

5. Subject to ARCO's absolute and unconditional obligation to divest at no minimum price, and the purpose of the divestiture as stated in Paragraph II.(D) of this order, the trustee shall use his or her best efforts to negotiate the most favorable price and terms available with each acquiring entity for the divestiture of the Properties to Be Divested. The divestiture shall be made in the manner set out in Paragraph II, *provided, however,* if the trustee receives bona fide offers from more than one acquiring entity or entities, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by ARCO, to which (as to the Paragraph I.(D)1 Properties to Be Divested only) Union Carbide has no reasonable objection, from among those approved by the Commission.

6. The trustee shall serve, without bond or other security, at the cost and expense of ARCO, on such reasonable and customary terms and conditions as the Commission or a court may set. Subject to the consent of ARCO, which consent shall not be unreasonably withheld, the trustee shall have authority to employ, at the cost and expense of ARCO, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants (all of whom shall be subject to appropriate confidentiality agreements) as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the sale 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 ARCO 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 Properties to Be Divested.

7. Except in the case of reckless disregard of his or her duties or intentional wrong doing, ARCO shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, or liabilities arising in any manner out of, or in connection with, the trustee's duties under this order.

8. Within sixty (60) days after appointment of the trustee, and subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, ARCO shall execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

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 X.(A) of this order.

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

11. The trustee shall have no obligation or authority to operate or maintain the Properties to Be Divested.

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

XI.

It is further ordered, That, within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until ARCO has fully complied with the provisions of Paragraphs II and III of this order, ARCO shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying and has complied with those provisions, including the Hold Separate Agreement. ARCO shall include in its

compliance reports, among other things that are required from time to time, a full description of substantive contacts or negotiations for the divestiture of assets or businesses specified in Paragraph II of this order, including the identity of all parties contacted. ARCO also shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and reports and recommendations concerning divestiture.

XII.

It is further ordered, That, for a period commencing on the date this order becomes final and continuing for ten (10) years, ARCO shall not acquire, without the prior approval of the Commission, directly or indirectly, through subsidiaries or otherwise, assets located in the United States or Canada, including their territories and possessions, used for or previously used for (and still suitable for use for) the production of PO, urethane polyether polyol, or propylene glycol. ARCO shall also not acquire, without the prior approval of the Commission, directly or indirectly, through subsidiaries or otherwise, more than one percent of the total outstanding stock or share capital of, or any other interest in, any entity (other than an entity included within ARCO under Paragraph I.(B) of this order as of the date the Agreement Containing Consent Order was signed) that owns or operates assets located in the United States or Canada, including their territories and possessions, engaged in the production of urethane polyether polyol or propylene glycol. *Provided, however,* these prohibitions shall not relate to the construction of new facilities. *Provided, further,* that such prior approval shall not be required if ARCO satisfies the conditions set forth in Paragraph XIII of this order.

XIII.

It is further ordered, That, if, in the absence of an acquisition agreement with an entity that neither owns nor operates nor has any interest in assets located in the United States or Canada, including their territories and possessions, engaged in the production of urethane polyether polyol, propylene glycol, or PO (hereinafter "Acquired entity"), ARCO announces its intention to acquire or commences an acquisition of, any interest in the Acquired entity and,

before ARCO obtains sufficient control of the Acquired entity to prevent an acquisition by the Acquired entity, such Acquired entity acquires more than one percent of the total outstanding stock or share capital of, or any other interest in, any third entity that has an interest in assets that produce urethane polyether polyol or propylene glycol in the United States or Canada, including their territories and possessions, (hereinafter "Third entity"), or said Acquired entity acquires any assets used in the production of urethane polyether polyol, propylene glycol or PO in the United States or Canada, including their territories and possessions, ARCO may, in lieu of obtaining prior approval of such acquisition under Paragraph XII of this order, comply with each of the requirements of this Paragraph XIII of this order. In order to make such an acquisition without obtaining the Commission's prior approval pursuant to Paragraph XII, ARCO shall:

(A) Notify the Commission as soon as practicable, and in any event, within three (3) days of ARCO learning of the acquisition by the Acquired entity of any interest in a Third entity, as described in Paragraph XIII of this order. Such notification shall follow the format for filings set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended. Such notification shall be in addition to any reporting, waiting period, and other requirements applicable to the transaction under Section 7A of the Clayton Act, 15 U.S.C. 18a and the Commission's Premerger Reporting Rules promulgated thereunder, 16 CFR Parts 801, 802, 803.

(B) In the case where the Acquired entity acquired assets used in the production of urethane polyether polyol, propylene glycol or PO, ARCO shall comply with all terms of the Agreement to Hold Separate, attached to this order and made a part hereof as Appendix IV. Said Agreement shall take effect as soon as ARCO has sufficient control over the Acquired entity to satisfy the terms of the Agreement to Hold Separate and shall continue in effect until such time as ARCO has divested all the stock or share capital of the Third entity or all the Assets and Businesses acquired by the Acquired entity or until such other time as the Agreement to Hold Separate provides. In the case where the Acquired entity acquired stock or share capital of the Third entity, as soon as ARCO has sufficient control over the Acquired entity to do so, ARCO shall place all stock and share capital of the Third entity in a non-voting trust until said stock or share capital is divested.

(C) Within three (3) months of the date when ARCO has sufficient

control over the Acquired entity to divest assets, stock or share capital of the Acquired entity, ARCO shall:

1. In the case where the Acquired entity acquired stock or share capital of the Third entity, divest, absolutely and in good faith, the stock or share capital of the Third entity, or

2. In the case where the Acquired entity acquired assets used in the production of urethane polyether polyol, propylene glycol or PO, divest, absolutely and in good faith, all the Assets and Businesses of the Acquired entity and also divest such additional ancillary assets and businesses and effect such arrangements that are necessary to assure the Viability and Competitiveness of the Assets and Businesses of the Acquired entity.

(D) ARCO shall divest the stock or share capital of the Third entity or the Assets and Businesses of the Acquired entity only to an acquiring entity or entities that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. In the case where the Acquired entity acquired assets used in the production of urethane polyether polyol or propylene glycol, ARCO shall demonstrate the Viability and Competitiveness of the Assets and Businesses of the Acquired entity in its application for approval of a proposed divestiture. The purpose of the divestiture is to ensure the continuation of the assets as ongoing, viable businesses engaged in the manufacture and sale of urethane polyether polyols and propylene glycol, and to remedy any lessening of competition resulting from the acquisition.

(E) In the case where the Acquired entity acquired assets used in the production of urethane polyether polyol or propylene glycol, ARCO shall take such action as is necessary to maintain the viability, competitiveness and marketability of the Assets and Businesses of the Acquired entity and shall not cause or permit the destruction, removal or impairment of any assets or businesses it may have to divest except in the ordinary course of business and except for ordinary wear and tear.

(F) If ARCO has not divested, absolutely and in good faith and with the Commission's prior approval, the stock or share capital of the Third entity or the Assets and Businesses of the Acquired entity within three (3) months of the date when ARCO has sufficient control over the Acquired entity to divest assets, stock or share capital of the Acquired entity, ARCO shall consent to the appointment by the Commission of a trustee to divest:

1. The stock or share capital of the Third entity or

2. The Assets and Businesses of the Acquired entity and to divest such additional ancillary assets and businesses of the Acquired entity and effect such arrangements that may be necessary to assure the Viability and Competitiveness of the Assets and Businesses of the Acquired entity.

(G) In the event 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, ARCO 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 ARCO to comply with this order.

(H) If a trustee is appointed by the Commission or a court pursuant to Paragraph XIII.(F) of this order, ARCO shall consent to the terms and conditions regarding the trustee's powers, authorities, duties and responsibilities set out in Paragraph X.(B) of this order. *Provided, however,* that each reference to "Properties to Be Divested" in Paragraph X.(B) of this order shall, for the purposes of this Paragraph XIII, mean either the "stock or share capital of the Third entity" or the "Assets and Businesses of the Acquired entity."

XIV.

It is further ordered, That, one year from the date this order becomes final and annually for nine years thereafter, ARCO shall file with the Commission a verified written report of its compliance with this order.

XV.

It is further ordered, That, for the purposes of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to ARCO or to Union Carbide, as applicable, made to its principal office, ARCO and Union Carbide shall permit any duly authorized representatives of the Commission:

(A) Access, during office hours and in the presence of counsel, to inspect and designate for copying all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of ARCO or of Union Carbide, as applicable, relating to any matters contained in this order; and

(B) Upon five days notice to ARCO or to Union Carbide, as applicable, and without restraint or interference from ARCO or Union Carbide, to interview officers or employees of ARCO and Union Carbide, who may have counsel present, regarding such matters.

XVI.

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

Commissioner Starek not participating.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate (the "Agreement") is by and among Atlantic Richfield Company, a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located at 515 South Flower Street, Los Angeles, California; ARCO Chemical Company, a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business at 3801 West Chester Pike, Newtown Square, Pennsylvania (collectively referred to as "ARCO"); and the Federal Trade Commission (the "Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively, the "Parties").

