

Complaint

119 F.T.C.

IN THE MATTER OF

LOCKHEED CORPORATION, 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-3576. Complaint, May 9, 1995--Decision, May 9, 1995

This consent order allows, among other things, the completion of the merger between Lockheed Corporation and Martin Marietta Corporation, and requires the merged firm to open up the teaming arrangements that each individual firm has with infrared sensor producers in order to restore competition for certain types of military satellites. The consent order also prohibits certain divisions of the merged firm from gaining access through other divisions to competitively sensitive information about competitors' satellite launch vehicles or military aircraft.

Appearances

For the Commission: *Ann B. Malester* and *Laura A. Wilkinson*.

For the respondents: *Richard Parker* and *David Beddon*,
O'Melveny & Meyers, Washington, D.C. *Raymond Jacobson*,
Howrey & Simon, Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that respondent Lockheed Corporation ("Lockheed"), a corporation subject to the jurisdiction of the Commission, has agreed to merge with respondent Martin Marietta Corporation ("Martin Marietta"), a corporation subject to the jurisdiction of the Commission, forming a newly created entity respondent Lockheed Martin Corporation ("Lockheed Martin"), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act as amended, ("FTC Act"), 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof

would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITIONS

1. "*Space Based Early Warning System*" means any satellite system designed to be used for tactical warning and attack assessment, theater and strategic missile defense, and related military purposes by the United States Department of Defense, including but not limited to the Space Based InfraRed ("SBIR") system and successor systems considered by the United States Department of Defense to follow SBIR programmatically.

2. "*Sensors*" means electro-optical sensors for use in any Space Based Early Warning System.

3. "*Lockheed/Hughes Teaming Agreement*" means the teaming agreement entered into on January 15, 1985, between Lockheed and the Electro-Optical and Data Systems Group of the Hughes Aircraft Company for the purpose of submitting a proposal to the United States Department of Defense for the Demonstration/Validation phase of the Follow-On Early Warning System, and all subsequent amendments or other modifications thereto.

4. "*Martin Marietta/Grumman Teaming Agreement*" means the teaming agreement entered into on June 20, 1994, between Martin Marietta and Grumman for the purpose of bidding on or otherwise competing for the United States Department of Defense's Alert, Locate and Report Missiles program, and all subsequent amendments or other modifications thereto.

5. "*Military Aircraft*" means aircraft manufactured for sale to the United States Department of Defense, whether for use by the United States Department of Defense or for transfer to a foreign military sale purchaser.

6. "*LANTIRN Systems*" means dual pod, externally mounted, Low-Altitude Navigation and Targeting Infrared for Night Systems manufactured by Martin Marietta for use on Military Aircraft.

7. "*Expendable Launch Vehicle*" means a vehicle that launches a Satellite(s) from the Earth's surface and is consumed during the process of launching a Satellite(s) and therefore cannot be launched more than one time.

8. "*Satellite*" means an unmanned machine that is launched from the Earth's surface for the purpose of transmitting data back to Earth

and which is designed either to orbit the Earth or travel away from the Earth.

9. "*Respondents*" means Lockheed, Martin Marietta and Lockheed Martin.

II. RESPONDENTS

10. Respondent Lockheed Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 4500 Park Granada Boulevard, Calabasas, California.

11. Respondent Lockheed Corporation is engaged in among other things the research, development, manufacture and sale of: Satellites, including Satellites for use in Space Based Early Warning Systems; Expendable Launch Vehicles; and Military Aircraft.

12. Respondent Martin Marietta Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Maryland, with its office and principal place of business located at 6801 Rockledge Drive, Bethesda, Maryland.

13. Respondent Martin Marietta Corporation is engaged in among other things the research, development, manufacture and sale of: Satellites, including Satellites for use in Space Based Early Warning Systems; Expendable Launch Vehicles; and LANTIRN Systems.

14. Respondent Lockheed Martin Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Maryland, with its office and principal place of business located at 6801 Rockledge Drive, Bethesda, Maryland.

15. Respondent Lockheed Martin Corporation, through the proposed merger of Lockheed and Martin Marietta, would be engaged in among other things the research, development, manufacture and sale of: Satellites, including Satellites for use in Space Based Early Warning Systems; Expendable Launch Vehicles; LANTIRN Systems; and Military Aircraft.

III. JURISDICTION

16. Respondents are, and at all times relevant herein have been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and are corporations whose business is in or affects commerce as "commerce" is defined in

Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

IV. THE MERGER

17. On or about August 29, 1994, respondents entered into an agreement and Plan of Reorganization whereby respondents would engage in a series of related transactions resulting in a newly created corporation, Lockheed Martin. The value of the transaction is in excess of \$9 billion ("Merger").

V. THE RELEVANT MARKETS

18. The relevant lines of commerce are:

- a. The research, development, manufacture and sale of Satellites, including but not limited to Satellites for use in Space Based Early Warning Systems;
- b. The research, development, manufacture and sale of Sensors;
- c. The research, development, manufacture and sale of Military Aircraft;
- d. The research, development, manufacture and sale of LANTIRN Systems; and
- e. The research, development, manufacture and sale of Expendable Launch Vehicles.

19. The United States is the relevant geographic area in which to analyze the effects of the Merger in all the relevant lines of commerce.

VI. STRUCTURE OF THE MARKETS

20. Because of the exclusive nature of the Lockheed/Hughes Teaming Agreement and the Martin Marietta/Grumman Teaming Agreement, the market for the research, development, manufacture and sale of Satellites for use in Space Based Early Warning Systems is highly concentrated as measured by the Herfindahl-Hirschmann Index ("HHI") or the two-firm and four-firm concentration ratios ("concentration ratios").

21. Respondents are actual competitors in the relevant market for the research, development, manufacture and sale of Satellites for use in Space Based Early Warning Systems.

22. The market for the research, development, manufacture and sale of Sensors is highly concentrated as measured by the HHI or concentration ratios.

23. The market for the research, development, manufacture and sale of LANTIRN Systems is highly concentrated as measured by the HHI or concentration ratios.

24. Respondents, through the proposed Merger, would be engaged in the research, development, manufacture and sale of both Military Aircraft and LANTIRN Systems, which are used in Military Aircraft.

25. Respondents, through the proposed Merger, would be engaged in the research, development, manufacture and sale of a wide range of Expendable Launch Vehicles and Satellites, which are launched from the Earth's surface by Expendable Launch Vehicles.

VII. BARRIERS TO ENTRY

26. Because of the exclusive nature of the Lockheed/Hughes Teaming Agreement and the Martin Marietta/Grumman Teaming Agreement, entry into the research, development, manufacture and sale of Satellites for use in Space Based Early Warning Systems is difficult and unlikely.

27. Entry into the market for the research, development, manufacture and sale of Sensors is difficult and unlikely.

28. Entry into the research, development, manufacture and sale of LANTIRN Systems is difficult and unlikely.

VIII. EFFECTS OF THE MERGER

29. The effects of the Merger, if consummated, may be substantially to lessen competition or to tend to create a monopoly in the markets for research, development, manufacture and sale of: Satellites for use in Space Based Early Warning Systems; Military Aircraft; and Expendable Launch Vehicles in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45, in the following ways, among others:

a. Actual, direct and substantial competition between respondents in the market for the research, development, manufacture and sale of Satellites for use in Space Based Early Warning Systems will be eliminated;

b. Respondents may disadvantage Military Aircraft competitors by modifying LANTIRN Systems in a manner that raises the costs of competing Military Aircraft;

c. Respondents may gain access to competitively sensitive non-public information concerning other Military Aircraft manufacturers, whereby:

(1) Actual competition between respondents and Military Aircraft manufacturers will be reduced; and

(2) Advancements in Military Aircraft research, development, innovation and quality will be reduced; and

d. Respondents may gain access to competitively sensitive non-public information concerning other Expendable Launch Vehicle manufacturers, whereby:

(1) Actual competition between respondents and Expendable Launch Vehicle manufacturers will be reduced; and

(2) Advancements in Expendable Launch Vehicle research, development, innovation and quality will be reduced.

IX. VIOLATIONS CHARGED

30. The Merger described in paragraph seventeen, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

31. The Merger agreement described in paragraph seventeen constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed merger of respondent Lockheed Corporation ("Lockheed") and respondent Martin Marietta

Corporation ("Martin Marietta"), forming respondent Lockheed Martin Corporation ("Lockheed Martin"), and it now appearing that Lockheed, Martin Marietta and Lockheed Martin, hereinafter sometimes referred to as "respondents," having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed Consent Agreement and Interim Agreement and placed such agreements on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons 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 Lockheed is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware with its office and principal place of business located at 4500 Park Granada Boulevard, Calabasas, California.
2. Respondent Martin Marietta is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Maryland, with its office and principal place of business located at 6801 Rockledge Drive, Bethesda, Maryland.

3. Respondent Lockheed Martin is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Maryland, with its office and principal place of business located at 6801 Rockledge Drive, Bethesda, Maryland.

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

ORDER

I.

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

A. "*Lockheed*" means Lockheed Corporation and its predecessors, successors, subsidiaries, divisions, groups and affiliates controlled by Lockheed, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

B. "*Missile Systems*" means the Missile Systems Division of Lockheed Missiles & Space Company, Inc., an entity with its principal place of business at 1111 Lockheed Way, Sunnyvale, California, which is engaged in, among other things, the research, development, manufacture and sale of Expendable Launch Vehicles, and its subsidiaries, divisions, groups and affiliates controlled by Missile Systems, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

C. "*Commercial Space*" means Lockheed Commercial Space Company, Inc., an entity with its principal place of business at 1111 Lockheed Way, Sunnyvale, California, and Lockheed-Khrunichev-Energia International ("LKEI"), a joint venture between Lockheed Commercial Space Company, Inc., Khrunichev Enterprise and Energia Scientific-Productive Entity with its principal place of business at 2099 Gateway Place, Suite 220, San Jose, California, which are engaged in, among other things, the research, development, manufacture, marketing and sale of Expendable Launch Vehicles, and its subsidiaries, divisions, joint venture partners, groups and affiliates controlled by Commercial Space, and their respective

directors, officers, employees, agents and representatives, and their respective successors and assigns.

D. "*Space Systems*" means the Space Systems Division of Lockheed Missiles & Space Company, Inc., an entity with its principal place of business at 1111 Lockheed Way, Sunnyvale, California, which is engaged in, among other things, the research, development, manufacture and sale of Satellites, and its subsidiaries, divisions, groups and affiliates controlled by Space Systems, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

E. "*Aeronautical Systems*" means Lockheed Aeronautical Systems Group, an entity with its principal place of business at 2859 Paces Ferry, Suite 1800, Atlanta, Georgia, which is engaged in, among other things, the research, development, manufacture and sale of Military Aircraft, and its subsidiaries, divisions, groups and affiliates controlled by Aeronautical Systems, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

F. "*Martin Marietta*" means Martin Marietta Corporation and its predecessors, successors, subsidiaries, divisions, groups and affiliates controlled by Martin Marietta, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

G. "*Astronautics*" means Martin Marietta's Astronautics Company, an entity with its principal place of business at P.O. Box 179, Denver, Colorado, which is engaged in, among other things, the research, development, manufacture and sale of Satellites and Expendable Launch Vehicles, and its subsidiaries, divisions, groups and affiliates controlled by Astronautics, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

H. "*Astro Space*" means Martin Marietta's Astro Space Company, an entity with its principal place of business at P.O. Box 800, Princeton, New Jersey, which is engaged in, among other things, the research, development, manufacture and sale of Satellites, and its subsidiaries, divisions, groups and affiliates controlled by Astro Space, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

I. "*Electronics and Missiles*" means Martin Marietta's Electronics and Missiles Company, an entity with its principal place of business

at 5600 Sand Lake Road, Orlando, Florida, which is engaged in, among other things, the manufacture and sale of LANTIRN Systems, and its subsidiaries, divisions, groups and affiliates controlled by Electronics and Missiles, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

J. "*Lockheed Martin*" means Lockheed Martin Corporation and its predecessors, successors, subsidiaries, divisions, groups and affiliates controlled by Lockheed Martin, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

K. "*Respondents*" means Lockheed, Martin Marietta and Lockheed Martin.

L. "*Hughes*" means GM Hughes Electronics Corporation, a corporation, organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 7200 Hughes Terrace, Los Angeles, California.

M. "*Grumman*" means Northrop Grumman Corporation, a corporation, organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1840 Century Park East, Los Angeles, California.

N. "*Person*" means any natural person, corporate entity, partnership, association, joint venture, government entity, trust or other business or legal entity.

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

P. "*Lockheed/Hughes Teaming Agreement*" means the teaming agreement entered into on January 15, 1985, between Lockheed and the Electro-Optical and Data Systems Group of the Hughes Aircraft Company for the purpose of submitting a proposal to the United States Department of Defense for the Demonstration/Validation phase of the Follow-On Early Warning System, and all subsequent amendments or other modifications thereto.

Q. "*Martin Marietta/Grumman Teaming Agreement*" means the teaming agreement entered into on June 20, 1994, between Martin Marietta and Grumman for the purpose of bidding on or otherwise competing for the United States Department of Defense's Alert, Locate and Report Missiles program, and all subsequent amendments or other modifications thereto.

R. "*Space Based Early Warning System*" means any Satellite system designed to be used for tactical warning and attack assessment, theater and strategic missile defense, and related military purposes by the United States Department of Defense, including but not limited to the Space Based InfraRed ("SBIR") system and successor systems considered by the United States Department of Defense to follow SBIR programmatically.

S. "*Military Aircraft*" means aircraft manufactured for sale to the United States Department of Defense, whether for use by the United States Department of Defense or for transfer to a foreign military sale purchaser.

T. "*LANTIRN Systems*" means dual pod, externally mounted, Low-Altitude Navigation and Targeting Infrared for Night Systems manufactured by Martin Marietta for use on Military Aircraft.

U. "*Expendable Launch Vehicle*" means a vehicle that launches a Satellite(s) from the Earth's surface that is consumed during the process of launching a Satellite(s) and therefore cannot be launched more than one time.

V. "*Satellite*" means an unmanned machine that is launched from the Earth's surface for the purpose of transmitting data back to Earth and which is designed either to orbit the Earth or travel away from the Earth.

W. "*Non-Public LANTIRN Information*" means any information not in the public domain furnished by any Military Aircraft manufacturer to Electronics and Missiles in its capacity as the provider of LANTIRN Systems, and (1) if written information, designated in writing by the Military Aircraft manufacturer as proprietary information by an appropriate legend, marking, stamp, or positive written identification on the face thereof, or (2) if oral, visual or other information, identified as proprietary information in writing by the Military Aircraft manufacturer prior to the disclosure or within thirty (30) days after such disclosure. Non-Public LANTIRN Information shall not include: (i) information already known to respondents, (ii) information which subsequently falls within the public domain through no violation of this order by respondents, (iii) information which subsequently becomes known to respondents from a third party not in breach of a confidential disclosure agreement, or (iv) information after six (6) years from the date of disclosure of such Non-Public LANTIRN Information to respondents, or such other

period as agreed to in writing by respondents and the provider of the information.

X. "*Non-Public ELV Information*" means any information not in the public domain furnished by an Expendable Launch Vehicle manufacturer to Space Systems, Astro Space or Astronautics in their capacities as providers of Satellites, and (1) if written information, designated in writing by the Expendable Launch Vehicle manufacturer as proprietary information by an appropriate legend, marking, stamp, or positive written identification on the face thereof, or (2) if oral, visual or other information, identified as proprietary information in writing by the Expendable Launch Vehicle manufacturer prior to the disclosure or within thirty (30) days after such disclosure. Non-Public ELV Information shall not include: (i) information already known to respondents, (ii) information which subsequently falls within the public domain through no violation of this order by respondents, (iii) information which subsequently becomes known to respondents from a third party not in breach of a confidential disclosure agreement, or (iv) information after six (6) years from the date of disclosure of such Non-Public ELV Information to respondents, or such other period as agreed to in writing by respondents and the provider of the information.

Y. "*Merger*" means the merger of Martin Marietta and Lockheed.

II.

It is further ordered, That respondents shall not enforce or attempt to enforce any provision contained in the Lockheed/Hughes Teaming Agreement that prohibits in any way Hughes from (1) competing against Lockheed for any part of any Space Based Early Warning System, or (2) teaming or otherwise contracting with any other person for the purpose of bidding on, developing, manufacturing, or supplying any part of any Space Based Early Warning System. Respondents shall not enforce or attempt to enforce any proprietary rights in the electro-optical sensors developed by Hughes in connection with or by virtue of the Lockheed/Hughes Teaming Agreement in a manner that would inhibit Hughes from competing with respondents for any part of any Space Based Early Warning System.

III.

It is further ordered, That respondents shall not enforce or attempt to enforce any provision contained in the Martin Marietta/Grumman Teaming Agreement that prohibits in any way Grumman from (1) competing against Martin Marietta for any part of any Space Based Early Warning System, or (2) teaming or otherwise contracting with any other person for the purpose of bidding on, developing, manufacturing, or supplying any part of any Space Based Early Warning System. Respondents shall not enforce or attempt to enforce any proprietary rights in the electro-optical sensors developed by Grumman in connection with or by virtue of the Martin Marietta/Grumman Teaming Agreement in a manner that would inhibit Grumman from competing with respondents for any part of any Space Based Early Warning System.