Premises

Whereas, on September 27, 1989, ARCO entered into an Asset Purchase Agreement providing for the acquisition of certain of the

assets and businesses (hereinafter "the Acquired Assets") of Union Carbide Chemicals and Plastics Company Inc., a wholly-owned subsidiary of Union Carbide Corporation (collectively referred to as "Union Carbide"); (hereinafter the "Acquisition"); and

Whereas, Union Carbide manufactures and sells Polyols and propylene glycol; and

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

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

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

Whereas, the Commission is concerned that if the Acquisition is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of the Properties to Be Divested as described in Paragraph I of the Consent Order and the Commission's right to seek to restore Union Carbide's Polyols and propylene glycol assets and businesses as a viable competitor; and

Whereas, the purpose of this Agreement and the Consent Order is to:

(i) Preserve the Acquired Assets as a viable independent business pending the divestiture of the Properties to Be Divested as viable and ongoing enterprises,

(ii) Remedy any anticompetitive effects of the Acquisition, and

(iii) Preserve the Acquired Assets as ongoing, viable entities engaged in the manufacture and sale of Polyols and propylene glycol in the event that divestiture is not achieved; and

Whereas, ARCO entering into this Agreement shall in no way be construed as an admission by ARCO that the Acquisition is illegal; and

Whereas, ARCO understands that no act or transaction contemplated by this Agreement shall be deemed immune or exempt from the

provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Agreement.

Now, therefore, the Parties agree, upon understanding that the Commission has determined that it has reason to believe the acquisition may substantially lessen competition, and in consideration of the Commission's agreement that, unless the Commission determines to reject the Consent Order, it will not seek further relief from ARCO or Union Carbide with respect to the Acquisition, except that the Commission may exercise any and all rights to enforce this Agreement and the Consent Order to which it is annexed and made a part thereof, and, in the event the required divestitures are not accomplished, to seek divestiture of such assets as are held separate pursuant to this Agreement, and other relief, as follows:

1. ARCO agrees to execute and be bound by the attached Consent Order.

2. ARCO agrees that from the date this Agreement is accepted until the earliest of the dates listed in subparagraphs 2.a - 2.c, it will comply with the provisions of paragraph 3 of this Agreement:

a. Three business days after the Commission withdraws its acceptance of the Consent Order pursuant to the provisions of Section 2.34 of the Commission's Rules;

b. 120 days after publication in the Federal Register of the Consent Order, unless by that date the Commission has finally accepted such Order; or

c. The day after the divestitures required by the Consent Order have been completed.

3. ARCO will hold the Acquired Assets as they are presently constituted separate and apart on the following terms and conditions:

a. The Acquired Assets shall be held separate and apart and shall be operated independently of ARCO (meaning here and hereinafter, ARCO excluding the Acquired Assets and excluding all personnel connected with the Acquired Assets on behalf of Union Carbide as of the date this Agreement was signed) except to the extent that ARCO must exercise direction and control over the Acquired Assets to assure compliance with this Agreement or the Consent Order.

b. ARCO shall not exercise direction or control over, or influence directly or indirectly, the Acquired Assets; *provided, however,* that ARCO may exercise only such direction and control over the Acquired

Assets as is necessary to assure compliance with this Agreement or the Consent Order.

c. ARCO shall maintain the viability and marketability of the Acquired Assets and shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair their marketability or viability.

d. Except for the single ARCO director, officer, employee, or agent serving on the "New Board" or "Management Committee" (as defined in subparagraph 3.i), ARCO shall not permit any director, officer, employee, or agent of ARCO to also be a director, officer or employee of the Acquired Assets.

e. Except as required by law or as reported by the auditor (provided for in subparagraph 3.f) and except to the extent that necessary information is exchanged in the course of evaluating the Acquisition, defending investigations or litigation, obtaining legal advice, acting to assure compliance with this Agreement or the Consent Order (including accomplishing the divestitures), or negotiating agreements to dispose of assets, ARCO shall not receive or have access to, or the use of, any of the Acquired Assets' "material confidential information" not in the public domain, except as such information would be available to ARCO in the normal course of business if the Acquisition had not taken place. Any such information that is obtained pursuant to this subparagraph shall only be used for the purposes set out in this subparagraph. ("*Material confidential information,*" as used herein, means competitively sensitive or proprietary information not independently known to ARCO from sources other than Union Carbide or the Acquired Assets, and includes but is not limited to customer lists, customers, price lists, prices, individual transactions, marketing methods, patents, technologies, processes, or other trade secrets).

f. ARCO may retain an independent auditor to monitor the operation of the acquired assets. Said auditor may report to ARCO on all aspects of the operation of the acquired assets other than information on customer lists, customers, price lists, prices, individual transactions, marketing methods, patents, technologies, processes, or other trade secrets.

g. ARCO shall not change the composition of the management of the Acquired Assets except that the non-ARCO (as ARCO is defined in subparagraph 3.a hereof) directors or members serving on the New Board or Management Committee (as defined in subparagraph 3.i hereof) shall have the power to remove employees for cause.

h. All material transactions, out of the ordinary course of business and not precluded by subparagraphs 3.a - 3.g hereof, shall be subject to a majority vote of the New Board or Management Committee (as defined in subparagraph 3.i hereof).

i. ARCO shall either separately incorporate the Acquired Assets and adopt new Articles of Incorporation and Bylaws that are not inconsistent with other provisions of this Agreement or shall establish a separate business venture with articles of agreement covering the conduct of the Acquired Assets in accordance with this Agreement. ARCO shall also elect a new three-person board of directors of the Acquired Assets ("New Board") or Management Committee of the Acquired Assets ("Management Committee") once it obtains title to the Acquired Assets. ARCO may elect the directors to the New Board or select the members of the Management Committee; *provided, however*, that such New Board or Management Committee shall consist of at least two non-ARCO directors, officers, or employees and no more than one ARCO director, officer, employee, or agent. Except as permitted by this Agreement, the director of the Acquired Assets or member of the Acquired Assets Management Committee who is also an ARCO director, officer, employee or agent shall not receive, in his or her capacity as a director or Management Committee member of the Acquired Assets, material confidential information and shall not disclose any such information received under this Agreement to ARCO or use it to obtain any advantage for ARCO. Such director or Management Committee member shall participate in matters which come before the New Board or Management Committee only for the limited purpose of considering a capital investment or other transactions exceeding $1,000,000 and carrying out ARCO's and the Acquired Assets' responsibilities under this Agreement or the Consent Order. Except as permitted by this Agreement, such director or Management Committee member shall not participate in any matter, or attempt to influence the votes of the other directors or Management Committee members with respect to matters that would involve a conflict of interest if ARCO and the Acquired Assets were separate and independent entities. Meetings of the New Board or Management Committee during the term of this Agreement shall be stenographically transcribed and the transcripts retained for two (2) years after the termination of this Agreement.

j. Any ARCO employee who obtains or may obtain confidential information under this Agreement shall enter a confidentiality

agreement prohibiting disclosure of confidential information until the day after the divestitures required by the Consent Order have been completed.

k. All earnings and profits of the Acquired Assets shall be retained separately in the Acquired Assets. If necessary, ARCO shall provide the Acquired Assets with sufficient working capital to operate at the current rate of operation.

l. Should the Federal Trade Commission seek in any proceeding to compel ARCO (meaning here and hereinafter ARCO including the Acquired Assets) to divest itself of the Acquired Assets or to compel ARCO to divest any assets or businesses of the Acquired Assets that it may hold, or to seek any other injunctive or equitable relief, ARCO shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the Acquisition. ARCO also waives all rights to contest the validity of this Agreement.

4. For the purpose of determining or securing compliance with this Agreement, subject to any legally recognized privilege, and upon written request with reasonable notice to ARCO made to its principal office, ARCO shall permit any duly authorized representative or representatives of the Commission:

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

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

5. This agreement shall not be binding until approved by the Commission.

APPENDIX II

STIPULATION

It is stipulated by and between the undersigned parties, by their respective attorneys, that:

(1) The parties consent that the Court may file and enter a Final Judgment in the form attached to this Stipulation, on the Court's own motion or on the motion of any

party at any time, and without further notice to any party or other proceedings, if plaintiff has not withdrawn its consent, which it may do at any time before the entry of judgment by serving notice of its withdrawal on defendants and filing that notice with the Court;

(2) The defendants waive any objection to venue for purposes of this Final Judgment;

(3) In the event plaintiff withdraws its consent or if the proposed Final Judgment is not entered pursuant to this Stipulation, this Stipulation shall be of no effect whatever and the making of this Stipulation shall be without prejudice to any party in this or any other proceeding; and

(4) The parties' execution of this Stipulation and the entry of Final Judgment settles, discharges, and releases any and all claims of the plaintiff arising from the acquisition by defendants Atlantic Richfield Company and ARCO Chemical Company of certain assets of defendants Union Carbide Corporation and Union Carbide Chemicals and Plastics Company Inc., as set forth in the Commission's complaint:

(a) Against the defendants for failure to comply with any provision of Section 7A of the Clayton Act, 15 U.S.C. 18a; and

(b) Against any officer, director, or partner of the defendants for failure to comply with any provision of Section 7A of the Clayton Act, 15 U.S.C. 18a.

FINAL JUDGMENT

Plaintiff, the United States of America, having commenced this action by filing its Complaint herein for violations of Section 7A of the Clayton Act, 15 U.S.C. 18a, commonly known as the Hart-Scott-Rodino Antitrust Improvements Act of 1976, and plaintiff and defendants, by their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein and without this Final Judgment constituting any evidence against or an admission by any party with respect to any such issue:

Now, therefore, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, and upon the consent of the parties hereto, it is hereby

Ordered, adjudged, and decreed as follows:

I.

The Court has jurisdiction of the subject matter herein and of the parties hereto. The Complaint states a claim upon which relief can be granted against the defendants, Atlantic Richfield Company, ARCO Chemical Company, Union Carbide Corporation, and Union Carbide Chemicals and Plastics Company Inc. under Section 7A of the Clayton Act, 15 U.S.C. 18a.

II.

Judgment is hereby entered in favor of plaintiff, United States of America and against defendants, Atlantic Richfield Company, ARCO Chemical Company, Union Carbide Corporation, and Union Carbide Chemicals and Plastics Company Inc., and, pursuant to Section 7A(g)(1) of the Clayton Act, 15 U.S.C. 18a(g)(1), defendants Atlantic Richfield Company and ARCO Chemical Company shall pay a total civil

penalty in the amount of One Million Dollars ($1,000,000), and defendants Union Carbide Corporation and Union Carbide Chemicals and Plastics Company Inc. shall pay a total civil penalty in the amount of One Million Dollars ($1,000,000). Payment shall be made by wire transfer of the funds to the United States Treasury through the Treasury Financial Communications System. The defendants shall pay the full amount of the civil penalties within fifteen (15) days of entry of this Final Judgment. In the event of a default in payment, interest at the rate of eighteen (18) percent per annum shall accrue thereon from the date of default to the date of payment.

III.

Each party shall bear its own costs of the within action.

IV.

Entry of this Final Judgment is in the public interest.

APPENDIX III

PATENT RIGHTS

Patent No.	Exp. Date	Title
3,836,598	09/17/91	Olefinic Silicone Organic Polymer Graft Copolymers
3,939,106	02/17/93	Energy Absorbing Polyurethane-Polyurea Cellular Elastomers
4,060,439	11/29/94	Polyurethane Foam Composition and Method of Making Same
4,104,236	08/01/95	Liquid Polymer/Polyols and Polyurethane Elastomers Based Thereon
4,107,106	08/15/95	Phenol-Aldehyde-Amine Resin/Glycol Curatives for Energy Absorbing Polyurethanes
4,111,865	09/05/95	Polymer/Polyols and Polyurethane Forms and Elastomers Therefrom
4,119,586	10/10/95	Polymer/Polyol Compositions, Processes for Making Same and Processes for Making Polyurethane Products Therefrom
4,125,505	11/14/95	Polymer/Polyols from High Ethylene Oxide Content Polyols
4,143,002	03/06/96	Chalk-Resistant, Medium to Dark Colored Polyurethanes, Polymer/Polyol and Polyisocyanate Compositions for Use in Producing Same and Methods for Making Said Polyurethanes
4,148,840	04/10/96	Polymer/Polyol Compositions Made from Preformed Polymer/Polyols, Processes for Making Same and Processes for Making Polyurethane Products Therefrom

Patent No.	Exp. Date	Title
4,172,825	10/30/96	Polymer/Polyol and Process for Production Thereof
4,190,711	02/26/97	Thermoplastic Polyether Polyurethane Elastomers
4,195,151	03/25/97	Phenol-Aldehyde-Amine Resin/Glycol Curative Compositions
4,198,488	04/15/97	Polymer-Polyols and Polyurethanes Based Thereon
4,208,314	06/17/97	Polymer/Polyols and Process for Production Thereof
4,214,055	07/22/97	High Resilience Flame-Retardant Polyurethane Foams Based on Polymer/Polyol Compositions
4,226,756	10/07/97	Mixtures of Extenders and Polyols or Polymer/Polyols Useful in Polyurethane Production
4,242,249	12/30/97	Polymer/Polyols via Non-Aqueous Dispersion Stabilizers
4,242,476	12/30/97	Polymer/Polyol Compositions Containing Vinylidene Chloride
4,282,331	08/04/98	Polyurethane Foam Prepared from a Copolymer/Polyol Composition
4,283,500	08/11/98	Polymer/Polyisocyanates
4,312,973	01/26/99	Polyurethane Elastomers Prepared from Polyol or Polymer/Polyol-Chain Extender Mixtures
4,332,716	06/01/99	Polymer/Polyisocyanate Compositions, Processes for Making Same, and Processes for Making Polyurethane Products Therefrom
4,350,780	09/21/99	Polyurethanes Made with Polymer/Polyols Prepared via Preformed Stabilizers
4,357,430	11/02/99	Polymer/Polyols, Methods for Making Same and Polyurethanes Based Thereon
4,407,983	10/04/00	Polyoxamate Polymer/Polyols
4,463,107	07/31/01	Polymer/Polyol Compositions Having Improved Combustion Resistance
4,495,341	01/22/02	Epoxy-Modified Polyols and Polymer-Polyols Useful in the Preparation of Improved Plastics, Including Polyurethane Foams, Elastomers and the Like
4,524,157	06/18/02	Adducts and Polymer-Polyols Useful in the Preparation of Improved Plastics, Including Polyurethane Foams, Elastomers and the Like
4,539,340	09/03/02	Half-Ester Adducts and Polymer-Polyols Useful in the Preparation of Improved

Patent No.	Exp. Date	Title
		Plastics, Including Polyurethane Foams, Elastomers and the Like
4,581,470	04/08/03	Novel Polyols and Uses Thereof
4,585,831	04/29/03	Epoxy-Modified Polyols and Polymer-Polyols Useful in the Preparation of Improved Plastics Including Polyurethane Foams, Elastomers and the Like
4,623,674	11/18/03	Polymer/Polyols of Substituted Styrenes and Polyurethanes Made Therefrom
4,647,624	03/03/04	Epoxy-Modified Polyols and Polymer-Polyols Useful in the Preparation of Improved Plastics, Including Polyurethane Foams, Elastomers and the Like
4,652,589	03/24/04	Polymer/Polyols Having Improved Combustion Resistance and Intrinsic Viscosity, Methods of Making Same and Polyurethanes Prepared Therefrom
4,659,772	04/21/04	Novel Polymer/Polyols and Uses Thereof
4,727,094	02/23/05	Method for Producing Polyurethanes
Re.32,733	08/16/05	Polymer/Polyol Compositions Having Improved Combustion Resistance

APPENDIX IV

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate (the "Agreement") is by and among Atlantic Richfield Company, a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located at 515 South Flower Street, Los Angeles, California; ARCO Chemical Company, a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business at 3801 West Chester Pike, Newtown Square, Pennsylvania (collectively referred to as "ARCO"); and the Federal Trade Commission (the "Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively, the "Parties").

Premises

Whereas, on September 27, 1989, ARCO entered into an Asset Purchase Agreement providing for the acquisition of certain of the assets and businesses of Union Carbide Chemicals and Plastics

Company Inc., a wholly-owned subsidiary of Union Carbide Corporation (collectively referred to as "Union Carbide"); (hereinafter the "Acquisition"); and

Whereas, Union Carbide manufactures and sells Polyols and propylene glycol; and

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

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

Whereas, the Commission is concerned that if an understanding is not reached, preserving the *status quo ante* of the assets of an Acquired entity described in Paragraph XIII.(B) of the Consent Order (hereinafter "Acquired Assets") during the time period provided by said Consent Order, divestiture of the Acquired Assets might be less than an effective remedy; and

Whereas, a purpose of this Agreement and the Consent Order is to:

(i) Preserve the Acquired Assets as a viable independent business pending the divestiture described in Paragraph XIII of the Consent Order as viable and ongoing enterprises, and

(ii) Remedy any anticompetitive effects of the acquisition described in Paragraph XIII of the Consent Order.

Whereas, ARCO entering into this Agreement shall in no way be construed as an admission by ARCO that the Acquisition is illegal; and

Whereas, ARCO understands that no act or transaction contemplated by this Agreement shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Agreement.

Now, therefore, the Parties agree, in consideration of the Commission's agreement that, unless the Commission determines to reject the Consent Order, it will not seek further relief from ARCO with respect to the Acquisition, except that the Commission may exercise any and all rights to enforce Section 7A(g)(1) of the Clayton Act in a civil penalty action with respect to the Acquisition, to enforce this Agreement and the Consent Order to which it is annexed and made a part thereof, and, in the event the required divestitures are not

accomplished, to seek divestiture of such assets as are held separate pursuant to this Agreement, and other relief, as follows:

1. ARCO agrees to execute and be bound by the attached Consent Order.

2. ARCO agrees that, from the date ARCO has sufficient control over the Acquired entity to satisfy the terms of this Agreement until the day after the divestitures required by Paragraph XIII of the Consent Order have been completed, ARCO will hold the Acquired Assets separate and apart on the following terms and conditions:

a. The Acquired Assets shall be held separate and apart and shall be operated independently of ARCO (meaning here and hereinafter, ARCO excluding the Acquired Assets and excluding all personnel connected with the Acquired Assets as of the date ARCO has sufficient control over the Acquired entity to satisfy the terms of this Agreement) except to the extent that ARCO must exercise direction and control over the Acquired Assets to assure compliance with this Agreement or the Consent Order.

b. ARCO shall not exercise direction or control over, or influence directly or indirectly, the Acquired Assets, provided, however, that ARCO may exercise only such direction and control over the Acquired Assets as is necessary to assure compliance with this Agreement or the Consent Order.

c. ARCO shall maintain the viability and marketability of the Acquired Assets and shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair their marketability or viability.