IV.

It is further ordered, That:

A. Respondents shall not, absent the prior written consent of the proprietor of Non-Public LANTIRN Information, provide, disclose, or otherwise make available to Aeronautical Systems any Non-Public LANTIRN Information; and

B. Respondents shall use any Non-Public LANTIRN Information obtained by Electronics and Missiles only in Electronics and Missiles' capacity as the provider of LANTIRN Systems, absent the prior written consent of the proprietor of Non-Public LANTIRN Information.

V.

It is further ordered, That respondents shall deliver a copy of this order to any United States Military Aircraft manufacturer prior to obtaining any Non-Public LANTIRN Information relating to the manufacturer's Military Aircraft either from the Military Aircraft's manufacturer or through the Merger; provided that for Non-Public LANTIRN Information described in paragraph I.W.(2) of this order, respondents shall deliver a copy of this order within ten (10) days of the written identification by the Military Aircraft manufacturer.

VI.

It is further ordered, That respondents shall not make any modifications, upgrades, or other changes to LANTIRN Systems or any component or subcomponent thereof that discriminate against any other Military Aircraft manufacturer with regard to the performance of the Military Aircraft or the time or cost required to integrate LANTIRN Systems into the Military Aircraft. Provided, however, that nothing in this paragraph shall prohibit respondents from making any such modifications, upgrades, or other changes that are: (1) necessary to meet competition from (a) foreign military aircraft, or (b) other products designed to provide targeting, terrain following, or night navigation functions comparable in performance to LANTIRN Systems; or (2) approved in writing by the Secretary of Defense or his or her designee.

VII.

It is further ordered, That:

A. Respondents shall not, absent the prior written consent of the proprietor of Non-Public ELV Information, provide, disclose, or otherwise make available to Astronautics, Missile Systems or Commercial Space any Non-Public ELV Information obtained by Astro Space or Space Systems; and

B. Respondents shall use any Non-Public ELV Information obtained by Astronautics, Astro Space or Space Systems only in Astronautics's, Astro Space's and Space System's capacities as providers of Satellites, absent the prior written consent of the proprietor of Non-Public ELV Information.

VIII.

It is further ordered, That respondents shall deliver a copy of this order to any United States Expendable Launch Vehicle manufacturer prior to obtaining any Non-Public ELV Information relating to the manufacturer's Expendable Launch Vehicle(s) either from the Expendable Launch Vehicle manufacturer or through the Merger; provided that for Non-Public ELV Information described in paragraph I.X.(2) of this order, respondents shall deliver a copy of

this order within ten (10) days of the written identification by the Expendable Launch Vehicle manufacturer.

IX.

It is further ordered, That respondents shall comply with all terms of the Interim Agreement, attached to this order and made a part hereof as Appendix I. Said Interim Agreement shall continue in effect until the provisions in paragraphs II, III, IV, V, VI, VII and VIII are complied with or until such other time as is stated in said Interim Agreement.

X.

It is further ordered, That within sixty (60) days of the date this order becomes final and annually for the next ten (10) years on the anniversary of the date this order becomes final, and at such other times as the Commission may require, respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with this order. To the extent not prohibited by United States Government national security requirements, respondents shall include in their reports information sufficient to identify (a) all modifications, upgrades, or other changes to LANTIRN Systems for which respondents have requested and/or received written approval from the Secretary of Defense or his or her designee pursuant to paragraph VI of this order, (b) all United States Military Aircraft manufacturers with whom respondents have entered into an agreement for the research, development, manufacture or sale of LANTIRN Systems, and (c) all United States Expendable Launch Vehicle manufacturers with whom respondents have entered into an agreement for the research, development, manufacture or sale of Satellites.

XI.

It is further ordered, That respondents shall notify the Commission at least thirty days prior to any proposed change in respondents, such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution

of subsidiaries or any other change in respondents that may affect compliance obligations arising out of this order.

XII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege and applicable United States Government national security requirements, upon written request, and on reasonable notice, any respondent shall permit any duly authorized representative 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 that respondent relating to any matters contained in this order; and

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

XIII.

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

APPENDIX I

INTERIM AGREEMENT

This Interim Agreement is by and between Lockheed Corporation ("Lockheed"), a corporation organized and existing under the laws of the State of Delaware, Martin Marietta Corporation ("Martin Marietta"), a corporation organized and existing under the laws of the State of Maryland, Lockheed Martin Corporation ("Lockheed Martin"), a corporation organized and existing under the laws of the State of Maryland (collectively referred to as "proposed respondents"), 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, Martin Marietta and Lockheed have proposed the merger of their businesses by the formation of a new corporation, Lockheed Martin; and

Whereas, the Commission is now investigating the proposed Merger to determine if it would violate any of the statutes the Commission enforces; and

Whereas, if the Commission accepts the Agreement Containing Consent Order ("Consent Agreement"), the Commission will place it on the public record for a period of at least sixty (60) days and subsequently may either withdraw such acceptance or issue and serve its complaint and decision in disposition of the proceeding 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 competition during the period prior to the final acceptance of the Consent Agreement by the Commission (after the 60-day public notice period), there may be interim competitive harm and divestiture or other relief resulting from a proceeding challenging the legality of the proposed Merger might not be possible, or might be less than an effective remedy; and

Whereas, proposed respondents entering into this Interim Agreement shall in no way be construed as an admission by proposed respondents that the proposed Merger constitutes a violation of any statute; and

Whereas, proposed respondents understand that no act or transaction contemplated by this Interim 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 Interim Agreement.

Now, therefore, the Parties agree, upon the understanding that the Commission has not yet determined whether the proposed Merger will be challenged, and in consideration of the Commission's agreement that, unless the Commission determines to reject the Consent Agreement, it will not seek further relief from proposed respondents with respect to the proposed Merger, except that the Commission may exercise any and all rights to enforce this Interim

Agreement, the Consent Agreement, and the final order in this matter, and, in the event that proposed respondents do not comply with the terms of this Interim Agreement, to seek further relief pursuant to Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and Section 7 of the Clayton Act, 15 U.S.C. 18, as follows:

1. Proposed respondents agree to execute and be bound by the terms of the order contained in the Consent Agreement, as if it were final, from the date the Consent Agreement is accepted for public comment by the Commission.

2. Proposed respondents agree to deliver within three (3) days of the date the Consent Agreement is accepted for public comment by the Commission, a copy of the Consent Agreement and a copy of this Interim Agreement to the United States Department of Defense, GM Hughes Electronics Corporation, Loral Corporation, Northrop Grumman Corporation, Rockwell International Corporation and TRW Incorporated.

3. Proposed respondents agree to submit within thirty (30) days of the date the Consent Agreement is signed by the proposed respondents, an initial report, pursuant to Section 2.33 of the Commission's Rules, signed by the proposed respondents setting forth in detail the manner in which the proposed respondents will comply with paragraphs II, III, IV, V, VI, VII and VIII of the Consent Agreement.

4. Proposed respondents agree that, from the date the Consent Agreement is accepted for public comment by the Commission until the first of the dates listed in subparagraphs 4.a and 4.b, they will comply with the provisions of this Interim Agreement:

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

b. The date the Commission finally accepts the Consent Agreement and issues its Decision and Order.

5. Proposed respondents waive all rights to contest the validity of this Interim Agreement.

6. For the purpose of determining or securing compliance with this Interim Agreement, subject to any legally recognized privilege and applicable United States Government national security

requirements, and upon written request, and on reasonable notice, to any proposed respondent made to its principal office, that proposed respondent shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of that proposed respondent 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 that proposed respondent relating to compliance with this Interim Agreement; and

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

7. This Interim Agreement shall not be binding until accepted by the Commission.

IN THE MATTER OF

THE PENN TRAFFIC COMPANY

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-3577. Complaint, May 15, 1995--Decision, May 15, 1995

This consent order permits, among other things, the Penn Traffic Company to acquire a number of Acme supermarkets from American Stores Company, but requires it to divest, to a Commission approved acquirer or acquirers within twelve months, one supermarket in each of the three Pennsylvania areas designated (Towanda, Mount Carmel, and Pittston). If the divestitures are not completed on time, the consent order permits the Commission to appoint a trustee to complete the transactions. In addition, the consent order requires the respondent, for ten years, to obtain Commission approval before acquiring any interest in any entity that owns or operates a supermarket in any of the three areas designated.

Appearances

For the Commission: *Ronald Rowe, Marimichael Skubel and William Baer.*

For the respondent: *Ken Hart, Donovan, Leisure, Newton & Irvine, New York, N.Y. Chris MacAvoy, Collier, Shannon, Rill & Scott, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that respondent The Penn Traffic Company ("Penn Traffic"), a corporation, subject to the jurisdiction of the Commission, has acquired certain assets of American Stores Company ("American"), in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

DEFINITIONS

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

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

THE PENN TRAFFIC COMPANY

2. Respondent Penn Traffic is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive offices located at 1200 State Fair Boulevard, Syracuse, New York.

3. Respondent Penn Traffic is, and at all times relevant herein has been, engaged in the operation of supermarkets in Pennsylvania.

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

ACQUISITION

5. On or about September 30, 1994, Penn Traffic entered into an agreement with American whereby Penn Traffic is to purchase 45 supermarkets, which operate under the trade name "Acme," from American's subsidiary, Acme Markets, Inc.

TRADE AND COMMERCE

6. Relevant line of commerce in which to analyze the effects of the acquisition described herein is the retail sale of food and grocery products in supermarkets.

7. Relevant sections of the country in which to analyze the acquisition described herein are the following locations:

a) The Towanda, Pennsylvania area, which includes the Borough of Towanda and the townships of Wysox, North Towanda, and Monroeton;

b) The Mount Carmel, Pennsylvania area, which includes the Borough of Mount Carmel and the Township of Mount Carmel; and

c) The Pittston, Pennsylvania area, which includes the city of Pittston, the townships of Pittston and Jenkins, and the boroughs of Dupont, Avoca, Hughestown, Duryea, Yatesville, and Laflin, Pennsylvania.

MARKET STRUCTURE

8. The retail sale of food and grocery products in supermarkets in the relevant sections of the country is concentrated, whether measured by the Herfindahl-Hirschmann Index (commonly referred to as "HHI") or by two-firm and four-firm concentration ratios.

ENTRY CONDITIONS

9. Entry into the retail sale of food and grocery products in supermarkets in the relevant sections of the country is difficult and would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant sections of the country.

ACTUAL COMPETITION

10. Prior to the acquisition described herein, Penn Traffic and American were actual competitors in the relevant line of commerce and sections of the country.

EFFECTS

11. The effect of the acquisition may be substantially to lessen competition in the relevant lines of commerce in the relevant sections of the country in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

- a. By eliminating direct competition between supermarkets owned or controlled by Penn Traffic and supermarkets owned or controlled by American;
- b. By increasing the likelihood that Penn Traffic will unilaterally exercise market power; and
- c. By increasing the likelihood of, or facilitating, collusion or coordinated interaction,

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

VIOLATIONS CHARGED

12. The acquisition by Penn Traffic of assets of American violates 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.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the acquisition by The Penn Traffic Company ("respondent") of certain assets of American Stores Company and respondent, having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration, and which, if issued by the Commission, would charge respondent with violations of the Clayton Act and Federal Trade Commission Act; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an

admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, 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 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 comments filed thereafter by interested persons 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 The Penn Traffic Company is a Delaware corporation, with its office and principal place of business at 1200 State Fair Boulevard, Syracuse, New York.

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

ORDER

I.

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

A. "*Respondent*" or "*Penn Traffic*" means The Penn Traffic Company, its predecessors, subsidiaries, divisions, and groups and affiliates controlled by The Penn Traffic Company, their successors and assigns, and their directors, officers, employees, agents, and representatives.

B. "*Assets to be divested*" means the assets described in paragraph II. A. of this order.

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

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

II.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, within twelve months from the date this order becomes final:

1. The "Acme" supermarket located at River and Park Streets, Borough of Towanda, Pennsylvania;
2. The "Acme" supermarket located on Kennedy Boulevard in Pittston, Pennsylvania; and
3. An "Acme" or a Penn Traffic supermarket located in the Township of Mount Carmel, Pennsylvania.

The assets to be divested shall include the grocery business operated, and all assets, leases, properties, business and goodwill, tangible and intangible, utilized in the distribution or sale of groceries at the locations that are divested.

B. Respondent shall divest the assets to be divested 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 ensure the continuation of the assets to be divested as ongoing, viable enterprises engaged in the supermarket business and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission's complaint.

C. Pending divestiture of such assets to be divested, respondent shall take such actions as are necessary to maintain the viability and marketability of such assets to be divested and to prevent the

destruction, removal, wasting, deterioration, or impairment of such assets to be divested except in the ordinary course of business and except for ordinary wear and tear.

D. Respondent shall comply with all the terms of the Asset Maintenance Agreement attached to this order and made a part hereof as Appendix I. The Asset Maintenance Agreement shall continue in effect until such time as respondent has divested all of the assets to be divested.

III.

It is further ordered, That:

A. If respondent has not divested, absolutely and in good faith and with the Commission's prior approval, such assets to be divested within twelve months from the date this order becomes final, the Commission may appoint a trustee to divest any of the remaining assets to be divested. 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, respondent shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the respondent to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III. A. of this order, respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after written notice by the staff of the Commission to respondent of the identity of any proposed

trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest any of the remaining assets to be divested.

3. Within ten (10) days after appointment of the trustee, respondent shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestitures required by this order.

4. The trustee shall have twelve (12) months from the date the Commission or court approves the trust agreement described in paragraph III. B. 3. to accomplish the divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this 12-month period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to any of the remaining assets to be divested or to any other relevant information, as the trustee may request. Respondent shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the divestitures. Any delays in divestiture caused by respondent shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondent's absolute and unconditional obligation to divest at no minimum price. The divestitures shall be made in the manner and to the acquirer or acquirers as set out in paragraph II. of this order; provided, however, if the trustee receives *bona fide* offers in any of the areas specified in this order for a supermarket to be divested from more than one

acquiring entity, and if the Commission determines to approve more than one acquiring entity, the trustee shall divest to the acquiring entity or entities selected by respondent from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the 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 the respondent, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the assets to be divested to satisfy paragraph II.

8. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III. A. of this order.

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

11. The trustee shall have no obligation or authority to operate or maintain the assets to be divested.

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

IV.

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

A. Acquire any stock, share capital, equity, or other interest in any supermarket or leasehold interest in any supermarket, including any facility that has operated as a supermarket within six (6) months of the date of the proposed acquisition, located in a) the Towanda, Pennsylvania area, which includes the Borough of Towanda and the townships of Wysox, North Towanda, and Monroeton; b) the Mount Carmel, Pennsylvania area, which includes the Borough of Mount Carmel and the Township of Mount Carmel; and c) the Pittston, Pennsylvania area, which includes the city of Pittston, the townships of Pittston and Jenkins, and the boroughs of Dupont, Avoca, Hughestown, Duryea, Yatesville, and Laflin, Pennsylvania.

B. Acquire any stock, share capital, equity, or other interest in any entity that owns any interest in or operates any supermarket or owned any interest in or operated any supermarket within six (6) months of the date of the proposed acquisition in a) the Towanda, Pennsylvania area, which includes the Borough of Towanda and the townships of Wysox, North Towanda, and Monroeton; b) the Mount Carmel, Pennsylvania area, which includes the Borough of Mount Carmel, and the Township of Mount Carmel; and c) the Pittston, Pennsylvania area, which includes the city of Pittston, the townships of Pittston and Jenkins, and the boroughs of Dupont, Avoca, Hughestown, Duryea, Yatesville, and Laflin, Pennsylvania.

Provided, however, that these prohibitions shall not apply to the construction of new facilities or the leasing of facilities that have not operated as supermarkets within six months of the date of the offer to lease.

V.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondent has fully complied with the provisions of paragraphs II. or III. of this order, respondent shall submit to the Commission verified written reports setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraphs II. and III. of this order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II. and III. of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

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

VI.

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

VII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, respondent shall permit any duly authorized representative of the Commission:

A. Upon reasonable notice to respondent, access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondent relating to any matters contained in this order; and

B. Upon reasonable notice to respondent and without restraint or interference from it, to interview respondent or officers, directors, or employees of respondent in the presence of counsel.

VIII.