d. Except for the single ARCO director, officer, employee, or agent serving on the "New Board" (as defined in subparagraph 2.i), ARCO shall not permit any director, officer, employee, or agent of ARCO to also be a director, officer or employee of the Acquired Assets.

e. Except as required by law or as reported by the auditor (provided for in subparagraph 2.f) and except to the extent that necessary information is exchanged in the course of evaluating the acquisition of the Acquired entity, defending investigations or litigation, obtaining legal advice, acting to assure compliance with this Agreement or the Consent Order (including accomplishing the divestitures), or negotiating agreements to dispose of Acquired Assets, ARCO shall not receive or have access to, or the use of, any of the Acquired Asset's "material confidential information" not in the public domain, except as such

information would be available to ARCO in the normal course of business if the acquisition of the Acquired entity had not taken place. Any such information that is obtained pursuant to this subparagraph shall only be used for the purpose set out in this subparagraph. ("*Material confidential information,*" as used herein, means competitively sensitive or proprietary information not independently known to ARCO from sources other than the Acquired entity, and includes but is not limited to customer lists, customers, price lists, prices, individual transactions, marketing methods, patents, technologies, processes, or other trade secrets).

f. ARCO may retain an independent auditor to monitor the operation of the Acquired Assets. Said auditor may report to ARCO on all aspects of the operation of the Acquired Assets other than information on customer lists, customers, price lists, prices, individual transactions, marketing methods, patents, technologies, processes, or other trade secrets.

g. ARCO shall not change the composition of the management of the Acquired Assets except that the non-ARCO (as defined in subparagraph 2.a hereof) directors or members serving on the New Board (as defined in subparagraph 2.i, hereof) shall have the power to remove employees for cause.

h. All material transactions, out of the ordinary course of business and not precluded by subparagraphs 2.a - 2.g hereof, shall be subject to a majority vote of the New Board (as defined in subparagraph 2.i hereof).

i. ARCO shall separately incorporate the Acquired Assets and shall adopt new Articles of Incorporation and By-laws that are not inconsistent with other provisions of this Agreement. ARCO shall also elect a new three-person board of directors of the Acquired Assets ("New Board"). ARCO may elect the directors to the New Board; *provided, however*, that such New Board shall consist of at least two non-ARCO directors, officers, or employees and no more than one ARCO director, officer, employee, or agent. Except as permitted by this Agreement, the director of the Acquired Assets who is also an ARCO director, officer, employee or agent shall not receive, in his or her capacity as a director, material confidential information and shall not disclose any such information received under this Agreement to ARCO or use it to obtain any advantage for ARCO. Such director shall participate in matters which come before the New Board only for the limited purpose of considering a capital investment or other transac-

tions exceeding $1,000,000 and carrying out ARCO's and the Acquired Asset's responsibilities under this Agreement or the Consent Order. Except as permitted by this Agreement, such director shall not participate in any matter, or attempt to influence the votes of the other directors with respect to matters that would involve a conflict of interest if ARCO and the Acquired Assets were separate and independent entities. Meetings of the New Board during the term of this Agreement shall be stenographically transcribed and the transcripts retained for two (2) years after the termination of this Agreement.

j. Any ARCO employee who obtains or may obtain confidential information under this Agreement shall enter a confidentiality agreement prohibiting disclosure of confidential information until the day after the divestitures required by Paragraph XIII of the Consent Order have been completed.

k. All earnings and profits of the Acquired Assets shall be retained separately in the Acquired Assets. If necessary, ARCO shall provide the Acquired Assets with sufficient working capital to operate at the current rate of operation.

l. Should the Federal Trade Commission seek in any proceeding to compel ARCO (meaning here and hereinafter ARCO including the Acquired Assets) to divest itself of the Acquired entity or to compel ARCO to divest any assets or businesses of the Acquired entity that it may hold, or to seek any other injunctive or equitable relief, ARCO shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the acquisition of the Acquired entity. ARCO also waives all rights to contest the validity of this Agreement.

3. For the purpose of determining or securing compliance with this Agreement, subject to any legally recognized privilege, and upon written request with reasonable notice to ARCO made to its principal office, ARCO shall permit any duly authorized representative or representatives of the Commission:

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

b. Upon five (5) days notice to ARCO, and without restraint or

interference from it, to interview officers or employees of ARCO, who may have counsel present, regarding any such matters.

4. This agreement shall not be binding until approved by the Commission.

IN THE MATTER OF

ROCHE HOLDING LTD., ET AL.

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

Docket C-3315. Complaint, Nov. 28, 1990—Decision, Nov. 28, 1990

This consent order requires, among other things, Roche Holding, Ltd., a Swiss pharmaceutical company, and related American corporations to divest either Genentech's interest in GLC Associates, a partnership between Genentech and Lubrizol, Inc., or GLC's vitamin C assets. Roche also is required to divest its human growth hormone releasing factor business. Both divestitures are to be effected to Commission-approved acquirers within one year after the effective date of the order; otherwise the Commission may appoint a trustee to make the divestitures.

Appearances

For the Commission: *M. Howard Morse* and *Steven A. Newborn.*

For the respondents: *Bertram M. Kantor, Wachtell, Lipton, Rosen & Katz,* New York, N.Y. and *Arthur F. Golden, Davis Polk & Wardwell,* New York, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondents, Roche Holding Ltd., Roche Holdings, Inc., and Hoffman-La Roche Inc. (collectively "Roche"), all subject to the jurisdiction of the Federal Trade Commission, propose to acquire voting securities of Genentech, Inc. ("Genentech"), also subject to the jurisdiction of the Federal Trade Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. 45; and it appearing that a proceeding in respect thereof would be in the public interest, the Commission hereby issues its complaint, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section (5b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

I. RESPONDENTS

1. Respondent Roche Holding Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of Switzerland with its principal executive offices located at Grenzacherstrasse 124, Basle, Switzerland 4002.

2. Respondent Roche Holdings, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of Delaware with its principal executive offices located at 345 Route 17 South, Upper Saddle River, New Jersey.

3. Respondent Hoffman-La Roche Inc. is a corporation organized, existing and doing business under and by virtue of the laws of New Jersey with its principal executive offices located at 340 Kingsland Street, Nutley, New Jersey.

4. Respondent Genentech, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its principal executive offices located at 460 Point San Bruno Boulevard, South San Francisco, California.

II. JURISDICTION

5. Respondents at all times herein have been and now are engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and are corporations whose business or practices are in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. THE PROPOSED ACQUISITION

6. On or about February 2, 1990, Roche entered into an Agreement and Plan of Merger with Genentech which contemplates the acquisition by Roche of a controlling interest in Genentech.

IV. THE RELEVANT MARKETS

7. The relevant product markets in which to analyze the proposed acquisition of Genentech are the research, development, production and marketing of: (1) vitamin C, (2) therapeutics for treatment of human growth hormone deficiency or other short stature deficiency, including human growth hormone and human growth hormone releasing factor, and (3) CD4-based therapeutics for the treatment of AIDS and HIV infection.

8. The relevant geographic market is the United States for all

products, except for vitamin C, for which the relevant geographic market is the world.

V. THE MARKET STRUCTURE

9. The vitamin C market, in both the United States and worldwide, is highly concentrated as measured by the Herfindahl-Hirschmann Index ("HHI") or by the four-firm and eight-firm concentration ratios. Roche is the market leader with a dominant market share. Genentech has developed a new patented process for producing vitamin C using recombinant DNA technology.

10. The production and marketing of therapeutics for treatment of human growth hormone deficiency or other short stature deficiency in the United States is highly concentrated as measured by the HHI or concentration ratios. Genentech has a near-monopoly share of the market, is protected by the Orphan Drug Act, and has sued its only human growth hormone competitor for patent infringement. Roche has conducted advanced clinical trials with a product which would compete with human growth hormone, human growth hormone releasing factor, and has developed and patented human growth hormone releasing factor analogs.

11. Genentech is the most advanced of a limited number of companies developing CD4-based therapeutics for use in the treatment of AIDS/HIV infection. Roche has also engaged in research and development of CD4-based therapeutics and has patent applications pending on its products.

VI. BARRIERS TO ENTRY

12. Entry into each of the relevant markets is difficult and time consuming. FDA regulations create long lead times for the introduction of new drugs; patents create large and often insurmountable barriers to entry.

VII. EFFECTS

13. The effect of the proposed acquisition may be to substantially lessen competition in the relevant markets described above in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the FTC Act, 15 U.S.C. 45, by, among other things:

a. Eliminating actual competition in the relevant markets;
b. Eliminating potential competition in the relevant markets;

c. Enhancing the likelihood of collusion or interdependent coordination between or among the firms in the relevant market;

d. Eliminating respondents as potential entrants and thus preventing a decrease in concentration in the relevant markets; and

e. Enhancing dominant firm patent protection and raising rivals' costs.

VIII. VIOLATIONS CHARGED

14. The acquisition as set forth in paragraph 6 herein, if consummated, violates 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.

15. The Agreement and Plan of Merger described in paragraph 6 herein violates 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

Commissioner Owen dissenting. Commissioner Starek did not participate.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission would charge respondents with violation of Section 7 of the Clayton Act and Section 5 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 a 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, 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 Genentech, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware, with its principal executive offices located at 460 Point San Bruno Boulevard, South San Francisco, CA.

2. Respondent Roche Holding Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of Switzerland with its principal executive offices located at Grenzacherstrasse 124, Basle, Switzerland 4002.

3. Respondent Roche Holdings, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware with its principal executive offices located at 345 Route 17 South, Upper Saddle River, New Jersey.

4. Respondent Hoffmann-La Roche Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the state of New Jersey with its principal executive offices located at 340 Kingsland Street, Nutley, New Jersey.

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

ORDER

I. DEFINITIONS

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

a. "*Genentech*" means Genentech, Inc., a Delaware corporation, its directors, officers, employees, agents and representatives, its predecessors, successors, subsidiaries, divisions, groups and any other corporations, partnerships, joint ventures, companies, and affiliates that Genentech controls, directly or indirectly, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

b. "*Roche*" means Roche Holding Ltd., a Swiss corporation, Roche Holdings, Inc., a Delaware corporation, and Hoffman-La Roche Inc., a New Jersey corporation, their directors, officers, employees, agents and representatives, their predecessors, successors, subsidiaries,

divisions, groups and any other corporations, partnerships, joint ventures, companies, and affiliates that Roche controls, directly or indirectly, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns, but not including Genentech.

c. "*Respondents*" means Genentech and Roche.

d. "*Acquisition*" means Roche's acquisition of any or all voting securities of Genentech pursuant to the Agreement and Plan of Merger between Roche and Genentech dated February 2, 1990.

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

f. "*Patents*" means some, all or any portion of all unexpired patents (including inventor's certificates) and patents issued in the future based upon patent applications filed as of the date this order becomes final, and all substitutions, continuations, continuations-in-part, divisions, renewals, reissues and extensions based on said patents, the applications therefor, or said patent applications.

g. "*Corresponding foreign patents*" means patents in a country other than the United States, entitled to the same priority date (or entitled to the same priority date if it had been timely filed) and based upon the same conception and reduction to practice.

h. "*Process patent*" means a patent whose claims are directed to the methods or manipulative steps used for the manufacture of a particular compound, composition of matter or article of manufacture.

i. "*Product patent*" means a patent which claims a particular compound, composition of matter or article of manufacture.

j. "*Products subject to order*" means Vitamin C, Human Growth Factor, and CD4-Based Therapeutics.

k. "*Vitamin C*" means ascorbic acid, however produced, and products produced as intermediates in the production of ascorbic acid, including but not limited to 2-keto-L-gulonic acid (2-KLG), ketogulonic acid (KGA) and L-ascorbic acid.

l. "*GLC*" means GLC Associates, a partnership between Genentech and the Enterprise Genetics, Inc., a Nevada corporation and wholly-owned indirect subsidiary of the Lubrizol Corporation.

m. "*GLC Vitamin C assets*" means all of GLC's assets relating to Vitamin C, wherever located, including all assets, title, properties, interests, rights and privileges, of whatever nature, tangible and intangible, including without limitation, all patents, trade secrets, technology, and know-how, and chemical and biological substances, and all contractual rights, and including, insofar as they relate to

Vitamin C, books and records, including but not limited to scientific reports, manuals, drawings, specifications, and supplier lists, and the rights, insofar as they related to Vitamin C, to any patents or know-how used by Genentech or GLC in conjunction with the research or development of Vitamin C.

n. "*Human Growth Factor*" means any protein, peptide, or analog thereof, whether produced by recombinant DNA technology, chemical synthesis, purification, or other method, used as a therapeutic for treatment of human growth hormone deficiency, or other short stature deficiency, including but not limited to Human Growth Hormone and Human Growth Hormone Releasing Factor.

o. "*Human Growth Hormone*" means the protein produced by the human pituitary gland or synthetic versions thereof (including versions with an extra methionine amino acid), which stimulates growth and metabolism, used as a therapeutic for treatment of human growth hormone deficiency or other short stature deficiency, whether produced by recombinant DNA technology, chemical synthesis, purification, or other method.

p. "*Human Growth Hormone Releasing Factor*" means growth hormone releasing factor, a polypeptide hormone which stimulates the human pituitary gland to release human growth hormone, or an analog thereof, used as a therapeutic for treatment of human growth hormone deficiency or other short stature deficiency, whether produced by recombinant DNA technology, chemical synthesis, purification, or other method.

q. "*Roche's Human Growth Hormone Releasing Factor Business*" means all of Roche's assets, title, properties, interests, rights and privileges, of whatever nature, tangible and intangible, including without limitation all patents, trade secrets, technology, and know-how, and chemical and biological substances, and all contractual rights (including all rights under the September 15, 1983 Licensing Agreement between Roche and the Salk Institute relating to Human Growth Hormone Releasing Factor), and including, insofar as they relate to Human Growth Hormone Releasing Factor, books and records, including but not limited to the results of research and development efforts by Roche, filings with the U.S. Food and Drug Administration, scientific and clinical reports, manuals, drawings, specifications, and supplier lists, and the exclusive rights, insofar as they relate to Human Growth Hormone Releasing Factor, to any patents or know-how used by Roche in conjunction with the research

or development of Human Growth Hormone Releasing Factor or delivery systems for Human Growth Hormone Releasing Factor, and including Roche's Human Growth Hormone Releasing Factor inventory wherever located; provided that, tangible assets used both in the research, development or production of Human Growth Hormone Releasing Factor as well as in the research, development or production of other compounds shall not be considered part of Roche's Human Growth Hormone Releasing Factor Business.

r. "*Roche's Human Growth Hormone Releasing Factor Patent Portfolio*" means all Roche United States Patents and Corresponding Foreign Patents, and all United States Patents and Corresponding Foreign Patents of other persons licensed to Roche for which Roche has the right to grant licenses or sublicenses, which may be infringed by the manufacture, use or sale of Human Growth Hormone Releasing Factor, including but not limited to the patents listed in Exhibit A to this order.

s. "CD4-Based Therapeutic" means a product containing CD4, soluble CD4, truncated soluble CD4, a CD4 fragment, or a CD4 conjugate, CD4 adhesion variant, CD4 hybrid, or CD4 fusion protein, used for the treatment of HIV-infected patients, whether asymptomatic or with ARC or AIDS, including but not limited to soluble CD4, CD4-IgG, CD4-IgG_3 CD4-IgM, CD4-Mu, and CD4-PE.

t. "*Roche's CD4-Based Therapeutics Patent Portfolio*" means all Roche United States Patents, and all United States Patents of other persons licensed to Roche for which Roche has the right to grant licenses or sublicenses, which may be infringed by the manufacture, use or sale of CD4-Based Therapeutics, including but not limited to the patent application listed in Exhibit B to this order.

II. GLC DIVESTITURE

It is ordered, That:

A. Respondents shall, within twelve (12) months after the date this order becomes final, divest, absolutely and in good faith, either Genentech's interest in GLC or the GLC Vitamin C Assets.

B. Respondents shall divest Genentech's interest in GLC or the GLC Vitamin C Assets only to an acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission. The purpose of this divestiture is to ensure the continuation of GLC or the GLC Vitamin C Assets as an ongoing enterprise engaged in the same business in which GLC is

presently employed and to remedy the lessening of competition resulting from the Acquisition alleged in the Commission's complaint.

C. Respondents shall take such action as is necessary to maintain the viability and marketability of GLC, and to prevent the destruction, removal or impairment of any assets subject to divestiture pursuant to this paragraph II except in the ordinary course of business and except for ordinary wear and tear.

D. Within thirty (30) days after the consummation of the divestiture required by this paragraph II, Genentech will commence teaching a reasonable number of persons designated by the acquirer how to produce Vitamin C using the GLC technology, if requested by the acquirer. Training sessions shall be conducted at the acquirer's facilities or at such other place as is mutually satisfactory to Genentech and the acquirer and shall continue for a period of time sufficient to satisfy the management of the acquirer that its personnel are well enough trained to produce Vitamin C as well as Genentech, *provided however*, that in no event shall Genentech be required to continue the training program for a period of more than one year. The acquirer will pay Genentech its expenses incurred in conducting such training sessions including salaries of its employees and travel and lodging costs.

III. GRF DIVESTITURE

It is ordered, That:

A. Roche shall, within twelve (12) months after the date this order becomes final, divest, absolutely and in good faith, Roche's Human Growth Hormone Releasing Factor Business.

B. The divestiture required by this order shall be made only to an acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission. The purpose of this divestiture is to ensure the continuation of Roche's Human Growth Hormone Releasing Factor Business as an ongoing enterprise engaged in the same business in which it is presently employed and to remedy the lessening of competition resulting from the Acquisition alleged in the Commission's complaint.

C. Roche shall take such action as is necessary to maintain the viability and marketability of Roche's Human Growth Hormone Releasing Factor Business, and to prevent the destruction, removal or impairment of any assets subject to divestiture pursuant to this paragraph III except in the ordinary course of business and except for

ordinary wear and tear. Pending the divestiture pursuant to this paragraph III, Roche shall not divulge to Genentech or use for Genentech's benefit any "material confidential information" relating to Roche's Human Growth Hormone Releasing Factor Business not in the public domain, except as such information would be available to Genentech in the normal course of business if the Acquisition had not taken place. ("*Material confidential information,*" as used herein, means competitively sensitive or proprietary information not independently known to Genentech from sources other than Roche, and includes but is not limited to patents, technologies, processes, or other trade secrets).