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

APPENDIX I

ASSET MAINTENANCE AGREEMENT

This Asset Maintenance Agreement ("Agreement") is by and between The Penn Traffic Company ("Penn Traffic"), a corporation organized under the laws of the State of Delaware, with its principal offices located at 1200 State Fair Boulevard, Syracuse, New York, and the Federal Trade Commission ("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, Penn Traffic, pursuant to an agreement dated September 30, 1994, agreed to purchase certain assets of American Stores Company (hereinafter "Acquisition"); 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 agreement containing consent order, the Commission is required to place it on the public record for a period of sixty (60) days for public comment 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 agreement is not reached preserving the *status quo ante* of the assets to be divested as described in paragraph II. A. of the attached agreement containing consent order ("Assets") during the period prior to their divestiture, when those Assets will be in the hands of Penn Traffic, that any divestiture resulting from any administrative proceeding challenging the legality of the Acquisition might not be possible, or might produce a less than effective remedy; and

Whereas, the Commission is concerned that prior to divestiture to the acquirer, it may be necessary to preserve the continued viability and competitiveness of the Assets; and

Whereas, the purpose of this Agreement and of the consent order is to preserve the Assets pending the divestiture to the acquirer approved by the Federal Trade Commission under the terms of the order, in order to remedy any anticompetitive effects of the Acquisition; and

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

Whereas, Penn Traffic 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, in consideration of the Commission's agreement that, unless the Commission determines to reject the consent order, it will not seek further relief from the parties with respect to the Acquisition, except that the Commission may exercise any and all rights to enforce this Agreement and the consent order annexed hereto and made a part thereof, and, in the event the required divestiture is not accomplished, to appoint a trustee to seek divestiture of the Assets, the Parties agree as follows:

TERMS OF AGREEMENT

1. Penn Traffic agrees to execute, and upon its issuance to be bound by, the attached consent order. The Parties further agree that each term defined in the attached consent order shall have the same meaning in this Agreement.

2. Unless the Commission brings an action to seek to enjoin the proposed acquisition pursuant to Section 13(b) of the Federal Trade

Commission Act, 15 U.S.C. 53(b), and obtains a temporary restraining order or preliminary injunction blocking the proposed acquisition, Penn Traffic will be free to close the Acquisition after 11:59 p.m., January 17, 1995.

3. Penn Traffic agrees that from the date this Agreement is accepted until the earliest of the dates listed in subparagraphs III.A - III.B it will comply with the provisions 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; or

b. On the day the divestiture set out in the consent order has been completed.

4. From the time Penn Traffic acquires the Assets until the divestiture set out in the consent order has been completed, Penn Traffic shall maintain the viability, competitiveness and marketability of the Assets, and shall not cause the wasting or deterioration of the Assets, nor shall it sell, transfer, encumber or otherwise impair their marketability or viability.

5. Should the Commission seek in any proceeding to compel Penn Traffic to divest itself of the Assets or to seek any other injunctive or equitable relief, Penn Traffic 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 not sought to enjoin the Acquisition. Penn Traffic 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 Penn Traffic to its principal offices, Penn Traffic shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of Penn Traffic, 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 Penn Traffic relating to compliance with this Agreement; and

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

7. This Agreement shall not be binding until approved by the Commission.

Complaint

119 F.T.C.

IN THE MATTER OF

FELSON BUILDERS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE
TRUTH IN LENDING ACT, REGULATION Z AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket C-3578. Complaint, May 15, 1995--Decision, May 15, 1995

This consent order requires, among other things, three California firms and an officer to comply with the full disclosure requirements of the Truth in Lending Act and Regulation Z, its implementing regulation, in advertising credit terms, and requires the respondents to make full written disclosure of the true costs and terms of the financing prior to consummation of credit agreements.

Appearances

For the Commission: *Jeffrey A. Klurfeld* and *Harold G. Sodergren*.

For the respondents: *Kenneth A. Cheitlin, McShane & Felson*, Walnut Creek, CA.

COMPLAINT

The Federal Trade Commission, having reason to believe that Felson Builders, Inc., a corporation; Diamond Crossing Associates, L.P., a limited partnership, dba D.C. Funding; Elmhurst Partners, L.P., a limited partnership, dba Elmhurst Funding; and Joseph L. Felson, individually and as an officer of Felson Builders, Inc., hereinafter sometimes referred to as respondents, have violated the Truth in Lending Act ("TILA"), 15 U.S.C. 1601-1667e, as amended, and its implementing Regulation Z, 12 CFR 226, and the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 41-58., as amended, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint and alleges:

PARAGRAPH 1. (a) Felson Builders, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California.

(b) Diamond Crossing Associates, L.P., dba D.C. Funding, is a limited partnership, organized, existing and doing business under and by virtue of the laws of the State of California.

(c) Elmhurst Partners, L.P., dba Elmhurst Funding, is a limited partnership, organized, existing and doing business under and by virtue of the laws of the State of California.

(d) Each of the above entities has its principal place of business at 1290 B Street, Suite 210, Hayward, California.

(e) Joseph L. Felson is an officer of Felson Builders, Inc. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. His principal place of business is the same as that of the corporate respondent.

PAR. 2. Respondent Felson Builders, Inc. has been and is now engaged in the construction, advertising, and offering for sale of homes to the public. In the course and conduct of its business, respondent Felson Builders, Inc. has, on numerous occasions, disseminated, or caused to be disseminated, advertisements in Chinese-language and in English, which offer "consumer credit," as that term is defined in the TILA and Regulation Z, to prospective purchasers of its homes.

PAR. 3. Respondents Diamond Crossing Associates, L.P., and Elmhurst Partners, L.P. have been and are now engaged in the selling of said homes, and in the advertising, offering and extending of "consumer credit" to the public for the purchase of said homes, and are "creditors," as those terms are defined in the TILA and Regulation Z.

PAR. 4. The acts and practices of respondents alleged in this complaint have been and are in or affecting commerce, as "commerce" is defined in the FTC Act.

PAR. 5. Respondents Diamond Crossing Associates, L.P., and Elmhurst Partners, L.P., in the course and conduct of their business, have failed to furnish consumers the disclosures as required by Sections 226.17(a) and 226.18 of Regulation Z, 12 CFR 226.17(a) and 226.18.

PAR. 6. The aforesaid practice of respondents Diamond Crossing Associates, L.P., and Elmhurst Partners, L.P., violates Section 128 of the TILA, 15 U.S.C. 1638, and Sections 226.17(a) and 226.18 of Regulation Z, 12 CFR 226.17(a) and 226.18, and constitutes an unfair

and deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

PAR. 7. Respondents Diamond Crossing Associates, L.P., and Elmhurst Partners, L.P., in the course and conduct of their business, have failed to furnish consumers prior to the consummation of a consumer credit transaction the disclosures as required by Sections 226.17(b) and 226.18 of Regulation Z, 12 CFR 226.17(b) and 226.18.

PAR. 8. The aforesaid practice of respondents Diamond Crossing Associates, L.P., and Elmhurst Partners, L.P., violates Section 128 of the TILA, 15 U.S.C. 1638, and Sections 226.17(b) and 226.18 of Regulation Z, 12 CFR 226.17(b) and 226.18, and constitutes an unfair and deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

PAR. 9. At all times material to this complaint, Section 226.24(c) of Regulation Z, 12 CFR 226.24(c), required that if any of the following terms is set forth in an advertisement:

- (i) The amount or percentage of any downpayment;
- (ii) The number of payments or period of repayment;
- (iii) The amount of any payment;
- (iv) The amount of any finance charge;

then it shall state the following terms, as applicable:

- (i) The amount or percentage of the downpayment;
- (ii) The terms of repayment;
- (iii) The "annual percentage rate," using that term or the abbreviation "APR," and if the rate may be increased after consummation, that fact.

PAR. 10. Respondents Felson Builders, Inc., Diamond Crossing Associates, L.P., Elmhurst Partners, L.P., and Joseph L. Felson, individually and as an officer of Felson Builders, Inc., in the course and conduct of their business, in connection with the advertising of consumer credit, have, on numerous occasions, disseminated, or caused to be disseminated, advertisements that state the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, but fail to state all of the terms required by Section

226.24(c) of Regulation Z, 12 CFR 226.24(c), including the amount of any balloon payment.

PAR. 11. The aforesaid practice of respondents Felson Builders, Inc., Diamond Crossing Associates, L.P., Elmhurst Partners, L.P., and Joseph L. Felson, individually and as an officer of Felson Builders, Inc., violates Section 144 of the TILA, 15 U.S.C. 1664, and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c), and constitutes an unfair and deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

PAR. 12. At all times material to this complaint, Section 226.24(b) of Regulation Z, 12 CFR 226.24(b), required that if an advertisement states a rate of a finance charge, it shall state the rate as an "annual percentage rate," using that term or the abbreviation "APR."

PAR. 13. Respondents Felson Builders, Inc., Diamond Crossing Associates, L.P., Elmhurst Partners, L.P., and Joseph L. Felson, individually and as an officer of Felson Builders, Inc., in the course and conduct of their business, in connection with the advertising of consumer credit, have, on numerous occasions, disseminated, or caused to be disseminated, advertisements that failed to state the rate of a finance charge as an "annual percentage rate," using that term or the abbreviation "APR."

PAR. 14. The aforesaid practice of Felson Builders, Inc., Diamond Crossing Associates, L.P., Elmhurst Partners, L.P., and Joseph L. Felson, individually and as an officer of Felson Builders, Inc., violates Section 144 of the TILA, 15 U.S.C. 1664, and Section 226.24(b) of Regulation Z, 12 CFR 226.24(b).

Chairman Pitofsky not participating.

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 San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Truth in Lending Act, as amended, and its

implementing Regulation Z, and the Federal Trade Commission Act, as amended; and

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

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

1. (a) Respondent Felson Builders, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California.

(b) Respondent Diamond Crossing Associates, L.P., is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of California.

(c) Respondent Elmhurst Partners, L.P., is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of California.

(d) Each of the above respondents has its principal place of business in the City of Hayward, State of California.

(e) Respondent Joseph L. Felson is an officer of respondent Felson Builders, Inc. He formulates, directs and controls the acts and practices of said respondent, and his principal place of business is located at the above stated address.

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

ORDER

I.

It is ordered, That respondents Felson Builders, Inc., a corporation, its successors and assigns, and its officers; Diamond Crossing Associates, L.P., a limited partnership, dba D.C. Funding, its successors and assigns, and its officers; Elmhurst Partners, L.P., a limited partnership, dba Elmhurst Funding, its successors and assigns, and its officers; and Joseph L. Felson, individually and as an officer of Felson Builders, Inc.; and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with any extension of consumer credit, or in connection with any advertisement to aid, promote, or assist, directly or indirectly, any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 CFR 226) of the Truth in Lending Act ("TILA") (15 U.S.C. 1601-1667e, as amended) do forthwith cease and desist from:

1. Failing to furnish consumers with the disclosures, as required by Section 128 of the TILA, 15 U.S.C. 1638, and by Sections 226.17(a) and 226.18 of Regulation Z, 12 CFR 226.17(a) and 226.18.

2. Failing to furnish consumers prior to the consummation of a consumer credit transaction with the disclosures, as required by Section 128 of the TILA, 15 U.S.C. 1638, and by Section 226.17(b) and 226.18 of Regulation Z, 12 CFR 226.17(b) and 226.18.

3. Stating the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without stating, clearly and conspicuously, all of the terms required by Regulation Z, as follows:

(1) The amount or percentage of the downpayment,

(2) The terms of repayment, including the amount of any balloon payment, and

(3) The "annual percentage rate," using that term or the abbreviation "APR." If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed.

(Section 144 of the TILA, 15 U.S.C. 1664, and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c))

4. Stating a rate of finance charge without stating the rate as an "annual percentage rate," using that term or the abbreviation "APR," as required by Regulation Z. If the annual percentage rate may be increased after consummation, the advertisement shall state that fact. The advertisement shall not state any other rate, except that a simple annual rate or periodic rate that is applied to an unpaid balance may be stated in conjunction with, but not more conspicuously than, the annual percentage rate.

(Section 144 of the TILA, 15 U.S.C. 1664, and Section 226.24(b) of Regulation Z, 12 CFR 226.24(b))

5. Failing to comply in any other respect with the Truth in Lending Act, 15 U.S.C. 1601-1667e, as amended, or its implementing regulation, Regulation Z, 12 CFR 226, as amended.

II.

It is further ordered, That respondents distribute a copy of this order to all their operating divisions, if any, and to all present or future personnel, agents or representatives having sales, advertising, or policy responsibilities with respect to the subject matter of this order, and that respondents secure from each such person a signed statement acknowledging receipt of said order.

III.

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

IV.

It is further ordered, That, for a period of five (5) years following service upon him of this order, the individual respondent named herein shall notify the Commission of the discontinuance of his present business or employment and of his affiliation with any new business or employment involved in the advertising and/or extension of "consumer credit," as that term is defined in the Truth in Lending Act and its implementing Regulation Z, no later than thirty (30) days after such discontinuance and affiliation has occurred. Such notice shall include the respondent's current business address and telephone number and a statement as to the nature of the business or employment in which he is engaged, as well as a description of his duties and responsibilities and financial interest in the business.

V.

It is further ordered, That for five (5) years after the date of service of this order respondents, their successors and assigns shall maintain and upon request make available all records that will demonstrate compliance with the requirements of this order.

VI.

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

Chairman Pitofsky not participating.

IN THE MATTER OF

SERVICE CORPORATION INTERNATIONAL

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-3579. Complaint, May 16, 1995--Decision, May 16, 1995

This consent order requires, among other things, the Texas corporation to divest, to a Commission-approved acquirer, the Uniservice Corporation assets and businesses in Medford, Oregon, within twelve months or transfer responsibility for the divestiture to a trustee appointed by the Commission, and to obtain prior Commission approval, for a period of ten years, before acquiring any interest in funeral establishments or cemeteries in Jackson County, Oregon.

Appearances

For the Commission: *K. Shane Woods* and *Charles A. Harwood*.

For the respondent: *Michael H. Byowitz, Wachtell, Lipton, Rosen & Katz*, New York, N.Y.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Service Corporation International ("SCI"), a corporation, through its wholly-owned subsidiaries SCI Oregon Funeral Services, Inc., a corporation, and UC Acquisition Corp., a corporation, have entered into an agreement with Uniservice Corporation ("Uniservice"), a corporation, that violates said Act and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITIONS

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

a. "*SCI*" means Service Corporation International, its predecessors, subsidiaries, divisions, and groups and affiliates controlled by Service Corporation International, their successors and assigns, and their directors, officers, employees, agents, and representatives.

b. "*Uniservice*" means Uniservice Corporation, its predecessors, subsidiaries, divisions, and groups and affiliates controlled by Uniservice Corporation, their successors and assigns, and their directors, officers, employees, agents, and representatives.

c. "*Funerals*" means a group of services provided at the death of an individual, the focus of which is some form of commemorative ceremony concerning the deceased at which ceremony the body is present; this group of services ordinarily includes, but is not limited to: the removal of the body from the place of death; its embalming or other preparation; making available a place for visitation and viewing, for the conduct of a funeral service, and for the display of caskets and outside cases; and the arrangement for and conveyance of the body to a cemetery or crematory for final disposition.

d. "*Perpetual care cemetery services*" means the provision of plots of land for, and the services associated with, including cemetery maintenance and upkeep, the final disposition of human remains by burial.

e. "*Medford area*" means Medford, Oregon, and its immediate environs.

II. THE RESPONDENT

1. Respondent SCI is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas with its office and principal place of business located at 1929 Allen Parkway, Houston, Texas.

2. Uniservice is a corporation organized, existing and doing business under and by virtue of the laws of the State of Oregon, with its office and principal place of business located at 415 N. Killingsworth Street, Portland, Oregon.

3. SCI and Uniservice are, and at all times relevant herein have been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, 15 U.S.C. 12, and are corporations whose businesses are in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

III. THE ACQUISITION

1. On or about October 5, 1994, SCI entered into an Agreement and Plan of Merger with Uniservice, in which SCI would acquire 100% of the voting securities of Uniservice.

IV. THE RELEVANT MARKETS

1. The relevant lines of commerce in which to evaluate the effects of the acquisition are the provision of funerals and the provision of perpetual care cemetery services.

2. The relevant section of the country in which to evaluate the effects of the acquisition is the Medford area.

3. SCI and Uniservice both own funeral establishments and own or operate perpetual care cemeteries in the Medford area, and compete in the provision of funerals and perpetual care cemetery services.

4. The markets for funerals and perpetual care cemetery services in the Medford area are highly concentrated, whether measured by the Herfindahl-Hirschmann Index or by two-firm or four-firm concentration ratios.

5. Entry into the relevant markets is difficult.

V. EFFECTS OF THE ACQUISITION

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

- a. By eliminating actual competition between SCI and Uniservice;
- and
- b. By tending to create a dominant firm in the relevant markets.

VI. VIOLATION CHARGED

1. The agreement described above violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and the acquisition described above, 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.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the acquisition of the voting securities of Uniservice Corporation by respondent and respondent having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of the 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 respondent has violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure 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 Service Corporation International is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas with its office and principal place of business located at 1929 Allen Parkway, Houston, Texas.

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

ORDER

I.

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

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

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

C. "*Funerals*" means a group of services provided at the death of an individual, the focus of which is some form of commemorative ceremony concerning the deceased at which ceremony the body is present; this group of services ordinarily includes, but is not limited to: the removal of the body from the place of death; its embalming or other preparation; making available a place for visitation and viewing, for the conduct of a funeral service, and for the display of caskets and outside cases; and the arrangement for and conveyance of the body to a cemetery or crematory for final disposition.

D. "*Funeral establishment*" means the Assets and Businesses of a facility that provides funerals.

E. "*Cemetery services*" means the provision of plots of land for, and the services associated with, the final disposition of human remains by burial.

F. "*Cemetery*" means the Assets and Businesses of a facility that provides cemetery services.

G. "*Cremation*" means the incineration of human remains.

H. "*Crematory*" means the Assets and Businesses of a facility that performs cremations.

I. "*Assets and Businesses*" include all assets, properties, business and goodwill, tangible and intangible, utilized by a funeral establishment, cemetery or crematory, including, but not limited to, the following:

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

2. All right to serve as directors on the Board of the Siskiyou Memorial Park;

3. All vendor lists, management information systems and software used on-site, and all catalogs, sales promotion literature and advertising materials, except that SCI may delete from such materials the Uniservice name, trademark or other identification;

4. All machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property;

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

6. All right, title and interest in the trade name of each funeral establishment, cemetery or crematory;

7. All right, title and interest in the books, records and files pertinent to any of the Properties to be Divested; and

8. A license to use the trade name "Carillon" in connection with the final disposition of cremains, a license to use the trademark "Life Centered Funeral Services" in connection with the sale of funerals, and a license to use the trademark "Life Trust" in connection with the sale of pre-need contracts, but in each case only in Medford and its environs.

J. "*Properties to be Divested*" means all of the Assets and Businesses of the following funeral establishments, cemeteries and crematories:

1. Perl Funeral Home
426 W. 6th Street
Medford, OR
2. Perl With Siskiyou Funeral Service
2100 Siskiyou Boulevard
Medford, OR
3. Siskiyou Memorial Park (cemetery)
2100 Siskiyou Boulevard
Medford, OR
4. Siskiyou Memorial Park (crematory)
2100 Siskiyou Boulevard
Medford, OR

II.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, within twelve months of the date this order becomes final, the Properties to be Divested, including resigning as directors of the Siskiyou Memorial Park and appointing individuals specified by the acquirer or acquirers to fill the vacancies created by those resignations; provided, however, that if the acquirer or acquirers choose not to acquire the Assets and Businesses of the crematory at 2100 Siskiyou Boulevard, because the acquirer or acquirers do not need such assets to engage in the business of providing funerals and cemetery services, respondent shall not be required to divest such assets; and provided further that if the acquirer or acquirers choose not to acquire any of the licenses described in paragraph I.I.8 of this order, respondent shall not be required to divest such asset or assets.

B. Respondent shall divest the Properties to be Divested 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 of the Properties to be Divested is to ensure the continued use of the Properties to be Divested in the same business in which the Properties to be Divested are engaged at the time of the proposed divestiture, and to remedy the lessening of competition resulting from the proposed acquisition as alleged in the Commission's complaint.

C. Pending divestiture of the Properties to be Divested, respondent shall take such actions as are necessary to maintain the viability and marketability of the Properties to be Divested and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Properties to be Divested except for ordinary wear and tear.

D. Respondent shall comply with all terms of the Agreement to Hold Separate, attached to this order and made a part hereof as Appendix I. The Agreement to Hold Separate shall continue in effect until such time as respondent has divested all the Properties to be Divested as required by this order.

III.

It is further ordered, That:

A. If SCI has not divested, absolutely and in good faith and with the Commission's prior approval, the Properties to be Divested within twelve months of the date this order becomes final, the Commission may appoint a trustee to divest the Properties to be Divested. 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, SCI shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the respondent to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A. of this order, respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondent and its counsel of the identity of any proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Properties to be Divested.

3. Within ten (10) days after appointment of the trustee, respondent shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers

necessary to permit the trustee to effect the divestiture required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.B.3 to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the Properties to be Divested or to any other relevant information, as the trustee may request. Respondent shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the divestitures. Any delays in divestiture caused by respondent shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondent's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to the acquirer or acquirers as set out in paragraph II of this order; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by respondent from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from

the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the respondent, 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.

8. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III.A. of this order.

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

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

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

IV.

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

A. Acquire any stock, share capital, equity, or other interest in any concern, corporate or non-corporate, engaged in at the time of such acquisition, or within the two years preceding such acquisition,

the sale of funerals or cemetery services in Jackson County, Oregon;
or

B. Acquire any assets used for or used in the previous two years for (and still suitable for use for) the sale of funerals or cemetery services in Jackson County, Oregon. Provided, however, that this paragraph IV shall not apply to new facilities constructed or developed by respondent.

V.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondent has fully complied with the provisions of paragraphs II and III of this order, respondent 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 paragraphs II and III of this order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and III of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture as required by this order.

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

VI.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution

of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of the order.

VII.

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

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

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

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate ("Agreement") is by and between Service Corporation International ("SCI"), a corporation organized and existing under the laws of the State of Texas, with its principal executive offices located at 1929 Allen Parkway, Houston, Texas, and the Federal Trade Commission ("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, "Parties").

PREMISES

Whereas, on or about October 5, 1994, SCI entered into an Agreement and Plan of Merger with Uniservice Corporation ("Uniservice"), in which (1) UC Acquisition Corp., a wholly-owned

subsidiary of SCI, would be merged into Uniservice, and (2) Uniservice shareholders would receive cash ("Acquisition"); and

Whereas, both SCI and Uniservice own interests in funeral establishments that provide funerals, cemeteries that provide cemetery services and crematories that provide cremations to consumers; and

Whereas, if the Commission accepts the Agreement Containing Consent Order ("SCI/Uniservice Consent Agreement"), the Commission must place the SCI/Uniservice Consent Agreement on the public record for public comment 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 the assets and businesses of certain Uniservice funeral establishments, a cemetery and a crematory ("Hold Separate Assets") listed in Exhibit A attached hereto and made a part hereof until the divestitures contemplated by the SCI/Uniservice Consent Agreement have been made, divestitures 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 purposes of this Agreement are to: (1) preserve the Hold Separate Assets as viable independent businesses pending the divestitures described in the SCI/Uniservice Consent Agreement; (2) preserve the Commission's ability to require the divestitures of the funeral establishments, a cemetery and a crematory as specified in the SCI/Uniservice Consent Agreement; and (3) remedy any anticompetitive aspects of the Acquisition; and

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

Whereas, SCI 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 not yet determined whether the Acquisition will be challenged, and in consideration of the Commission's agreement that at the time it accepts for public comment the proposed order in the SCI/Uniservice Consent Agreement it will grant early termination of the Hart-Scott-Rodino waiting period, and unless the Commission

determines to reject the SCI/Uniservice Consent Agreement, it will not seek further relief from SCI with respect to the Acquisition, except that the Commission may exercise any and all rights to enforce this Agreement, the SCI/Uniservice Consent Agreement to which it is annexed and made a part, and the order, once it becomes final, and in the event that the required divestitures are not accomplished, to appoint a trustee to seek divestiture of the Hold Separate Assets pursuant to the SCI/Uniservice Consent Agreement, as follows:

1. SCI agrees to execute and be bound by the SCI/Uniservice Consent Agreement.

2. SCI shall hold the Hold Separate Assets separate and apart from the date this Agreement is accepted until the first to occur of (a) ten business days after the Commission withdraws its acceptance of the SCI/Uniservice Consent Agreement pursuant to the provisions of Section 2.34 of the Commission's Rules or (b) the date the divestitures required by the order contained in the SCI/Uniservice Consent Agreement are accomplished. SCI's obligation to hold the Hold Separate Assets separate and apart shall be on the following terms and conditions:

a. SCI shall hold separate and apart the Hold Separate Assets.

b. Except as provided herein and as is necessary to assure compliance with this Agreement and the consent order, SCI shall not exercise direction or control over, or influence directly or indirectly, the Hold Separate Assets or any of their operations or businesses.

c. SCI shall cause the Hold Separate Assets to continue using their present names and trade names, and shall maintain and preserve the viability and marketability of each of the Hold Separate Assets and shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair their marketability or viability. During the term of this Agreement, SCI shall provide the Hold Separate Assets with the same or better quality of support services, including without limitation, payroll processing, accounting, management information systems, and computer support, as Uniservice provided to the Hold Separate Assets prior to the acquisition.

d. SCI shall refrain from taking any actions that may cause any material adverse change in the business or financial conditions of the Hold Separate Assets.

e. SCI shall not change the composition of the management of the Hold Separate Assets, except that SCI may fill vacancies and remove management for cause.

f. SCI shall maintain separate financial and operating records and shall prepare separate quarterly and annual financial statements for the Hold Separate Assets and shall provide the Commission with such statements for each funeral establishment, cemetery and crematory within ten days of their availability.

g. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating the Acquisition, defending investigations or litigation, or negotiating agreements to dispose of assets, SCI shall not receive or have access to, or the use of, any of the Hold Separate Assets' material confidential information not in the public domain, except as such information would be available to SCI 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 purpose set out in this subparagraph. ("Material confidential information," as used herein, means competitively sensitive or proprietary information not independently known to SCI from sources other than Uniservice, and includes but is not limited to pre-need customer lists, prices quoted by suppliers, or trade secrets.)

h. All earning and profits of the Hold Separate Assets shall be held separate. If necessary, SCI shall provide any or all of the Hold Separate Assets with sufficient working capital to operate at their current levels.

i. SCI shall refrain from, directly or indirectly, encumbering, selling, disposing of, or causing to be transferred any assets, property, or business of the Hold Separate Assets, except that the Hold Separate Assets may advertise, purchase merchandise and sell or otherwise dispose of merchandise in the ordinary course of business.

3. Should the Federal Trade Commission seek in any proceeding to compel SCI to divest itself of the shares of Uniservice stock that SCI may acquire, or to compel SCI to divest any assets or businesses of Uniservice that it may hold, or seek any other injunctive or equitable relief, SCI shall not raise any objection based upon the

early termination of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the Acquisition. SCI also waives all right 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 respondent made to their principal offices, respondent shall permit any duly authorized representative or representatives of the Commission:

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

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

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

EXHIBIT A

Hold Separate Assets

1. Perl Funeral Home
426 W. 6th Street
Medford, OR
2. Perl With Siskiyou Funeral Service
2100 Siskiyou Boulevard
Medford, OR
3. Siskiyou Memorial Park (cemetery)
2100 Siskiyou Boulevard
Medford, OR
4. Siskiyou Memorial Par (crematory)
2100 Siskiyou Boulevard
Medford, OR

Complaint

119 F.T.C.

IN THE MATTER OF

MONTEDISON S.P.A., 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-3580. Complaint, May 25, 1995--Decision, May 25, 1995

This consent order requires, among other things, the Royal Dutch Petroleum Company and the Shell Group of Companies to divest all of Shell Oil's polypropylene assets to Union Carbide Corporation, or to another Commission approved acquirer, within six months, requires Montedison to relinquish revenues under the profit sharing agreement from future U.S. licenses by Mitsui Petrochemical Industries Ltd., and requires the respondents, for ten years, to obtain Commission approval before acquiring any interest in such a company or before entering into similar agreements.

Appearances

For the Commission: *Howard Morse, Rhett Krulla and William Baer.*

For the respondents: *Robert Joffe, Cravath, Swaine & Moore, New York, N.Y. Kevin Arquit, Rogers & Wells, Washington, D.C. William Pelster, Skadden, Arps, Slate, Meagher & Flom, New York, N.Y. and Allen Lackey and Charles Corddry, in-house counsel for Shell Oil Co., Houston, TX.*

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 Montedison S.p.A. and HIMONT Incorporated (collectively "Montedison") and Shell Petroleum N.V., a holding company of the Royal Dutch/Shell Group of Companies ("the Shell Group") controlled by N.V. Koninklijke Nederlandsche Petroleum Maatschappij (Royal Dutch Petroleum Company) ("Royal Dutch") and The "Shell" Transport and Trading Company, p.l.c. ("Shell T&T"), (collectively "Shell") have agreed to form and acquire interests in a joint venture that would merge certain assets and

businesses of Montedison and of companies of the Shell Group, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, and having reason to believe that Montedison has entered into agreements in restraint of trade in violation of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

I. RESPONDENTS

1. Respondent Montedison S.p.A. is a corporation organized, existing and doing business under and by virtue of the laws of Italy with its principal executive offices located at Foro Buonaparte, 31, 20121 Milan, Italy.

2. Respondent HIMONT Incorporated 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 Three Little Falls Centre, 2801 Centerville Road, Wilmington, Delaware. HIMONT Incorporated is a wholly-owned, indirect subsidiary of Montedison S.p.A.

3. Respondent Royal Dutch Petroleum Company is a corporation organized, existing and doing business under and by virtue of the laws of the Netherlands with its principal executive offices located at Carel van Bylandtlaan 30, The Hague, The Netherlands.

4. Respondent The "Shell" Transport and Trading Company, p.l.c., is a corporation organized, existing and doing business under and by virtue of the laws of England with its principal executive offices located at Shell Centre, London SE1 7NA, England.

5. Respondent Shell Oil Company ("Shell Oil") is a corporation organized, existing and doing business under and by virtue of the laws of Delaware with its principal executive offices located at One Shell Plaza, Houston, Texas. Shell Oil is a member company of the Royal Dutch/Shell Group of Companies, and all of its shares are directly or indirectly owned by Royal Dutch Petroleum Company and The "Shell" Transport and Trading Company, p.l.c.

6. 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.

II. THE PROPOSED JOINT VENTURE

7. On or about December 30, 1993, Montedison and Shell entered into an agreement to form and acquire equal interests in a joint venture that would merge the majority of Shell's and Montedison's worldwide polyolefins businesses. The proposed joint venture, designated by Montedison and Shell as "Montell," combines assets valued at over six billion dollars.

8. Under the terms of the agreement between Montedison and Shell, Shell would retain outside the proposed joint venture polypropylene assets of Shell Oil, including Shell Oil's polypropylene catalyst and polypropylene resin production facilities, Shell Oil's rights and obligations under a 1983 Cooperative Undertaking Agreement with Union Carbide Corporation ("Union Carbide"), pursuant to which Shell Oil and Union Carbide research, develop and license polypropylene technology and polypropylene catalyst worldwide, and Shell Oil's interest in the Seadrift Polypropylene Company, a partnership with Union Carbide which produces polypropylene resin. Nonetheless, Shell would control Shell Oil as well as Montell, and the proposed joint venture would create a common interest between Shell and Montedison.

III. THE RELEVANT MARKETS

9. One relevant line of commerce within which to analyze the likely effects of the proposed joint venture is licensing of polypropylene technology, which involves licensing a combination of current generation; advanced process technology, plant design, polypropylene catalyst technology and rights to purchase and use polypropylene catalysts.

10. Another relevant line of commerce within which to analyze the likely effects of the proposed joint venture is polypropylene technology, including polypropylene process technology, plant design, and polypropylene catalyst technology, whether licensed to others or consumed internally. Innovation through competition in

research and development in the polypropylene technology market leads to reductions in cost, improved product properties and performance, and expansion of applications and use of polypropylene resins.

11. Another relevant line of commerce within which to analyze the likely effects of the proposed joint venture is the licensing, production and sale of high-yield/high-specificity polypropylene catalysts and catalyst technology. Polypropylene catalysts initiate the polymerization of propylene and control the characteristics of the polypropylene resin produced as well as the cost of production. There is no economic substitute for such catalysts in the production of polypropylene resin.

12. Another relevant line of commerce within which to analyze the likely effects of the proposed joint venture is the production and sale of polypropylene resin. Polypropylene resin has distinct performance characteristics and superior physical properties, including high temperature resistance and stiffness, compared to other commodity thermoplastics. Polypropylene is the lowest cost thermoplastic per pound, and because of its relatively low density, it has a substantial cost advantage on a volume basis. There is no economic substitute for polypropylene resin in the vast majority of applications where it is used.

13. Another relevant line of commerce within which to analyze the likely effects of the proposed joint venture is the production and sale of polypropylene impact copolymer resin, a type of polypropylene resin produced through copolymerization, in a second reactor, of polypropylene and ethylene or other olefin monomers and characterized by high impact strength. Polypropylene impact copolymer resin has distinct performance characteristics and superior physical properties in low temperature applications and applications requiring high impact strength. There is no economic substitute for polypropylene impact copolymer resin in the vast majority of applications where it is used.

14. The relevant geographic area within which to analyze the likely effects of the proposed joint venture in polypropylene technology; in licensing of polypropylene technology; and in the licensing, production and sale of polypropylene catalysts is the world. Polypropylene technology can be transferred easily and is disseminated throughout the world through licensing. Polypropylene catalysts are also distributed throughout the world.

15. The relevant geographic area within which to analyze the likely effects of the proposed joint venture in the production and sale of polypropylene resin, and in the production and sale of polypropylene impact copolymer resin, includes the United States and Canada. Sustained imports are unlikely because of the relatively high cost of transporting polypropylene resin, import duties, long lead times required for shipping polypropylene resin from overseas, and the need for after-sales technical support.

IV. MARKET STRUCTURE

16. Montedison, through HIMONT, is the leading competitor in each of the relevant markets. Montedison's strong market position in the polypropylene resin markets and its extensive licensing network provide a flow of information and support its research and development program. Montedison accounts for approximately 20 percent of polypropylene resin capacity and production, and approximately 30 percent of capacity and 35 percent of production of polypropylene impact copolymer resin, in the United States and Canada.