D. Within thirty (30) days after the consummation of the divestiture required by this paragraph III, Roche will commence teaching a reasonable number of persons designated by the acquirer how to produce Human Growth Hormone Releasing Factor, if requested by the acquirer. Training sessions shall be conducted at the acquirer's facilities or at such other place as is mutually satisfactory to Roche and the acquirer and shall continue for a period of time sufficient to satisfy the management of the acquirer that its personnel are well enough trained to produce Human Growth Hormone Releasing Factor as well as Roche, *provided however*, that in no event shall Roche be required to continue the training program for a period of more than one year. The acquirer will pay Roche its expenses incurred in conducting such training sessions including salaries of its employees and travel and lodging costs.

IV. TRUSTEE DIVESTITURE

It is further ordered, That:

A. If respondents have not divested, absolutely and in good faith and with the Commission's approval, Genentech's interest in GLC or the GLC Vitamin C Assets as required by paragraph II within the twelve-month period provided for in paragraph II, respondents shall consent to the appointment of a trustee by the Commission to divest Genentech's interest in GLC or the GLC Vitamin C Assets. If respondents have not divested, absolutely and in good faith and with the Commission's approval, Roche's Human Growth Hormone Releasing Factor Business as required by paragraph III within the twelve-month period provided for in paragraph III, respondents shall consent to the appointment of a trustee by the Commission to divest Roche's Human Growth Hormone Releasing Factor Business. 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, for any violation of this order, respondents shall consent to the appointment of one or more trustees 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 respondents to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph IV of this order, the following terms and conditions shall apply:

(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.

(2) The trustee shall have the exclusive power and authority, subject to the prior approval of the Commission, to accomplish the divestitures required by paragraph II and paragraph III of this order. The trustee shall have twelve (12) months from the date of appointment to accomplish the divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of such 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 by the court for a court-appointed trustee; *provided, however,* that the Commission or court may only extend the divestiture period two (2) times.

(3) The trustee shall have full and complete access to the personnel, books, records, and facilities relating to Genentech's interest in GLC, and GLC Vitamin C Assets, Roche's Human Growth Hormone Releasing Factor Business, and any other relevant information as the trustee may reasonably request. Respondents shall develop such financial or other information as the trustee may reasonably request and shall cooperate with any reasonable request of 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 the respondents shall extend the time for divestiture under

this paragraph IV in an amount equal to the delay, as determined by the Commission, or the court for a court-appointed trustee.

(4) 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 at no minimum price and the purpose of the divestitures as stated in paragraphs II and III of this order and subject to the prior approval of the Commission. If the trustee receives bona fide offers from more than one prospective acquirer, and if the Commission approves more than one such acquirer, the trustee shall divest to the acquirer selected by respondents from among those approved by the Commission.

(5) 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 authority to employ, at the cost and expense of respondents, such consultants, accountants, attorneys or other persons reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and for all expenses incurred. After approval by the Commission and, in the case of a court-approved trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of respondents and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's accomplishing the divestiture of Genentech's interest in GLC or the GLC Vitamin C Assets or Roche's Human Growth Hormone Releasing Factor Business.

(6) Within sixty (60) days after appointment of the trustee, and subject to the prior approval of the Commission, and, in the case of a court-appointed trustee, of the court, the respondents shall, consistent with the provisions of this order, execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

(7) Except for cases of misfeasance, negligence, willful or wanton acts, or bad faith by the trustee, the trustee shall not be liable to respondents for any action taken or not taken in the performance of the trusteeship. 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, performance of the

trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, claims, or expenses result from misfeasance, negligence, willful or wanton acts, or bad faith by the trustee.

(8) If the trustees ceases to act or fails to act diligently, one or more substitute trustees shall be appointed in the same manner as provided in paragraph IV of this order.

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

(10) The trustee shall have no obligation or authority to operate or maintain the GLC Vitamin C Assets or Roche's Human Growth Hormone Releasing Factor Business.

V. LICENSING ALTERNATIVE

It is further ordered, That:

A. If respondents have not divested Roche's Human Growth Hormone Releasing Factor Business as required by paragraph III within the twelve-month period provided for in paragraph III, the Commission, rather than appointing a trustee pursuant to paragraph IV, in its sole discretion, may require that Roche, upon written application made within ten (10) years of the date this order becomes final, grant non-exclusive licenses to produce and sell Human Growth Hormone Releasing Factor under Roche's Human Growth Hormone Releasing Factor Patent Portfolio for the life of all patents in the portfolio, at a royalty not in excess of 1% of net sales (if only Process Patents are licensed) or 3% of net sales (if any Product Patents are licensed) and reasonable and customary terms and conditions, to any and all sole proprietorships, partnerships, corporations or other business entities which state an intention to produce or sell a Human Growth Hormone Releasing Factor in the United States, or research and develop a Human Growth Hormone Releasing Factor for purposes of later producing or selling a Human Growth Hormone Releasing Factor in the United States.

B. Neither the Commission's invocation of its option under this paragraph V, nor its decision not to invoke its option under this paragraph V shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it for any failure by respondents to comply with this order.

VI. CD4 MANDATORY LICENSING

It is further ordered, That Roche shall, upon written application made within ten (10) years of the date this order becomes final, grant non-exclusive licenses to produce and sell CD4-Based Therapeutics under Roche's CD4-Based Therapeutic Patent Portfolio for the life of all patents in the portfolio, at a royalty not in excess of 1% of net sales (if only Process Patents are licensed) or 3% of net sales (if any Product Patents are licensed) and reasonable and customary terms and conditions, to any and all sole proprietorships, partnerships, corporations or other business entities which state an intention to produce or sell a CD4-Based Therapeutic in the United States, or research and develop a CD4-Based Therapeutic for purposes of later producing or selling a CD4-Based Therapeutic in the United States.

VII. DISPOSITION OF PATENTS

It is further ordered, That respondents shall not dispose or permit the disposition of any patents or rights thereunder so as to deprive them of the power to grant or cause to be granted the licenses required by this order; *provided that,* if, after the expiration of three (3) years from the date this order becomes final for any patent which has issued prior to the date this order becomes final, or three (3) years from the date of issuance of any patent which has not issued as of the date this order becomes final, if no license has been requested under such patent, respondents may abandon and dedicate to the public such patent.

VIII. PATENT VALIDITY

It is further ordered, That nothing herein shall be deemed to prevent any person from attacking in any proceeding or controversy the validity, scope or enforceability of any present or future patent, nor shall this order be construed as imputing any validity, enforceability, or value to any such patent.

IX. PUBLICATION OF PATENT AVAILABILITY

It is further ordered, That within sixty (60) days after the date this order becomes final and annually thereafter for nine (9) years, respondents shall publish in the Official Gazette of the United States Patent Office a notice (1) identifying by number, title, date of issue, and subject matter, or by other appropriate means, all United States Patents which are available for license pursuant to the terms of this

order; (2) stating that respondents will grant licenses pursuant to the terms of this order; and (3) stating that a copy of this order and a copy of all Patents subject to licensing under the order are available from respondents upon written request. Respondents shall provide a copy of this order and the most recent edition of such notice to all persons who inquire as to the availability of a license for any Patent subject to licensing under this order, and shall provide copies, for a reasonable copying fee, of any Patents subject to licensing under this order, upon request by any person.

X. HOLD SEPARATE AGREEMENT

It is further ordered, That the respondents shall comply with all terms of the Agreement to Hold Separate, attached hereto and made a part hereof as Appendix I. Said Agreement shall continue in effect until respondents' divestiture obligations with respect to GLC under paragraphs II and IV of the order are satisfied, or until such other time as the Agreement to Hold Separate provides.

XI. PRIOR APPROVAL

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, each respondent shall cease and desist from acquiring, without the prior approval of the Commission, directly or indirectly, through subsidiaries or otherwise, except in the ordinary course of business, assets used in, or more than 1% of the stock or share capital of or any interest in any company engaged in, clinical development or the manufacture or sale in the United States of any Products Subject to order, or any exclusive rights whether by license or otherwise to any United States Patents for use in the clinical development or the manufacture or sale of any Products Subject to order. This paragraph XI shall not apply to any acquisition of a nonexclusive license to any United States Patents with respect to any Products Subject to order and shall not apply to the acquisition of any United States Patents or any exclusive license to any United States Patents, with respect to any Products Subject to order, for a present value of less than one million dollars ($1,000,000) including initial payments and expected future royalties.

XII. COMPLIANCE REPORTS

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and

every sixty (60) days thereafter until respondents have fully satisfied the divestiture obligations of this order, respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intended to comply, are complying, and have complied with the order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of all contacts or negotiations with prospective acquirers for the divestitures required by this order, including the identity of all parties contacted. Respondents also shall include in their compliance reports copies of all written communications to and from such parties, and all internal memoranda, reports, and recommendations concerning the required divestitures.

B. One year from the date this order becomes final and annually thereafter for nine (9) years, respondents shall file with the Commission a verified written report of their compliance with paragraphs V (if invoked by the Commission), VI, VII, IX and XI of this order.

XIII. INVESTIGATION

It is further ordered, That for the purposes of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to respondents made to their principal offices, respondents shall make available to any duly authorized representatives of the Commission:

A. All books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession of under the control of respondents relating to any matters contained in this order, for inspection and copying during office hours and in the presence of counsel; and

B. Upon five (5) days' notice to respondents, and without restraint or interference from respondents, for interview, officers or employees of respondents, who may have counsel present, regarding such matters. Officers and employees of respondents whose place of employment is outside the United States will be made available on reasonable notice.