17. Montedison has coordinated with Mitsui Petrochemical Industries Ltd. ("Mitsui") in licensing of polypropylene technology and in the sale of polypropylene catalysts. Montedison and Mitsui share royalties from licensing of polypropylene technology and licensing of catalyst technology and share profits from the sale of polypropylene catalysts manufactured in the United States for sale to licensees of Montedison and Mitsui in the Western Hemisphere. Montedison and Mitsui polypropylene technology accounts for approximately 45% of all polypropylene capacity built or projected to be built in the world since 1990, and over 50% of capacity built or projected to be built under technology licenses. Montedison and Mitsui catalysts account for over 55% of world production of polypropylene catalysts.

18. Shell is the second largest producer of polypropylene catalyst, polypropylene resin and impact copolymer polypropylene resin in the world and is a leader in catalyst technology. Shell's strong global position in polypropylene resin supports, and provides a flow of market information for, its research and development activities in polypropylene technology.

19. Shell Oil and Union Carbide engage in research and development and license polypropylene technology throughout the world, combining pursuant to a December 1983 Cooperative Undertaking Agreement, Shell's "SHAC" polypropylene catalyst with Union Carbide's "Unipol" process technology. In addition, Shell, Shell Oil, and Union Carbide cooperate in research and development of polypropylene catalysts pursuant to a Polypropylene Catalyst Research and Development Agreement. Unipol/SHAC is the second leading polypropylene technology in the world. The Shell Group and Unipol/SHAC licenses account for over 25% of all polypropylene capacity built or projected to be built in the world since 1990, and over 30% of capacity built or projected to be built pursuant to technology licenses.

20. Shell Oil produces polypropylene catalysts in the United States which it uses for production of polypropylene resin and sells to Unipol/SHAC licensees. In addition, Shell sells polypropylene catalysts manufactured under contract exclusively for Shell. Overall, Shell accounts for approximately 20% of world production of polypropylene catalyst.

21. Shell produces and sells polypropylene resin in the United States and Canada and markets polypropylene impact copolymer resin and other polypropylene resin manufactured in the Seadrift joint venture plant jointly owned by Shell and Union Carbide. Shell, including Seadrift, accounts for over 8% of capacity and over 9% of production of polypropylene resin, and over 11% of capacity and over 7% of production of polypropylene impact copolymer resin, in the United States and Canada.

22. The technology licensing market is very highly concentrated, as measured by the Herfindahl-Hirschmann Index ("HHI") and other measures of concentration. The proposed joint venture would create a common interest between Montedison and Shell, increasing concentration as measured by the HHI by over 3000 points to over 7000. The Montedison/Mitsui and Unipol/SHAC technologies collectively account for over 80 % of completed and projected additions to capacity pursuant to technology licenses since 1990. Other technologies are not a significant competitive constraint.

23. The polypropylene technology market is also very highly concentrated. The HHI for completed and projected additions to capacity based on technology employed, including both licensed and captive technology, would increase by over 2300 points to over 5100

as a result of the proposed joint venture. The Montedison/Mitsui and Unipol/SHAC technologies collectively account for over 70% of all polypropylene capacity built or projected to be built worldwide since 1990.

24. The polypropylene catalyst market is also very highly concentrated. The proposed joint venture would put under common control over 75% of the world's production of polypropylene catalyst. The proposed joint venture would increase concentration as measured by the HHI in polypropylene catalyst production by over 2400 points to over 6000.

25. The U.S. and Canada polypropylene market is moderately concentrated. The proposed joint venture would increase concentration as measured by the HHI by over 350 points to over 1400 for both capacity and production.

26. The U.S. and Canada polypropylene impact copolymer market would become highly concentrated as a result of the proposed joint venture. The joint venture would increase concentration as measured by the HHI by approximately 700 points for capacity and approximately 500 points for production to approximately 2100 and 2300, respectively.

27. Entry into the relevant markets would not be timely, likely or sufficient to deter or offset reductions in competition resulting from the proposed joint venture. Invention of a current generation polypropylene catalyst and process technology requires substantial technological expertise, takes several years of research and development, and involves large sunk costs with no guarantee of success. Patent obstacles, and uncertainties of patent litigation, further increase the risk of entry. Once a current generation polypropylene catalyst and process technology has been invented additional time and sunk costs are required to commercialize the technology. Entry into licensing of polypropylene technology requires, in addition to the time and requirements for entry into polypropylene technology, matching process technology, plant design and a polypropylene catalyst so that they function efficiently together to produce a range of grades of polypropylene resin; customer acceptance of the resin offered by the technology and assurance that the technology is free of potential patent liability; and a track record of commercial success in manufacturing and selling polypropylene resin using the process technology, plant design and polypropylene catalyst.

28. Barriers to entry into the polypropylene catalyst, polypropylene resin and polypropylene impact copolymer resin markets include patents, environmental permitting, extensive sunk costs and time consumed in research and development, design and construction of a plant, and customer qualification. Effluent and solvent recovery make design, siting and permitting of a polypropylene catalyst plant particularly difficult. Even after catalyst plant construction is completed, substantial additional time is required before suitable catalysts can be produced and customer qualification requirements met.

29. The polypropylene resin and polypropylene impact copolymer resin markets are characterized by industry practices that facilitate coordinated interaction, including but not limited to:

- a. Licensing agreements that allow technology providers to monitor sales and capacity expansions of licensee competitors;
- b. Supply arrangements that allow suppliers of polypropylene catalysts to monitor the level of production and sales of polypropylene resin competitors;
- c. The existence of industry-wide surveys that communicate among competitors, on a monthly basis, information concerning price, capacity utilization rates, and inventory;
- d. Advance notification of price increases and signaling of price increases through the trade press;
- e. Advance announcements of capacity expansion; and
- f. Long-term relationships between customers and suppliers, difficult qualification requirements, and high costs to customers in switching suppliers, that facilitate customer allocation.

V. EFFECTS OF THE PROPOSED JOINT VENTURE

30. The effect of the proposed joint venture may be substantially to lessen competition or to tend to create a monopoly in the relevant markets in the following ways, among others:

- a. It will eliminate actual, direct and substantial competition between Montedison and Shell in the relevant markets;
- b. It will create a shared interest between Montedison and Shell and result in spill-over effects on competition outside the joint venture;

c. It will reduce Montedison's and Shell's incentives to license polypropylene technology and to license or sell polypropylene-catalysts to polypropylene resin manufacturers that compete with the joint venture;

d. It will substantially increase the level of concentration in the relevant markets;

e. It will increase Montedison and Shell's ability unilaterally to exercise market power in polypropylene technology; in the licensing of polypropylene technology; and in the production, sale and licensing of polypropylene catalysts;

f. It will increase the price of polypropylene technology licenses and polypropylene catalysts and reduce innovation in polypropylene technology, increasing the cost of polypropylene resin production and the price of polypropylene resin;

g. It will significantly enhance the likelihood of coordinated interaction among competitors in the production and sale of polypropylene resin and polypropylene impact copolymer resin;

h. It will increase barriers to entry into the relevant markets; and

i. It will allow Shell to limit the ability of Union Carbide and Shell Oil to compete in the licensing of polypropylene technology pursuant to the Cooperative Undertaking Agreement and the Polypropylene Catalyst Research and Development Agreement.

31. The proposed joint venture may impair the ability of Union Carbide and Shell Oil to engage in export sales through licensing of polypropylene technology in export markets, resulting in the loss of substantial economic opportunities in the United States. Shell's acquisition of an interest in the joint venture likely would cause Shell to reduce its investment in support of Unipol/SHAC, reducing the export of goods and services, including catalyst and licensing, engineering and technical support services, from the United States. The proposed joint venture has a direct, substantial, and reasonably foreseeable adverse effect on export trade or export commerce of persons engaged in such trade or commerce in the United States.

VI. OTHER ANTICOMPETITIVE CONDUCT

32. Montedison's royalty and profit sharing agreement with Mitsui constitutes an unfair method of competition in the licensing of polypropylene technology and in the licensing of polypropylene

catalyst. The purpose and effect of Montedison's agreement with Mitsui is to limit competition and to allocate or divide territories or markets for the licensing of polypropylene technology and in the licensing of polypropylene catalyst, including the United States. Although earlier technology licensing agreements between Montedison and Mitsui may have been justified as reasonable agreements to exchange and transfer technology, Montedison entered into subsequent and current agreements with Mitsui upon expiration of the earlier agreements with the purpose and effect of allocating or dividing territories or markets for the licensing of polypropylene technology and licensing of catalyst technology and restricting competition, including price competition, between Montedison and Mitsui in the United States.

VII. VIOLATIONS CHARGED

33. The agreement between Montedison and Shell described in paragraph seven violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

34. The proposed joint venture between Montedison and Shell, would, if consummated, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

35. The proposed joint venture would have an adverse effect on U.S. export trade in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

36. The agreement between Montedison and Mitsui described in paragraphs seventeen and thirty-two violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission ("the Commission"), having initiated an investigation of the proposed formation of a joint venture between Montedison S.p.A. and HIMONT Incorporated (collectively "Montedison") and Shell Petroleum N.V., a holding company of the Royal Dutch/Shell Group of Companies ("the Shell Group") controlled by N.V. Koninklijke Nederlandsche Petroleum Maatschappij (Royal Dutch Petroleum Company) ("Royal Dutch") and The "Shell" Transport and Trading Company, p.l.c. ("Shell

T&T"), that would merger certain assets and businesses of Montedison and of companies of the Shell Group; and Royal Dutch, Shell T&T, and Shell Oil Company ("Shell Oil"), a company of the Shell Group, (collectively "Shell") and Montedison, all collectively hereinafter sometimes referred to as "respondents," having been furnished with it 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 Shell and Montedison with violations of the Clayton Act and Federal Trade Commission Act; and

Respondents Shell and Montedison, 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 a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons 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 Montedison S.p.A. is a corporation organized, existing and doing business under and by virtue of the laws of Italy with its principal executive offices located at Foro Buonaparte, 31, 20121 Milan, Italy.

2. Respondent HIMONT Incorporated 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 Three Little Falls Centre, 2801 Centerville Road, Wilmington, Delaware.

HIMONT Incorporated is a wholly-owned, indirect subsidiary of Montedison S.p.A.

3. Respondent Royal Dutch is a corporation organized, existing and doing business under and by virtue of the laws of the Netherlands with its principal executive offices located at Carel van Bylandtlaan 30, The Hague, The Netherlands. Royal Dutch is a holding company which, together with Shell T&T, controls the Shell Group.

4. Respondent Shell T&T is a corporation organized, existing and doing business under and by virtue of the laws of England with its principal executive offices located at Shell Centre, London SE1 7NA, England. Shell T&T is a holding company which, together with Royal Dutch, controls the Shell Group.

5. Respondent Shell Oil is a corporation organized, existing and doing business under and by virtue of the laws of Delaware with its principal executive offices located at One Shell Plaza, Houston, Texas. Shell Oil is a member company of the Shell Group, and all of its shares are directly or indirectly owned by Royal Dutch and Shell T&T.

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

ORDER

I.

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

A. The following terms shall mean the following entities:

1. "*Montedison*" means Montedison S.p.A. and its wholly owned subsidiary Montedison (Nederland) N.V., a holding company that owns Montecatini Nederland B.V., which in turn owns, directly or indirectly, through its subsidiaries HIMONT Incorporated, Spherilene S.r.l., Moplefan S.p.A. and Montepolmieri Sud, S.p.A., all of the polyolefins interests of Montedison S.p.A. "Montedison" includes all subsidiaries, divisions, and groups and affiliates controlled by Montedison S.p.A., their respective successors and assigns, and their

respective directors, officers, employees, agents and representatives. Unless otherwise indicated, "Montedison" does not include Montell.

2. "*HIMONT*" means HIMONT Incorporated. "HIMONT" includes all subsidiaries, divisions, and groups and affiliates controlled by HIMONT, their respective successors and assigns, and their respective directors, officers, employees, agents and representatives.

3. "*Shell*" means N.V. Koninklijke Nederlandsche Petroleum Maatschappij (Royal Dutch Petroleum Company) ("Royal Dutch"), The "Shell" Transport and Trading Company, p.l.c. ("Shell T&T"), and the Shell Group.

4. "*The Shell Group*" means all companies controlled by Royal Dutch and/or Shell T&T, including Shell Oil and Shell Petroleum N.V. "The Shell Group" includes all subsidiaries, divisions, and groups and affiliates controlled by companies of the Shell Group, Royal Dutch or Shell T&T, their respective successors and assigns, and their respective directors, officers, agents and representatives. Unless otherwise indicated, "the Shell Group" does not include Montell.

5. "*Shell Oil*" means Shell Oil Company. "Shell Oil" includes all subsidiaries, divisions, and groups controlled by Shell Oil, their respective successors and assigns, and their respective directors, officers, agents and representatives. Unless otherwise indicated, "Shell Oil" does not include Polycy.

6. "*Montell*" means Montell Polyolefins, the corporation to be formed, pursuant to the Agreement to Merge Polyolefins Businesses, to hold the majority of the polyolefins businesses of Montedison and of Shell and to be owned, directly or indirectly, by Montedison and companies of the Shell Group. "Montell" includes all subsidiaries, divisions, and groups controlled by Montell, their respective successors and assigns, and their respective directors, officers, agents and representatives.

7. "*Montell Affiliates*" means companies that Montell controls as that term is defined in 16 CFR 801.1(b), except that this term shall also include (i) any entity other than Montell in which Shell or Montedison has an ownership interest of 25% or more as of December 1, 1994 and which interest is contributed to Montell, and (ii) companies in which Montell has an ownership interest of 35% or more and would have control as defined in 16 CFR 801.1(b) if

ownership interests held directly or indirectly by a government were excluded.

8. "*Technipol*" means a company to be formed and held separate by Montedison under the terms and conditions of the attached Agreement to Hold Separate. "Technipol" includes all subsidiaries, divisions, and groups controlled by Technipol, their respective successors and assigns, and their respective directors, officers, agents and representatives.

9. "*Polyco*" means a company to be formed by Shell Oil to succeed to and conduct, under the terms and conditions of this order, the Properties to Be Divested. "Polyco" includes all subsidiaries, divisions, and groups controlled by Polyco, their respective successors and assigns, and their respective directors, officers, agents and representatives.

10. "*Akzo Nobel*" means Akzo Nobel N.V., Akzo Nobel Inc., Akzo Chemicals BV and Akzo Chemicals Inc.

11. "*Mitsui*" means Mitsui Petrochemical Industries Ltd.

12. "*Union Carbide*" or "UCC" mean Union Carbide Corporation.

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

C. "*Agreement to Merge Polyolefins Businesses*" means the agreement between Montedison and Shell Petroleum N.V. (a company of the Shell Group) dated December 30, 1993, and amendments thereto, to merge the majority of the worldwide polyolefins businesses of Montedison and of Shell into a new entity to be owned by Montedison and companies of the Shell Group.

D. "*Propylene Polymers*" or "PP" mean homopolymers of propylene and copolymers or polyolefinic alloys of propylene with less than 50% by mol of other monoolefins and having a flexural modulus (measured according to ASTM D 790-71) higher than 4,000 Kg/cm².

E. "*PP Catalyst*" means supported catalyst components including compounds of transition metals of Groups IV-VIII of the Periodic Table, at least in part supported on a carrier, the essential component of which is a halogen-containing compound of magnesium, for use in production of Propylene Polymers.

F. "*Catalyst Support*" means preformed catalyst supports or support carriers which may be titanated, *i.e.*, combined with titanium or with a titanium containing compound, to produce PP Catalyst.

G. "*Catalyst Systems*" means specified combinations of PP Catalyst and other components designed, developed, used, or suitable for use for the production of Propylene Polymers.

H. "*PP Technology*" means technology relating to Propylene Polymers and the production thereof, and to the preparation and use of Catalyst Systems.

I. "*Catalyst Technology*" means technology relating to PP Catalyst and to the production, preparation and use of PP Catalyst, Catalyst Support and Catalyst Systems.

J. "*Shell Catalyst Technology*" means Catalyst Technology, including Know-How and patent rights, developed, under development, used, offered for license or licensed to any person by companies of the Shell Group at any time prior to the date of transfer to Polyco of the Properties to Be Divested.

K. "*Shell Oil Catalyst Technology*" means Catalyst Technology, including Know-How and patent rights, developed, under development, used, offered for license or licensed to any person by Union Carbide or Shell Oil at any time prior to the date of transfer to Polyco of the Properties to Be Divested.

L. "*Unipol PP Technology*" means PP Technology and Catalyst Technology, including Know-How and patent rights, developed, under development, offered for license, or licensed to any person by UCC and/or Shell Oil in accordance with their Cooperative Undertaking Agreement dated December 22, 1983, or used by UCC and Shell Oil in their partnership PP facility at Seadrift, Texas at any time prior to the date this order becomes final.

M. "*Unipol/SHAC Technology Business*" means the research and development, promotion, and licensing of Unipol PP Technology and Shell Oil Catalyst Technology; the research and development of PP Catalyst, Catalyst Support and Catalyst Systems utilizing Unipol PP Technology and Shell Oil Catalyst Technology; rights and obligations under, and activities conducted pursuant to, the Cooperative Undertaking Agreement between UCC and Shell Oil dated December 22, 1983, and the Polypropylene Catalyst Research and Development Agreement among Shell Oil, UCC and Shell Internationale Research Maatschappij B.V. ("The Tripartite Catalyst Research Agreement"); and the research and development, production and sale of Propylene Polymers, and the demonstration of Unipol PP Technology and Shell Oil Catalyst Technology, pursuant

to the Seadrift Polypropylene Company partnership agreement between UCC and Shell Oil.

N. "*LIPP Process*" means PP Technology developed and used by Shell for the production of Propylene Polymers through a bulk liquid polymerization process.

O. "*Know-How*" means all relevant information, including knowledge, experience and specifications.

P. "*Material Confidential Information*" means competitively sensitive or proprietary information, not in the public domain, concerning the PP Technology, Catalyst Technology, PP Catalyst, Catalyst Support, or Propylene Polymers businesses.

Q. "*Properties to Be Divested*" means

1. All assets, tangible and intangible, of Shell Oil relating to PP Technology, Catalyst Technology, Propylene Polymers and PP Catalyst, including without limitation:

a. Shell Oil's Propylene Polymers plant and assets at Norco, Louisiana, and Shell Oil's associated facilities at Norco, Louisiana for splitting and separating polymer-grade propylene and propane from chemical-grade propylene;

b. Shell Oil's PP Catalyst plant and assets at Norco, Louisiana;

c. Shell Oil's interest in the Seadrift Polypropylene Company and the Propylene Polymers plant at Seadrift, Texas;

d. Shell Oil's PP Catalyst pilot plant;

e. Shell Oil's facilities and equipment (other than real property and general, chemical analytical equipment) at the Westhollow Technology Center at Houston, Texas, primarily utilized during the year prior to the transfer to Polyco of the Properties to Be Divested in research, development and technical support with respect to Shell Oil's Propylene Polymers, PP Catalyst and Catalyst Technology businesses;

f. A rent-free lease, until five years from the date of divestiture of the Properties to Be Divested or until such earlier date as the acquirer may elect, to offices and research and development space at the Westhollow Technology Center at Houston, Texas, associated with the Properties to Be Divested;

g. All owned or leased distribution facilities, rail cars and other assets used in sales or technical service of Propylene Polymers or PP

Catalyst, other than real property at the headquarters offices, general sales offices, and research center of Shell Oil;

h. All intellectual property, including patent rights, trade secrets, technology and Know-How, relating to Catalyst Technology, PP Catalyst, Catalyst Systems, and Propylene Polymers;

i. All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, management information systems, software, inventions, specifications, designs, drawings, processes and quality control data;

j. All interest in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees, including without limitation agreements with Shell Canada and Pecten, and rights under warranties and guarantees, express or implied;

k. All books, records, and files;

l. Shell Oil's interest in owned or leased real property associated with the Norco, Louisiana, and Seadrift, Texas, Propylene Polymers plants, together with appurtenances, licenses and permits;

m. Shell Oil's interest in owned or leased improvements to real property associated with the Norco, Louisiana, PP Catalyst plant, together with appurtenances, licenses and permits, and a rent-free lease to the land associated with the PP Catalyst plant for the life of the plant;

n. Shell Oil's interest in the Unipol/SHAC Technology Business and in the Cooperative Undertaking Agreement dated December 22, 1983, including but not limited to all future revenue of Shell Oil from Unipol PP Technology and Shell Catalyst Technology developed, under development, offered for license, or licensed to any person by UCC or Shell Oil at any time prior to the date of transfer to Polyco;

o. Exclusive world-wide rights to all Shell Oil trademarks and trade names relating to Propylene Polymers other than Shell Oil trademarks used by Shell Oil for its products generally, such as the "SHELL" mark and the Pecten emblem;

p. All licenses relating to the manufacture and sale of Propylene Polymers and PP Catalyst or the licensing of PP Technology or Catalyst Technology, including but not limited to Shell Oil's rights under the following patents:

- (1) All applicable patents of Shell;
- (2) All patents of Montedison and Mitsui covered by the July 30, 1985 Agreement of Himont Incorporated, Mitsui, Union Carbide Corporation, and Shell Chemical Company; any patent license agreements between Montedison and Shell; and any patent license agreements between Mitsui and Shell;
- (3) Phillips U.S. Patent 4,376,851 "crystalline polypropylene";
- (4) Studiengesellschaft Kohle U.S. Patent 4,125,698 covering production of PP with a titanium chloride/DEAC catalyst; and
- (5) Amoco Chemical Company patents covering "PP Catalyst" identified in the patent license agreement between Amoco and Shell Oil, including Amoco U.S. Patent 4,540,679; Japan Patent Application 59350/85 and European Patent Application 159,150; and

q. Shell Oil's rights under The Tripartite Catalyst Research Agreement; the Polypropylene Agreement between Shell Research Limited and Shell Oil Company; the PP Catalyst Patent Settlement Agreement between Shell Internationale Research Maatschappij B.V. and Shell Oil Company; and the July 30, 1985 Agreement of Himont Incorporated, Mitsui, Union Carbide Corporation, and Shell Chemical Company, subject to any necessary approval of parties not subject to this order; and

2. All Shell's worldwide rights to the "SHAC" trademark; all customer lists, records and files, all catalogs, and all sales promotion literature relating to sales by Shell outside the United States of PP Catalyst and Propylene Polymers manufactured by Shell Oil; and all interest in and to contracts entered into by Shell in the ordinary course of business with customers, sales representatives, distributors and agents relating to the sale, outside the United States, of PP Catalyst or Propylene Polymers manufactured by Shell oil (together with associated bid and performance bonds).

R. "*Viability and Competitiveness*" means having the capability and incentive to operate independently at annual levels of research and development, licensing, production, and sales of PP Technology, Catalyst Technology, PP Catalyst, Catalyst Support and Propylene Polymers at least equal to levels experienced during each of the two (2) calendar years immediately preceding the date of transfer to Polyco of the Properties to Be Divested, and capable through its own

resources of functioning independently and competitively in the PP Technology, Catalyst Technology, PP Catalyst, and Propylene Polymers businesses.

II.

It is further ordered, That:

A. Shell and Shell Oil, as applicable, shall divest the Properties to Be Divested, absolutely and in good faith, within six (6) months of the date this order becomes final, and shall also divest such additional, ancillary assets and businesses and effect such arrangements as are necessary to assure the marketability and the Viability and Competitiveness of the Properties to Be Divested.

B. The period of six (6) months as specified in paragraph II.A shall be extended to March 31, 1997, if either of the following conditions is satisfied:

1. Union Carbide declines, within thirty (30) days following receipt by Union Carbide of the report of the independent appraiser, to acquire the Properties to Be Divested for the fair market value of the Properties to Be Divested as an operating business as determined by an independent appraisal prepared in accordance with the following procedure, or as otherwise agreed, or at such price as agreed, by Shell Oil and Union Carbide:

a. Prior to the expiration of fifteen (15) days from the date this order becomes final Shell Oil will notify Union Carbide of Shell Oil's selection of an independent appraiser;

b. The independent appraiser selected by Shell Oil will perform the appraisal unless within fifteen (15) days from notification of Shell Oil's selected independent appraiser, Union Carbide objects to Shell Oil's selected independent appraiser and notifies Shell Oil of its selection of an independent appraiser;

c. Within fifteen (15) days from the date the name of Union Carbide's selected independent appraiser is received by Shell Oil, Shell Oil will either agree to Union Carbide's selected independent appraiser or request that the two selected independent appraisers jointly select, within ten (10) days of such request, another independent appraiser;

d. The compensation paid to the independent appraiser shall be paid by Shell Oil or as otherwise agreed by Shell Oil and Union Carbide, and the amount of compensation shall be independent of the amount of the fair market value of the Properties to Be Divested as determined by the appraisal;

e. The independent appraiser shall be authorized by Shell to question personnel and examine all relevant books and records, including personnel and books and records of the Unipol/SHAC Technology Business, in connection with the appraisal under appropriate confidentiality provisions;

f. The independent appraisal shall be completed and presented by the appraiser to Union Carbide and Shell Oil within forty-five (45) days of the selection of the appraiser as set forth in this paragraph II.B.1 of this order; or

2. Union Carbide, within (30) days of receiving notice from Shell Oil that Shell proposes to divest Polyco to a named acquirer approved by the Commission, does not consent to the transfer of Polyco's interest in the Cooperative Undertaking Agreement dated December 22, 1983, to such Commission approved acquirer.

C. In the event that, prior to the expiration of the six (6) months specified in paragraph II.A of this order, the Commission has neither approved nor disapproved, within sixty (60) days of receipt of the application, an application for approval of a divestiture to a proposed acquirer submitted in accordance with paragraphs II.A and II.F of this order, the time period specified in paragraph II.A of this order may be extended by the Commission by the number of days in excess of sixty (60) required by the Commission to rule on the divestiture application and, if the Commission approves divestiture to a person other than Union Carbide, the Commission may further extend such period, if necessary, by thirty (30) days in order to provide Shell Oil time to comply with the requirements of paragraph II.B.2 of this order.

D. Provided further, if at the instance of Union Carbide over the opposition of Shell, Shell is enjoined or otherwise prohibited by court order from divesting the Properties to Be Divested, Shell shall promptly give written notice of such order to the Commission, whereupon the period within which Shell shall divest the Properties to Be Divested under paragraphs II.A, II.B or II.C of this order shall

be extended to the earlier of (1) one year from the expiration of the time specified in paragraph II.A of this order and such additional time as may be allowed in paragraphs II.B or II.C of this order; or (2) ninety (90) days after the injunction or other order expires.

E. Respondents 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 Shell and Shell Oil, as applicable, have divested all the Properties to Be Divested or until such other time as the Agreement to Hold Separate provides. Profits accumulated by Technipol during the period the Agreement to Hold Separate is in effect shall be retained by Montedison upon expiration of the Agreement to Hold Separate and shall in no event be transferred to Montell or Shell.

F. Shell and Shell Oil, as applicable, shall divest the Properties to Be Divested as an incorporated, ongoing business, identified herein as "Polycom and established in accordance with the attached Agreement to Hold Separate, and shall divest the Properties to Be Divested only to Union Carbide or to another acquirer or acquirer s 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 ensure the continuation of Polyco as an ongoing and viable business engaged in the research, development, manufacture and sale of PP Catalyst and Propylene-Polymers and in the research, development, and, licensing of PP Technology and Catalyst Technology, and to remedy the lessening of competition resulting from the proposed acquisition as alleged in the Commission's complaint.

G. The Properties to Be Divested shall be divested free and clear of (1) all royalties, mortgages, encumbrances and liens to Shell or Montell; and (2) any contractual commitments or obligations to Shell or Montell existing as of the date of divestiture.

H. Should any transfer of an agreement, contract or license required by paragraph II.A of this order not be possible after reasonable effort by Shell and Shell Oil due to a person other than a party to this order withholding its consent to the transfer, Shell Oil shall enter into an agreement with Polyco or the acquirer thereof the purpose of which agreement is to realize the same effect as such transfer. Shell Oil shall submit a copy of each such agreement with its compliance reports to the Commission pursuant to paragraphs VIII.A and VIII.B of this order. Further, Shell Oil shall secure, at its

expense, patent licenses, or assignments of patent licenses, extending to Polyco and the acquirer thereof rights and royalty rates with respect to the manufacture and sale of Propylene Polymers and PP Catalyst from the Properties to Be Divested, and rights to expand production and sale, no less favorable than those held by Shell Oil as of the date of transfer to Polyco of the Properties to Be Divested.

III.

It is further ordered, That:

A. Prior to transfer of any assets or businesses from Shell into Montell or merger of any part of Shell and Montell or Montedison, Shell shall

1. Extend to Polyco, without royalty to Shell or Montell, Shell's rights under agreements relating to the research and development, manufacture and sale of PP Catalyst, Catalyst Support, and Catalyst Systems by any person, including but not limited to nonexclusive rights to sell, and to contract with Akzo Nobel for the production of, PP Catalyst and Catalyst Support;

2. Disclose to Polyco all Shell Catalyst Technology in its possession or to which it has rights;

3. Grant Polyco, without royalty to Shell or Montell, the perpetual, non-exclusive right (1) to license, subject to the rights of Union Carbide, Shell Catalyst Technology to any person worldwide; (2) to sell worldwide to any person PP Catalyst and Catalyst Systems based on Shell Catalyst Technology; and (3) to enforce intellectual property rights with respect to Shell Catalyst Technology worldwide, including without exclusion the right to sue any person who by the manufacture, use or sale of any PP Catalyst or Catalyst System infringes any Shell patent which has been applied for in any country in the world before the date this order becomes final. All costs of any such suit by Polyco shall be borne by Polyco and all damages recovered shall be retained by Polyco; and

4. Grant Polyco, without royalty to Shell or Montell, the exclusive right, until seven years from the date of divestiture of the Properties to Be Divested, (1) to license, subject to the rights of Union Carbide, Shell Catalyst Technology to persons other than Montell and Montell Affiliates; and (2) to sell to persons other than

Montell and Montell Affiliates (or LIPP Process licensees for use in their LIPP Process plants) such PP Catalyst formulations or their equivalent as were manufactured or sold by Shell, or manufactured for Shell by Akzo Nobel, prior to the date this order becomes final; and

B. Shell and Montell shall grant to Polyco and licensees of Unipol PP Technology immunity under patents relating to PP Technology, Catalyst Technology, PP Catalyst, Catalyst Support, Catalyst Systems or Propylene Polymers, based on work conducted prior to December 31, 1997, or prior to one year after divestiture of the Properties to Be Divested, whichever is later, by persons who, as Shell personnel within one (1) year prior to the date of the formation of Montell, had access to Unipol PP Technology other than in the public domain and other than Catalyst Technology received by Shell Oil from other companies of the Shell Group.

C. Until one (1) year after divestiture of the Properties to Be Divested no Shell research personnel who, within one (1) year prior to the date of the formation of Montell, had access to Unipol PP Technology (other than Catalyst Technology received by Shell Oil from other companies of the Shell Group) shall engage in research at facilities of Montell on PP Technology, Shell Catalyst, Technology or Montedison Catalyst Technology. Provided, however, nothing in this order shall require Shell to conduct any research and development for any person or to refrain from conducting research and development for, and at the expense of, any person, including Montell and communicating with, or receiving communications from, such person regarding such research and development work. The results of any research and development conducted by Shell prior to December 31, 1997, or one year after divestiture of the Properties to Be Divested, whichever is later, on Shell Catalyst Technology, including but not limited to research or development conducted for, or at the expense of, Montell, shall be provided to Polyco without payment for use in the Unipol/SHAC Technology Business.

D. Shell (including former employees of Shell transferred to Montell) shall not provide, disclose or otherwise make available to Montedison, Technipol, Montell or Montell Affiliates any Material Confidential Information relating to Unipol PP Technology or the Unipol/SHAC Technology Business (other than Catalyst Technology received by Shell Oil from other companies of the Shell Group), provided however nothing in this paragraph III.D of this order shall

prohibit (1) Montell Affiliates who are licensees of Unipol PP Technology from receiving information, in accordance with such license, for use in their Unipol PP Technology licensed production facilities, including information obtained by Shell, prior to the formation of Montell, under The Tripartite Catalyst Research Agreement; and (2) any communication between Shell and Montell necessary to ensure that Montell and its employees make no unauthorized use or disclosure of any Material Confidential Information.

E. Until two (2) years after divestiture of the Properties to Be Divested, Shell, Montell and Technipol shall not employ, or make offers of employment to, any person employed by Shell Oil whose principal duties, during the year prior to the date of transfer to Polyco of the Properties to Be Divested, related to the management, development or operation of the Properties to Be Divested. This provision, however, does not apply to employment by Shell Oil of any employee who is terminated by Polyco or by the acquirer of the Properties to Be Divested or who is not offered employment by Polyco or by the acquirer of the Properties to Be Divested at a base salary that is at least equivalent, and incentives and benefits that are comparable, to those held by the employee prior to the divestiture of the Properties to Be Divested. Provided, however, Shell Oil shall not be required to, but may, terminate employment of any employee who refuses to accept employment with Polyco; Shell Oil shall substitute alternative personnel of equivalent qualifications, education and experience for any persons declining to accept employment with Polyco who are not terminated by Shell. Shell Oil shall encourage and facilitate employment by Polyco or by the acquirer of the Properties to Be Divested of employees whose principal duties, during the year prior to the date of transfer to Polyco of the Properties to Be Divested, related to the management, development or operation of the Properties to Be Divested; shall not offer any incentive to such employees to decline employment with Polyco or with the acquirer of the Properties to Be Divested or to accept other employment in Shell; and shall remove any impediments that exist which may deter such employees from accepting employment with Polyco or with the acquirer of the Properties to Be Divested, including but not limited to the payment for the benefit of the employees of all accrued bonuses, pensions and other accrued benefits to which such employees are entitled as of the date of the divestiture. Shell Oil

shall not impose any loss of pension benefits on employees to which such employees are entitled under the Shell Oil pension plan as administered under ERISA.

IV.

It is further ordered, That from the date this order becomes final and continuing until three (3) years following the date of the divestiture required by this order, Shell shall, at Polycol's request or at the request of the acquirer of the Properties to Be Divested, contract with Polyco or the acquirer of the Properties to Be Divested to supply to Polyco or the acquirer propylene monomer, in such quantities and product grade as Polyco or the acquirer may request for use in the Properties to Be Divested subject only to the capacity and grade constraints of Shell's propylene monomer production facilities in the United States and preexisting contractual obligations to persons other than Shell, Montedison, and Montell. The price, terms, and conditions at which Shell shall supply any grade of propylene monomer to Polyco and to the acquirer of the Properties to Be Divested shall be no less favorable to Polyco and the acquirer of the Properties to Be Divested than the price, terms, and conditions at which Shell supplies such grade of propylene monomer, directly or indirectly, to Montell in North America, through exchange or otherwise.