Information or documents obtained by the Commission pursuant to this paragraph XIII shall be accorded such confidential treatment as is available under Sections 6(f) and 21 of the Federal Trade Commission Act, 15 U.S.C. 46(f) and 57b-2.

XIV. CORPORATE CHANGES

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

Commissioner Owen dissenting. Commissioner Starek did not participate.

EXHIBIT A

U.S. Patent No. 4,622,312 issued Nov. 11, 1986; Arthur M. Felix, Edgar P. Heimer, Thomas F. Mowels; Growth hormone releasing factor analogs; Appl. No. 653,163; Filed Sept. 24, 1984

U.S. Patent No. 4,649,131 issued March 10, 1987; Arthur M. Felix, Edgar P. Heimer, Thomas F. Mowels; Growth hormone releasing factor analogs; Appl. No. 762,891; Filed Aug. 6, 1985

U.S. Patent No. 4,728,609 issued March 1, 1988; Ram S. Bhatt, Kenneth J. Collier, Robert M. Crowl, Mohindar S. Poonian; Recombinant growth hormone releasing factor; Appl. No. 778-779; Filed Sept. 24, 1985

U.S. Patent No. 4,732,972 issued March 22, 1988; Arthur M. Felix, Edgar P. Heimer, Polypeptides having growth hormone releasing activity; Appl. No. 789,922; Filed Oct. 21, 1985

U.S. Patent No. 4,734,399 issued March 29, 1988; Arthur M. Felix, Edgar P. Heimer, Thomas F. Mowels; Growth hormone releasing factor analogs; Appl. No. 922,572; Filed Oct. 23, 1986

EXHIBIT B

U.S. Patent Pending; Klaus Karjalainen, Andre Traunecker; Chimeric CD4-immunoglobulin polypeptides; Appl. No. 510,773; Filed April 18, 1990

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate (the "Agreement") is by and among Genentech, Inc. ("Genentech"), a corporation organized and

existing under the laws of the State of Delaware, with its principal executive offices located at 460 Point San Bruno Boulevard, South San Francisco, Ca. Roche Holding Ltd., a corporation organized and existing under the laws of Switzerland, with its principal executive offices located at Grenzacherstrasse 124, Basle, Switzerland 4002; Roche Holdings, Inc., a corporation organized and existing under the laws of the state of Delaware, with its principal executive offices located at 345 Route 17 South, Upper Saddle River, New Jersey; and Hoffmann-La Roche Inc., a corporation organized and existing under the laws of the state of New Jersey, with its principal executive offices located at 340 Kingsland Street, Nutley, New Jersey (collectively "Roche"); and the Federal Trade Commission (the "Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively, the "Parties").

Premises

Whereas, on February 2, 1990, Genentech and Roche entered into an Agreement and Plan of Merger which contemplates the acquisition by Roche of a controlling interest in Genentech (hereinafter the "Acquisition"); and

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

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

Whereas, the Commission is concerned that if an understanding is not reached, preserving the *status quo ante* and holding separate GLC (as defined in the Consent Order) during the period prior to the divestiture of GLC's Vitamin C Assets (as defined in the Consent Order) or the divestiture of Genentech's interest in GLC pursuant to paragraph II or IV of the Consent Order, divestiture might be less than an effective remedy; and

Whereas, the purpose of this Agreement and the Consent Order is to:

(i) Preserve the viability and marketability of GLC as an indepen-

dent business pending the divestiture of the GLC Vitamin C Assets or Genentech's interest in GLC, and

(ii) Preserve GLC as an ongoing business engaged in the same business in which it is presently employed in the event that divestiture is not achieved; and

(iii) Remedy any possible anticompetitive effects of the Acquisition, and

Whereas, Genentech and Roche (collectively "respondents") entering into this Agreement shall in no way be construed as an admission that the Acquisition is unlawful; and

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

Now, therefore, the Parties agree, upon understanding that the Commission has not yet determined whether the Acquisition would be challenged, and in consideration of the Commission's agreement that, unless the Commission determines to reject the Consent Order, it will not seek further relief from respondents with respect to the Acquisition, except that the Commission may take action at some later date with respect to the effect, if any, of the acquisition on competition with respect to alpha interferon, and may exercise any and all rights to enforce this Agreement and the Consent Order to which it is annexed and made a part thereof, and in the event the required divestiture is not accomplished, to seek divestiture of such assets as are held separate pursuant to this Agreement, as follows:

1. Respondents agree to execute and be bound by the attached Consent Order and agree that terms defined in the Consent Order shall have the same meanings when used therein.

2. Respondents agree that from the date this Agreement is accepted until the earliest of the dates listed in subparagraphs 2.a - 2.c, they will comply with the provisions of paragraph 3 of this Agreement:

a. Three business days after the Commission withdraws its acceptance of the Consent Order pursuant to the provisions of Section 2.34 of the Commission's Rules;

b. One hundred twenty (120) days after publication in the Federal Register of the Consent Order unless by that date the Commission has finally approved and issued the Consent Order, if respondents, at their option, have chosen to terminate this Agreement to Hold Separate,

which they may do by delivering written notice of termination to the Commission, which termination shall be effective ten (10) days after the Commission's receipt of such notice if the Commission does not finally approve and issue the Consent Order before the end of that ten (10) day period;

c. If the Commission issues the Consent Order, the GLC divestiture required by the Consent Order has been completed.

3. Respondents will hold GLC, including all its assets associated with the research and development of vitamin C, as it is presently constituted, separate and apart on the following terms and conditions:

a. GLC, as it is presently constituted, shall be held separate and apart and shall be operated independently of Roche; *provided, however,* that Roche may exercise only such direction and control over GLC as is necessary to assure compliance with this Agreement.

b. Roche shall not exercise direction or control over, or influence directly or indirectly, GLC or any of its operations or businesses; *provided, however,* that Roche may exercise only such direction and control over GLC as is necessary to assure compliance with this Agreement.

c. Respondents shall maintain the viability and marketability of GLC and shall not sell, dispose of, or transfer any assets, property or business of GLC (other than in the ordinary course of business), or encumber or otherwise impair its marketability or viability. Respondents shall refrain from taking any actions which may cause any material adverse change in the business or financial condition of GLC.

d. Respondents shall continue to promote and maintain GLC, including without limitation the levels of research and development efforts presently associated with said business, and shall maintain and preserve all of the intangible rights and other assets of said business so that said business can be divested in accordance with the requirements of the Consent Order.

e. Except as required by law, and except to the extent necessary to defend against investigations or litigation, or to negotiate an agreement to divest GLC in compliance with the Consent Order, Roche shall not receive or have access to, or the use of, any "material confidential information" of GLC not in the public domain, except as such information would be available to Roche in the ordinary course of business if the Acquisition had not taken place. Any such information that is obtained pursuant to this subparagraph shall only be used for the purposes set out in this subparagraph. ("*Material confidential*

information," as used herein, means competitively sensitive or proprietary information not independently known to Roche from sources other than GLC, and includes but is not limited to patents, technologies, processes, production costs, or other trade secrets).

f. Except as permitted by this Agreement, Roche shall not participate in any matter, or attempt to influence GLC with respect to matters that would involve a conflict of interest if Roche and GLC were separate and independent entities. Meetings of the Board or Management Committee of GLC during the term of this Agreement shall be stenographically transcribed and the transcripts retained for two (2) years after the termination of this Agreement.

g. All earnings and profits of GLC shall be retained separately in GLC. If necessary, Roche and Genentech shall provide GLC with sufficient working capital to operate at GLC's current rate of operation.

h. Respondents shall maintain separate financial and operating records and shall prepare separate financial statements for GLC and shall provide the Commission's Bureau of Competition with quarterly and annual financial statements within ten days of their availability.

i. Should the Federal Trade Commission seek in any proceeding to compel respondents to divest Genentech or GLC or any assets of GLC that they may hold, or to seek any other injunctive or equitable relief, respondents shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the Acquisition to be consummated. Respondents also waive all rights to contest the validity of this Agreement.

4. For the purpose of determining or securing compliance with this Agreement, subject to any legally recognized privilege, and upon written request with reasonable notice to respondents, respondents shall permit any duly authorized representative or representatives of the Commission:

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

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

matters. Officers and employees of respondents whose place of employment is outside the United States will be made available on reasonable notice.

5. Any information or documents obtained by the Commission pursuant to paragraph 4 shall be accorded such confidential treatment as is available under Sections 6(f) and 21 of the Federal Trade Commission Act, 15 U.S.C. 46(f) and 57b-2.

6. This agreement shall not be binding until approved by the Commission.

SEPARATE STATEMENT OF COMMISSIONER ANDREW J. STRENIO, JR.

Although I preferred securing relief in additional markets, I concur with the majority in finding sufficient grounds to accept the consent agreement.

DISSENTING STATEMENT OF COMMISSIONER DEBORAH K. OWEN

In the matter of the acquisition of Genentech, Inc. by Roche Holdings Ltd., and its United States subsidiaries, Roche Holdings, Inc. and Hoffman-La Roche Inc., the Federal Trade Commission has today accepted a consent agreement and issued a final order based on the doctrine of actual potential competition. In finding reason to believe that this acquisition would violate Section 7 of the Sherman Act and Section 5 of the Clayton Act, the Commission has departed from past precedent in potential competition cases, *B.A.T. Industries, Ltd.*, 104 FTC 916 (1984), as well as from the *U.S. Department of Justice Merger Guidelines*, 4 Trade Reg. Rep. (CCH) ¶13,103 at §4.1. I dissent.