V.

It is further ordered, That:

A. If Shell or Shell Oil, as applicable, has not divested, absolutely and in good faith and with the Commission's prior approval, the Properties to Be Divested within the time required by paragraph II.A of this order or within such additional time as may be allowed in paragraphs II.B, II.C or II.D of this order, the Commission may appoint a trustee to divest the Properties to Be Divested. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission, Shell 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(1) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Shell to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph V.A of this order, Shell shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of Shell, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Shell has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to Shell of the identity of any proposed trustee, Shell shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Properties to Be Divested.

3. Within ten (10) days after appointment of the trustee, Shell shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph V.B.3 to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the Properties to Be Divested or to any other relevant information, as the trustee may request. Shell and Polyco shall develop such financial or other information as such trustee may request and shall cooperate with the

trustee. Shell and Polyco shall take no action to interfere with or impede the trustee's accomplishment of the divestitures. Any delays in divestiture caused by Shell or Polyco shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, in the case of a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Shell's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to the acquirer or acquirers as set out in paragraph II.A of this order; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by Shell from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of Shell, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Shell, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission or, 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 Shell 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.

8. Shell shall indemnify the trustee and hold the trustee harmless against any liabilities, losses, claims, damages, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, claims, damages, or expenses result from

misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph V.A of this order.

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

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

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

VI.

It is further ordered, That:

A. Royal Dutch, Shell T&T and Montedison shall obligate Montell, Montedison shall obligate Technipol, and Shell Oil shall obligate Polyco, to be bound by this order and insure compliance with this order by Montell, Technipol and Polyco, respectively.

B. Shell, Montedison and Montell shall not restrict any Montell Affiliate from licensing PP Technology or Catalyst Technology from the Unipol/SHAC Technology Business or Technipol or from purchasing PP Catalyst or Catalyst Systems from Polyco or Technipol.

C. Polyco shall not withhold its consent, except for good cause, to Union Carbide to grant or negotiate license fees and royalty rates below those minimums specified in the Cooperative Undertaking Agreement dated December 22, 1983, and attachments thereto.

D. Shell, Montedison, Montell and Technipol shall not enter into or renew any agreement or understanding with any developer or licensor of PP Technology or Catalyst Technology or any manufacturer, or seller of PP Catalyst, Catalyst Support, or Catalyst Systems limiting the geographic area within which, or limiting the persons to whom, such person may license PP Technology or Catalyst Technology or may manufacture and sell PP Catalyst,

Catalyst Support, or Catalyst Systems, unless such agreement or understanding relates exclusively to markets other than the United States and has no effect on United States commerce, including but not limited to export commerce. Nothing in this paragraph VI.D shall prohibit Shell, Montedison, Montell or Technipol from legitimately designating a sales agent for the sale of, or contract manufacturer for the production of, PP Catalyst or Propylene Polymers in any geographic area, or from limiting the persons, geographic area or uses for which they respectively grant legitimate licenses of their PP Technology or Catalyst Technology.

E. Montedison, Montell and Technipol shall not (1) enforce any provision in any agreement with Mitsui providing for sharing of royalties with respect to licenses granted by Mitsui after the date this order becomes final for use of PP Technology and Catalyst Technology in the United States in Propylene Polymers plants and in the production of Propylene Polymers; or (2) enter into or renew any agreement with Mitsui providing for sharing of royalties with respect to licensing of PP Technology or Catalyst Technology in the United States for use in Propylene Polymers plants and in the production of Propylene Polymers.

VII.

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

A. Acquire any stock, share capital, equity, or other interest in any concern, corporate or non-corporate, other than the acquisition by Shell or Montedison of additional shares of Montell, engaged in at the time of such acquisition, or within two (2) years preceding such acquisition engaged in,

1. The research and development (other than only implementation of technology licensed from others), or sale or licensing to any person, of PP Technology or Catalyst Technology anywhere in the world;

2. The research and development, sale, or manufacture for sale of PP Catalyst, Catalyst Support, or Catalyst Systems anywhere in the world; or

3. The manufacture or sale of Propylene Polymers in the United States or Canada; or

B. Acquire any assets used for or previously used for (and still suitable for use for)

1. The research and development (other than only implementation of technology licensed from others), or sale or licensing to any person, of PP Technology or Catalyst Technology anywhere in the world;

2. The research and development, sale, or manufacture for sale of PP Catalyst, Catalyst Support, or Catalyst Systems anywhere in the world; or

3. The manufacture or sale of Propylene Polymers in the United States or Canada.

Provided, however, these prohibitions shall not relate to the construction of new facilities or the acquisition of new or used equipment in the ordinary course of business from a person other than the persons referred to in paragraph VII.A of this order. Provided, further that this paragraph VII of this order shall not apply to the acquisition of Technipol by Montell following completion of the divestiture of the Properties to Be Divested and expiration of the attached Hold Separate Agreement.

VIII.

It is further ordered, That:

A. Within sixty (60) days from the date this order becomes final and every sixty (60) days thereafter until Shell has fully complied with the provisions of paragraphs II and V of this order, Shell Oil 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 paragraphs II and V of this order. Shell Oil shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts

being made to comply with paragraphs II and V of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Shell Oil shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

B. One (1) year from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, Royal Dutch, Shell Oil, Montedison and Montell shall each file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with this order.

IX.

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

X.

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, Shell, Montedison and Montell shall each permit any duly authorized representative 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 Shell, Montedison or Montell, as applicable, relating to any matters contained in this order; and

B. Upon five (5) days notice to Shell, Montedison or Montell and without restraint or interference from it, to interview its officers,

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

XI.

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

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate ("Agreement") is by and among Montedison S.p.A., a corporation organized, existing and doing business under the laws of Italy with its principal executive offices located at Foro Buonaparte, 31, 20121 Milan, Italy, and its wholly-owned subsidiary, HIMONT Incorporated, a corporation organized, existing and doing business under the laws of the State of Delaware with its principal executive offices located at Three Little Falls Centre, 2801 Centerville Road, Wilmington, Delaware (collectively "Montedison"); Royal Dutch Petroleum Company, a corporation organized, existing and doing business under the laws of the Netherlands with its principal executive offices located at Carel van Bylandtlaan 30, The Hague, The Netherlands, and The "Shell" Transport and Trading Company, p.l.c., a corporation organized, existing and doing business under the laws of England with its principal executive offices located at Shell Center, London SE1 7NA, England, and their wholly-owned subsidiary, Shell Oil Company, a corporation organized, existing and doing business under the laws of the State of Delaware with its principal executive offices located at One Shell Plaza, Houston, Texas (collectively "Shell"); 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 or about December 30, 1993, Montedison and Shell Petroleum N.V., a holding company of the Shell Group, entered into an agreement providing for the merger (hereinafter the "Acquisition") of the majority of the polyolefin assets and businesses of Montedison

(hereinafter the "Montedison Merged Assets") and the majority of the polyolefin assets and businesses of Shell (hereinafter the "Shell Merged Assets"); and

Whereas, Montedison and Shell each develop and license PP Technology and Catalyst Technology and each develop, manufacture and sell PP Catalyst and Propylene Polymers; and

Whereas, Montedison will establish Technipol and hold Technipol separate from Montell in accordance with the Decision of the Commission of the European Communities in Case No. IV/M. 269-SHELL/MONTECATINI; 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 agreement containing consent order ("consent order"), which would require the divestiture of certain assets, the Commission must place the consent order 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 Montedison Merged Assets and the Shell Merged Assets, respectively, during the period specified in paragraph four of this Agreement, 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.Q of the consent order and the Commission's right to have the Properties to Be Divested continue as a separate, viable and independent entity; and

Whereas, the purpose of this Agreement and the consent order is to:

(i) Preserve the Properties to Be Divested, also referred to herein as "Polyco," as a viable business independent from Montedison, pending the divestiture of the Properties to Be Divested as a viable and ongoing enterprise;

(ii) Preserve Technipol as a viable business independent from Shell, pending the divestiture of the Properties to Be Divested as a viable and ongoing enterprise; and

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

Whereas, Montedison's and Shell's entering into this Agreement shall in no way be construed as an admission by Montedison and Shell that the Acquisition is illegal, and this Agreement shall in no way be construed as limiting in any way the obligations of Montedison and Shell pursuant to the Decision of the Commission of the European Communities in Case No. IV/M. 269-SHELL/MONTECATINI; and

Whereas, Montedison and Shell 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, upon 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, the Commission will not seek a temporary restraining order, preliminary injunction, or permanent injunction with respect to the Acquisition, and in recognition 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 divestiture is not accomplished, to seek divestiture of the Properties to Be Divested and such other relief as the Commission may consider appropriate, the Parties agree as follows:

1. Montedison and Shell agree that from the date this Agreement is signed by Shell and Montedison until the earliest of the dates listed in paragraphs 1.a or 1.b, they each will comply with the provisions of this Agreement:

a. Ten 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 the divestiture required by the consent order has been completed.

2. Montedison, Royal Dutch, Shell T&T and Shell Oil agree to execute and be bound by the agreement containing consent order and to comply, from the date this Agreement is accepted, with the provisions of the consent order as if it were final.

3. The terms capitalized herein shall have the same definitions as in the consent order. In addition, the following terms used herein shall have the following definitions:

a. "*Montedison PP Technology*" means PP Technology and Catalyst Technology, including Know-How and patent rights, developed, under research and development, used, offered for license, or licensed to any person by Montedison at anytime prior to the date of transfer to Technipol of the Montedison Properties to Be Transferred. For purposes of this Agreement Catalloy process and related catalyst technology and technology concerning the production of PP Catalyst or the production of any other component of Catalyst System shall be excluded from "Montedison PP Technology."

b. "*Montedison Properties to Be Transferred*" means the businesses, rights and interests and other assets, tangible and intangible, required to be transferred from Montedison to Technipol pursuant to paragraph eight of this Agreement.

c. "*Existing Montedison Licenses*" means licenses of Montedison PP Technology to persons other than Montell Affiliates in effect as of the date of transfer to Technipol of the Montedison Properties to Be Transferred and includes so-called "catalyst use know-how licenses," "process know-how licenses" and "patent licenses."

d. "*Improvements*" means all refinements, optimizations, or new technical developments, patentable or unpatentable, of Know-How, PP Technology and Catalyst Technology with commercial application, other than Major Advances.

e. "*Major Advances*" means all new technical developments of and changes, patentable or unpatentable, to existing Know-How, PP Technology and Catalyst Technology with commercial application, of the type generally recognized in the industry as revolutionary or of major consequence and would, upon commercial implementation, (a) reduce production costs of Propylene Polymers by at least one (1) cent per pound; (b) significantly increase the quality, productivity or selling potential of the PP Catalyst, Catalyst Support or Catalyst System, or the quality or selling potential of the Propylene Polymers; or (c) enable production of new Propylene Polymers commercially

competitive primarily in end-uses for which Propylene Polymers produced and sold commercially have not been previously suitable for technological reasons. Major Advances include, for example:

- i. In the case of PP Technology, elimination of a unit operation, addition of a unit operation, or introduction of a new comonomer or additive;
- ii. In the case of PP Catalyst, a change in the major type of Catalyst Support;
- iii. In the case of Catalyst Systems, a change in the major type of components or elimination of one component together with a type change in another component; and
- iv. In the case of Propylene Polymers, new compositions or types that display chemical and physical properties not previously achievable by the relevant technology.

4. Montedison and Shell agree that from the date this Agreement is signed by Montedison and Shell until March 1, 1995, Montedison will hold the Montedison Merged Assets separate and apart from Shell and from Montell, and Shell will hold the Shell Merged Assets separate and apart from Montedison and from Montell.

5. Commencing prior to, or concurrently with, transfer to Montell of the Shell Merged Assets, Shell will hold the Properties to Be Divested as they are presently constituted (hereafter "Polyco") separate and apart on the following terms and conditions:

a. Shell and Shell Oil, as applicable, shall transfer to Polyco all ownership and control of the Properties to Be Divested. Polyco shall be held separate and apart and shall be operated independently of Shell (meaning here and hereinafter, Shell excluding Polyco and excluding all personnel connected with Polyco as of the date this Agreement as signed) except to the extent that Shell Oil must exercise direction and control over Polyco to assure compliance with this Agreement or with the consent order.

b. Shell Oil shall separately incorporate Polyco and cause Polyco to adopt new Articles of Incorporation and By-laws and any other required documents for Polyco that are not inconsistent with other provisions of this Agreement. Shell Oil shall also elect a new six-person board of directors of Polyco ("New Board") prior to, or concurrently with, transfer of any assets or businesses from Shell into

Montell or merger of any part of Shell and Montell or Montedison. Questions before the New Board shall be approved by a simple majority of the directors voting on the matter, provided that Polyco shall engage in no transaction that is precluded by this Agreement or by the consent order. Shell Oil may elect the directors to the New Board; provided, however, that such New Board shall consist of at least three outside directors neither previously nor currently employed by Shell or Montedison; two officers of Polyco; and a maximum of one Shell Oil (but not Royal Dutch, Shell T&T or Montell) director, officer, employee, or agent; provided, further, that such Shell Oil director, officer, employee or agent shall enter into a confidentiality agreement in accordance with the provisions of paragraph 5.h hereof and shall not be a person involved in Shell or Montell's Propylene Polymers or PP Catalyst businesses, as defined in paragraph I. of the consent order. Such director who is also a Shell Oil director, officer, employee or agent shall participate in matters that come before the New Board only for the limited purpose of carrying out Shell Oil's and Polyco's responsibilities under this Agreement or under the consent order. Shell Oil will take no action to delay or limit expansion of production capacity by Polyco. Except as permitted by this Agreement, the Shell Oil director shall not participate in any matter, or attempt to influence the votes of the other directors with respect to matters, including but not limited to expansion of capacity, that would involve a conflict of interest if Shell Oil and Polyco were separate and independent entities. In the case of deadlock by the New Board on any question in which the Shell Oil director participates, a second vote shall be taken on the question and the Shell Oil director shall not vote. The New Board shall include a chairman who is independent of Shell and is competent to assure the continual Viability and Competitiveness of Polyco. Shell Oil shall notify the Commission in its next compliance report submitted pursuant to paragraph VIII.A of the consent order of the identity and relevant qualifications and experience of any person whom Shell Oil has appointed as an original or subsequent director of Polyco.

c. Except for the single Shell Oil director, officer, employee, or agent serving on the "New Board" (as defined in paragraph 5.b) Shell shall not permit any director, officer, employee or agent of Shell to also be a director, officer, employee or agent of Polyco. In the event any members of management of the Properties to Be Divested should

choose not to accept employment with Polyco, or should retire or otherwise leave their management positions, the non-Shell (as Shell is defined in paragraph 5.a hereof) directors serving on the New Board (as defined in paragraph 5.b hereof) shall have the exclusive power to replace such members of management.

d. Polyco shall be staffed with sufficient employees to maintain the Viability and Competitiveness of the Properties to Be Divested. Shell, Montell and Technipol shall not employ, or make offers of employment to, any person employed by Shell Oil whose principal duties, during the year prior to the date of transfer to Polyco of the Properties to Be Divested, related to the management, development or operation of the Properties to Be Divested. This provision, however, does not apply to employment by Shell Oil of any employee who is terminated by Polyco or who is not offered employment by Polyco at a level of compensation and benefits at least equivalent to those held by the employee prior to the date of transfer to Polyco of the Properties to be Divested. Shell Oil shall encourage and facilitate employment by Polyco of Shell Oil employees who had line responsibility with respect to the Properties to Be Divested in the year prior to the transfer to Polyco of the Properties to Be Divested; shall not offer any incentive to such employees to decline employment with Polyco or accept other employment in Shell; and shall remove any impediments that exist which may deter much employees from accepting employment with Polyco, including but not limited to the payment, or transfer for the account of the employee, of all accrued bonuses, pensions and other accrued benefits to which such employees would otherwise have been entitled had they remained in the employment of Shell Oil.

e. Shell shall not exercise direction or control over, or influence directly or indirectly, Polyco; provided, however, that Shell Oil may exercise only such direction and control over Polyco as is necessary to assure compliance with this Agreement or with the consent order, including dissolution, merger, consolidation, bankruptcy, sale of substantially all assets, major acquisitions, issuance of equity securities or any change in the legal status of Polyco.

f. Shell shall not cause or permit any destruction, removal, wasting, deterioration or impairment of Polyco, except for ordinary wear and tear. Shell Oil shall maintain the marketability and the Viability and Competitiveness of Polyco and shall not sell, transfer, encumber (other than in the normal course of business) or otherwise

impair its marketability or Viability and Competitiveness. Shell Oil shall provide Polyco with sufficient working capital to operate at current rates of operation, to perform all necessary routine maintenance to, and replacement of, plant and equipment of the Properties to Be Divested, and to maintain the Viability and Competitiveness of the Properties to Be Divested.

g. Shell shall not change the composition of the management of Polyco except that the non-Shell (as Shell is defined in paragraph 5.a hereof) directors or members serving on the New Board (as defined in paragraph 5.b hereof) shall have the power to remove any employee. With the exception of the single Shell Oil director, Shell Oil shall not remove directors of the New Board except for cause.

h. Except as permitted by this Agreement, the Shell Oil New Board member shall not in his or her capacity as a New Board member receive Material Confidential Information and shall not disclose any such information received under this Agreement to Shell, Montedison or Montell or use it to obtain any advantage for Shell, Montedison or Montell. Any Shell Oil director, officer, employee or agent 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.

i. Except as required by law and except to the extent that necessary information is exchanged in the course of 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, Shell, Montedison and Montell shall not receive or have access to, or the use of, any Material Confidential Information of Polyco, except as such information would be available to Montedison in the normal course of business if the Acquisition had not taken place. Any such information that is obtained by Shell Oil pursuant to this paragraph shall only be used for the purposes set out in this paragraph. Provided, however, until divestiture of Polyco, hourly personnel assigned to Polyco plant operations may continue to be covered by existing contracts between Shell Oil and any unions representing such employees; and Shell Oil may assign Shell Oil personnel to perform the accounting, analytical chemistry, human resources, information systems, transportation services and tax

functions for Polyco provided that such Shell Oil personnel shall enter into confidentiality agreements in accordance with the provisions of paragraph 5.h hereof and provided further that those Shell Oil personnel working with Material Confidential Information of Polyco shall not be involved in Montell's PP Technology, Catalyst Technology, PP Catalyst or Propylene Polymers business, as defined in paragraph I. of the consent order for the period that Shell must comply with paragraph five hereof. Provided further that the New Board (as defined in subparagraph 5.b hereof) may designate and contract with Shell Oil as a non-exclusive sales agent for sales of PP Catalyst or Propylene Polymers by Polyco outside the United States, provided that all Shell Oil personnel with access to Material Confidential Information of Polyco in connection with such contract or agency shall, prior to gaining such access, enter into confidentiality agreements in accordance with the provisions of paragraph 5.h hereof.

j. All earnings and profits of Polyco shall be retained separately in Polyco.

k. Should any transfer to Polyco of an agreement, contract or license required to be included in the Properties to Be Divested not be possible after reasonable effort by Shell Oil due to another party withholding its consent to the transfer, Shell Oil shall enter into an agreement with Polyco the purpose of which agreement is to realize the same effect as such transfer. Further, Shell Oil shall secure, at its expense, patent licenses, or assignments of patent licenses, extending to Polyco rights and royalty rates with respect to the manufacture and sale of Propylene Polymers and PP Catalyst, and rights to expand production and sale, no less favorable than those held by Shell Oil as of the date of transfer to Polyco of the Properties to Be Divested.

6. Prior to, or concurrently with, transfer to Montell of the Shell Merged Assets, Royal Dutch and Shell T&T shall ensure that companies of the Shell Group shall:

a. Take such actions as are necessary to establish and maintain separate and apart from Montell the Koninklijke/Shell Laboratorium Amsterdam ("KSLA") research and development laboratory of Shell Research B.V., a company of the Shell Group; and

b. Take such actions as are necessary to ensure that no Shell research personnel who have had access to Unipol PP Technology

(other than Catalyst Technology received by Shell Oil from other companies of the Shell Group) within one (1) year prior to the date of the formation of Montell engage in research at facilities of Montell.

7. Shell Oil's Pecten international marketing organization shall not market or distribute products of Montell but may, as requested by Polyco, market and distribute products produced by Polyco.

8. Prior to, or concurrently with, transfer to Montell of the Montedison Merged Assets, Montedison shall

a. Transfer to Technipol as an ongoing business:

i. PP research and development facilities in the Giulio Natta Research Center in Ferrara, Italy, by outright transfer or lease, including transfer of its P03 pilot plant, equipment, rights-of-way, easements, and other rights and assets appropriate and sufficient to preserve the Viability and Competitiveness of the Montedison PP Technology business.

ii. The irrevocable worldwide right, for a period not to expire prior to the divestiture of the Properties to be Divested, to grant to any person perpetual Montedison PP Technology licenses subject to any lawful rights previously granted to persons not parties to this Agreement. This right shall be exclusive subject to the right of Montell to license Montell Affiliates.

iii. Existing Montedison Licenses and Montedison's PP Catalyst supply contracts with persons other than Montell Affiliates. Should any such transfer not be possible after reasonable effort by Montedison due to the other party withholding its consent to the transfer, Montedison or Montell shall enter into an agreement with Technipol to service the licenses not transferred to Technipol and account for revenues from such licenses strictly for the benefit and account of Technipol, the purpose of which agreement is to realize to the extent possible the same effect of a transfer of such licenses.

iv. Montedison's PP Catalyst sales business.

v. Personnel who possess the specific skills and experience required by Technipol sufficient to support, conduct and preserve the Viability and Competitiveness of the Montedison Properties to Be Transferred. Montedison shall appoint Technipol's managers on the

basis of demonstrated ability and specific experience in the Montedison PP Technology field.

vi. Such other assets (including cash and working capital) and personnel as may be required to effectuate the remedial purpose of this order and to assure that Technipol will be capable of operating independently at the same level of research, development and licensing of PP Technology, and sale of PP Catalyst as existed in the Montedison Properties to Be Transferred on average during the two (2) years prior to the Transfer Date.

b. Physically separate, to the extent feasible, the assets, personnel, offices and facilities transferred or leased to Technipol from those retained in Montedison and from those transferred to Montell so as to assure the independence of Technipol from Montell and to assure that Material Confidential Information that is not to be made available to another person pursuant to the consent order and this Agreement is not accessible to such person.

c. Assign to Technipol all other agreements in which Montedison grants to a person other than Montell or a Montell Affiliate the right to practice Montedison PP Technology. Should any such assignment not be possible after reasonable effort by Montedison due to the other party withholding its consent to the assignment, Montedison or Montell shall enter into an agreement with Technipol the purpose of which is to realize the effect of such assignment.

d. Take such actions as necessary to ensure an ongoing agreement between Montell and Technipol pursuant to which Montell will provide to Technipol, at Montell's cost, services (such as building security, fire protection, trash removal, shipping and receiving, accounting and cleaning services), utilities and common maintenance for the Montedison Properties to Be Transferred, as may be requested by Technipol.

Provided, however, that Montedison shall retain for Montell ownership of, and free right to practice and use, and sell product resulting from the practice or use of, all Montedison PP Technology and PP Catalyst production assets.

9. Commencing prior to, or concurrently with, transfer to Montell of the Montedison Merged Assets, Montedison will hold Technipol as constituted in accordance with paragraph eight of this Agreement separate and apart on the following terms and conditions:

a. Montedison shall separately incorporate Technipol and adopt Articles of Incorporation and By-laws for Technipol that are not inconsistent with other provisions of this Agreement. Montedison shall also elect a board of directors of Technipol prior to, or concurrently with, transfer to Montell of the Montedison Merged Assets.

b. Technipol shall be operated independently of Montell and Shell, and neither Shell nor Montell shall have any ownership or other financial interest in Technipol or exercise direction or control over, or influence directly or indirectly, Technipol, except as specifically authorized by this Agreement.

c. Montedison shall not permit any director, officer, employee or agent of Montell, or any director, officer, employee or agent of Montedison involved in management or oversight of Montell, to also be a director, officer, employee or agent of Technipol.

d. Any Montedison director, officer, employee or agent who obtains or may obtain Material Confidential Information of Technipol under this Agreement shall not disclose to Shell or Montell such Material Confidential Information until the day after divestiture of the Properties to Be Divested has been completed.

e. Montedison shall not cause or permit any destruction, removal, wasting, deterioration or impairment of Technipol, except for ordinary wear and tear. Montedison shall also maintain the Viability and Competitiveness of Technipol and shall not sell, transfer, encumber (other than in the normal course of business) or otherwise impair its Viability and Competitiveness.

f. The purpose of the formation of Technipol and the transfer to it of the Montedison Properties to Be Transferred is to ensure the continuation of separate, full-functioning entity to conduct the business of the Montedison Properties to Be Transferred and to preserve the Viability and Competitiveness of that business until the Properties to Be Divested are divested.

g. Montell shall provide Technipol and its licensees and prospective licensees access to any and all of Montell's commercial scale PP plants using Montedison PP Technology for demonstrating the PP Technology and Catalyst Technology used in the plant to prospective licensees and shall provide technical assistance and training for personnel of Technipol's licensees. In consideration for providing such services and assistance to Technipol, Montell may charge no more than its actual hourly cost of pay and benefits for the

services of Montell personnel providing technical assistance and training and, in the case of technical assistance or training by Montell Personnel at a licensee's or prospective licensee's facilities, reasonable and customary travel and per diem subsistence costs of such personnel.

h. With respect to future Improvements or Major Advances in Montedison PP Technology by Technipol or Montell:

i. Technipol and Montell shall each own any Improvements or Major Advances it develops at its own cost or finances.

ii. Technipol shall have the right to license to any person any results obtained from research and development in the field of PP Technology performed by Technipol under contract for Montell.

iii. Technipol may grant Montell a paid-up, royalty-free, perpetual and non-exclusive right to use any Improvements owned by Technipol or received by Technipol from its licensees.

iv. Technipol may grant Montell a non-exclusive license to use any Major Advances owned by Technipol or received by Technipol from its licensees on a non-discriminatory basis on terms available to other persons.

v. Montell shall grant Technipol a paid-up, royalty-free, perpetual and non-exclusive right to license persons other than Montell Affiliates to use any Improvements owned by Montell.

vi. Montell shall grant Technipol the right to license third parties to use any Major Advances owned by Montell, unless Montell is contractually prohibited, by contract with any person other than a Montell Affiliate or a respondent, from sharing such Major Advances with Technipol. Such grant to Technipol shall be on reasonable terms and conditions which shall, in any event, be no less favorable to Technipol than those offered by Montell to any person other than a Montell Affiliate.

i. Technipol shall have the exclusive right, subject to any lawful rights previously granted to persons not parties to this Agreement, to enforce intellectual property rights with respect to Montedison PP Technology, and to sell PP Catalyst to persons other than Montell and Montell Affiliates.

j. Except as expressly provided in this Agreement, all sales, licensing and other business relationships between Technipol and

either Montedison, Shell or Montell shall be conducted on a non-discriminatory basis on terms available to other persons.

k. Pursuant to a PP Catalyst supply agreement between Montell and Technipol, Montell shall produce PP Catalyst, including Improvements thereto, for Technipol for use by Technipol's licensees and PP Catalyst customers, subject to the rights of Akzo Nobel. To this end, Montell shall dedicate such portion of its PP Catalyst production capacity as is required to supply Technipol's licensees and PP Catalyst customers. The price for PP Catalyst supplied by Montell to Technipol shall be negotiated between Montell and Technipol, but in no event shall be more than the lowest contract price, in terms of the price per pound of Propylene Polymers produced per pound of PP Catalyst, for PP Catalyst available to a licensee other than a Montell Affiliate or government controlled licensee, as of December 31, 1993, recalculated in accordance with the pricing formula in the PP Catalyst supply contract for that licensee, less eight percent (8%).

l. Pursuant to a Catalyst Support supply agreement between Montell and Technipol, Montell shall produce Catalyst Support, including Improvements thereto, for Technipol for sale to Akzo Nobel. The price for Catalyst Support supplied by Montell to Technipol shall be negotiated between Montell and Technipol, but in no event shall be more than the price charged to Akzo Nobel as of December 31, 1993, recalculated in accordance with the pricing formula in the Catalyst Support supply contract between Akzo Nobel and Himont, less eight percent (8%).

m. Notwithstanding any agreement entered into by Montell and Technipol pursuant to paragraphs 9.k and 9.l of this Agreement, Technipol may acquire PP Catalyst and Catalyst Support from any other person.

n. Technipol shall provide to Montell, on the date of transfer to Technipol of the Montedison Properties to Be Transferred and on the first day of every calendar quarter thereafter, an estimate of its requirements for PP Catalyst and Catalyst Support for the following twelve (12) months. Montell shall supply PP Catalyst and Catalyst Support in quantities sufficient to maintain an inventory of PP Catalyst and Catalyst Support equivalent to Technipol's requirements for PP Catalyst and Catalyst Support for a period of six (6) months. In the event that Montell is unable to maintain an inventory of PP Catalyst and Catalyst Support sufficient to supply Technipol's

requirements for PP Catalyst and Catalyst Support for a period of six (6) months, Montell will grant to Technipol the right and Know-How necessary to produce, or have produced on its behalf, PP Catalyst and Catalyst Support.

o. In the case of any shortage of PP Catalyst or Catalyst Support production Montell shall continue to supply Technipol with its requirements except that in the case of shortages that are not the result of Montell's actions Montell may allocate PP Catalyst and Catalyst Support to Technipol and Montell and Montell Affiliates on a pro rata basis based on the previous twelve (12) months. In the case of any shortage of PP Catalyst or Catalyst Support to Technipol, Technipol may request that Montell expand the production facilities, at Montell's expense, in order to meet the requirements of Technipol.

p. Technipol shall have the sole right to determine, subject to PP Catalyst supply contracts with persons other than Montell or Montell Affiliates existing as of the date the Montedison Properties to Be Transferred are transferred to Technipol and the existing Akzo Agreement, the sales price, quantity and type of PP Catalyst and Catalyst Support sold by Technipol to any person.

q. Montell and Shell shall not interfere in, or attempt to influence, any decisions or activities of Technipol.

r. Shell, Montedison, Montell, Technipol and Polyco shall not exchange or discuss between each other, directly or indirectly, current or future intentions, plans or forecasts for pricing, production or capacity for PP Catalyst, Catalyst Support, Catalyst Systems or Propylene Polymers, or royalty rates for licensing PP Technology or Catalyst Technology to others, except as required between Montell and Technipol in accordance with paragraphs 9.k and 9.1 of this Agreement.

10. Except as otherwise provided in the consent order or this Agreement, as required for the purpose of tax return preparation, compliance with any law or request from a revenue authority, or to the extent that necessary information is exchanged in the course of evaluating and consummating the formation of Montell, Technipol or Polyco, defending government investigations or litigation, or negotiating to dispose of assets:

a. Neither Montedison, Montell, Technipol nor Polyco shall provide, disclose or otherwise make available to Shell any Material Confidential Information.

b. Neither Montedison nor Technipol shall provide, disclose or otherwise make available to Montell any Material Confidential Information of Technipol.

c. Shell shall not provide, disclose or otherwise make available to Montedison, Montell or Technipol any material Confidential Information of Polyco or the Unipol/SHAC Technology Business (other than Catalyst Technology received by Shell Oil from other companies of the Shell Group), provided however nothing in this paragraph 10.c of this Agreement shall prohibit (a) Montell Affiliates who are licensees of Unipol PP Technology from receiving information, in accordance with such license, for use in their Unipol PP Technology licensed production facilities, including information obtained by Shell, prior to the formation of Montell, under The Tripartite Catalyst Research Agreement; and (b) any communication between Shell and Montell necessary to ensure that Montell and its employees make no unauthorized use or disclosure of any Material Confidential Information.

d. Neither Montell nor Shell shall provide, disclose or otherwise make available to Montedison or Technipol any Material Confidential Information.

Provided, however, that nothing in this Agreement shall limit or prohibit (a) Montell, Technipol or Polyco from licensing or otherwise doing business on a nondiscriminatory basis with each other or with any entity in which Montedison or a Shell Group company has an interest; or (b) persons elected by Shell or Montedison to the Montell board of directors from participating in decisions relating to Montell if they do not also participate in decisions relating to similar businesses of Technipol or Polyco.

11. To the extent that this Agreement or the consent order requires Shell or Montedison to take, or prohibits Shell or Montedison from taking, certain actions that otherwise may be required or prohibited by contract, Shell and Montedison shall abide by the terms of this Agreement and the consent order and shall not assert as a defense such contract rights in a civil penalty action brought by the Commission to enforce the terms of this Agreement or the consent order.

12. Should the Federal Trade Commission seek in any proceeding to compel Shell (meaning here and hereinafter Shell including Polyco) to divest itself of the Montedison Merged Assets, to compel

Shell to divest any assets or businesses of the Shell Merged Assets or the Montedison Merged Assets that it may hold, to compel Montedison to divest itself of the Shell Merged Assets, to compel Montedison to divest any assets or businesses of the Montedison Merged Assets or the Shell Merged Assets that it may hold, or to seek any other injunctive or equitable relief for any failure to comply with the consent order or this Agreement, or in any way relating to the Acquisition, Shell and Montedison 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. Shell and Montedison also waive all rights to contest the validity of this Agreement.

13. 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 Montedison, Shell, Polyco or Montell made to its principal office, Montedison, Shell, Polyco and Montell shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of Montedison or Shell 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 Montedison, Shell, Polyco or Montell relating to compliance with this Agreement; and

b. Upon ten (10) days notice to Montedison, Shell, Polyco or Montell and without restraint or interference from it, to interview officers or employees of Montedison, Shell, Polyco or Montell who may have counsel present, regarding any such matters.

14. This Agreement shall not be binding on the Commission until it is approved by the Commission.