The consistent theme of case precedent and the Merger Guidelines is that before a merger will be challenged under a theory of actual potential competition, the prospective entrant must be willing and able imminently to enter a market which is not now performing competitively. In the instant case, the Commission alleged anticompetitive effect and took relief in markets where, in my judgment, there is substantial doubt that the prospective entrant is willing to enter; there is only speculation that the prospective entrant is able to enter; and/or it is certain that entry is not imminent. Moreover, there are as yet no firms or products in one market, so drawing conclusions about competitive performance in that market in the relatively distant future

is speculative at best. What appears to be the Commission's approach to entry in this potential competition case diverges from the position that the Commission has taken on entry in mergers between horizontal competitors. In the latter instance, the Commission looks at entry to determine whether firms not now in the market would defeat any anticompetitive behavior by firms currently in the market. Traditionally, under the standard used by the Commission, and in accord with Section 3.3 of the *Merger Guidelines*, new entry must generally be expected to take place within two years before the prospect of that entry will cause the Commission not to challenge a merger that would otherwise be objectionable. Further, as this Commission and its sister antitrust enforcement agency have recently made clear, the prospect of such entry must be supported by more than mere hypothesis. Consonant with these standards, *B.A.T. Industries* requires "clear proof" that entry would occur within the "near future" before a merger is challenged on the basis of actual potential competition. 104 FTC at 925-926.

In today's action, the Commission has apparently found that there is reason to believe that a merger would substantially lessen competition in markets where, in my opinion, there could not be competition between the firms for periods well in excess of two or three years, and it is debatable whether the support was more than "mere hypothesis". No justification for this divergence in the treatment of entry has been provided,[1] and the apparent inconsistency in antitrust analysis is troubling.

[1] While there may indeed be industries for which the appropriate time period to evaluate entry in horizontal merger cases and actual potential competition cases is longer than two years, this does not provide a basis for using a substantially longer time period for analysis of entry in potential competition cases than in horizontal competition cases.

IN THE MATTER OF

BUDGET RENT A CAR CORPORATION

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

Docket C-3316. Complaint, Dec. 27, 1990—Decision, Dec. 27, 1990

This consent order prohibits, among other things, Budget Rent A Car Corporation ("Budget") from failing to inspect and, if appropriate, repair its rental vehicles covered by manufacturers' safety recall notices within a reasonable period of time after receiving such notices. In addition, the consent order provides the respondent the option, if it chooses not to inspect and repair, to disclose to prospective renters of affected vehicles, prior to the signing of the rental agreement, that the vehicles are subject to safety recall notices and have not been inspected or repaired, and to describe to prospective renters the defect in question.

Appearances

For the Commission: *Steven H. Toporoff* and *Lydia B. Parnes.*

For the respondent: *John Baer, Keck, Mahin & Cate,* Chicago, IL.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Budget Rent A Car Corporation, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereto would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Budget Rent A Car Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 200 North Michigan Avenue, Chicago, Illinois.

PAR. 2. Respondent is now, and for sometime in the past, has been engaged in the business of offering automobiles to the general public for rent.

PAR. 3. In the course and conduct of its business, respondent rents automobiles to the general public in various States of the United States and the District of Columbia. By these and other operations, respondent engages in, and at all times mentioned above has been engaged in, a substantial course of business in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 4. In the course and conduct of its business, respondent receives written notification, sometimes called a recall notice, from automobile manufacturers sent pursuant to the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. 1391 *et seq.*, and the rules and regulations promulgated thereunder, 49 CFR Part 577, that some of respondent's automobiles may contain safety-related defects.

PAR. 5. Respondent has rented to the general public automobiles that were subject to recall notices without inspecting within a reasonable period of time and, if appropriate, repairing such automobiles even though, with respect to such recalls, substantial numbers of consumers had undertaken inspections and appropriate repairs.

PAR. 6. In the circumstances described in paragraph five, respondent has failed to disclose to some renters that their automobiles were subject to recall notices, but were not inspected to determine whether they contained the safety-related defect(s). These facts, if known by some prospective renters or purchasers, would likely affect their consideration of whether to rent or purchase automobiles from respondent. Therefore, respondent has failed to disclose material facts to renters of its automobiles.

PAR. 7. Respondent's acts and practices in failing to disclose to renters that it did not inspect vehicles that were subject to recall notices within a reasonable period of time, herein alleged, were and are all to the prejudice and injury of the public and constituted, and now constitute, unfair acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, as amended, 15 U.S.C. 45(a).

Commissioner Strenio voted in the negative. Commissioner Starek did not participate.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent, Budget Rent A Car

Corporation, and the respondent having been furnished thereafter with a copy of a complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined it had reason to believe that the respondent has violated the Federal Trade Commission Act, and that the complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

(1) Budget Rent A Car Corporation ("Budget") is a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware, with its principal office and place of business located at 200 North Michigan Avenue, Chicago, Illinois.

(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

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

1. "*Affected Vehicles*" means respondent's rental fleet vehicles that are covered by recall notices received by respondent.

2. "*Rental fleet vehicles*" means those vehicles that respondent's corporate owned locations rent to the public.

3. "*Manufacturer*" means any person or entity engaged in the manufacturing or assembling of motor vehicles.

4. "*Recall notice*" means written notification from manufacturers to owners under the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. 1391 *et seq.*, and the rules and regulations promulgated thereunder, 49 CFR Part 577, that their vehicles may contain safety-related defects.

5. "*Reasonable period of time*" means a period of time not to exceed 120 days from the date the affected vehicle's notice of safety recall was received by respondent.

I.

It is ordered, That respondent Budget Rent A Car Corporation, a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or through any corporate owned locations' advertising, offering for rental, or rental of any rental fleet vehicle in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing within a reasonable period of time after receipt of a recall notice, to inspect or to have inspected each such affected vehicle and to repair or to have repaired each such affected vehicle found to contain the safety defect(s); *provided, however,* that failure to comply with respect to any specific affected vehicle shall not be deemed to be a violation of this order if respondent can demonstrate that such failure to comply was due to circumstances beyond its control, including, but not limited to, the unavailability of replacement parts to complete that affected vehicle's safety recall procedures, and if respondent can show that, upon learning of such failure to comply, it complied at the earliest practicable date.

II.

It is further ordered, That respondent may elect, in lieu of the obligations set forth in Part I of this order, to disclose to each prospective renter of an affected vehicle, prior to the signing of a rental agreement, that the affected vehicle is subject to a safety recall notice and has not been inspected or repaired; *provided, however,* that if made, the disclosure shall be set forth in a separate document attached to the rental agreement and: (1) shall state that the specific car is the subject of a safety recall; (2) shall describe the safety recall in question; (3) shall describe the nature of the defect; and it shall be initialed by the consumer.

III.

It is further ordered, That, for a period of two (2) years, respondent shall maintain at the place said documents are routinely kept and upon request make available to the Federal Trade Commission for inspection and copying:

1. Any recall notice received subsequent to the date of this order and records sufficient to show the date or dates it was received from the manufacturer;
2. Records disclosing the vehicle identification number, make and model of every affected vehicle; and
3. Documents evidencing the inspection and, if required, the repair of affected vehicles.

IV.

It is further ordered, That respondent shall:

1. Distribute a copy of this order to all officers and any employee having responsibilities for recall procedures; and
2. Distribute a copy of this order to all its existing and future U.S. licensees.

V.

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

VI.

It is further ordered, That respondent shall, within one hundred twenty (120) days after the date of service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

Commissioner Strenio voted in the negative. Commissioner Starek did not participate.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

Last year, the Commission and Budget Rent A Car Corporation signed a consent agreement. That agreement, which settled allegations that Budget had failed to disclose that some of its rental cars had unrepaired safety defects, required Budget to inspect and, if necessary, repair cars subject to federal safety recalls within 120 days or to disclose to consumers that such cars had not been inspected or repaired. After considering comments criticizing that agreement, the Commission has determined to modify the original consent agreement. Because the modified agreement with Budget is a significant improvement over the original agreement, I am concurring in the Commission's decision to approve it, although I would have preferred to require Budget to give consumers an important "early warning" disclosure that I believe they deserve.

Part II of the original agreement would have allowed Budget to elect to disclose that an uninspected vehicle "is subject to a recall notice," but failed to require Budget to specify what the defect is. Consumer response to safety recall campaigns varies because consumers are more concerned about some possible safety defects than others. The modified consent agreement between the Commission and Budget requires Budget to give each prospective renter a written description of the particular safety defect in question before renting a car that has not been inspected or repaired, which is a significant improvement over the original agreement.

But the timing of a disclosure may be just as important as its content. That is why I also favored adding to the agreement an additional requirement that Budget's reservation agents inform each consumer who calls to reserve a rental car if there is any possibility that he or she will get an uninspected or unrepaired car. Rental car customers who first learn of a possible safety problem after arriving at the rental counter may be taken by surprise and left with no realistic alternative to accepting what is offered to them. Hurried consumers may be very reluctant to turn down a car, even if it is subject to a safety recall, particularly if they are told that no other car or only a more expensive car is available. The Commission required a similar disclosure in a recent case involving another rental car firm,[1] and I believe it should do the same here.

[1] In *General Rent-A-Car Systems, Inc.*, C-3255 (consent order issued June 13, 1989), the Commission required a rental car firm to disclose make and model information to consumers when they made reservations.