

## IN THE MATTER OF

## THE DOW CHEMICAL 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-3785. Complaint, Feb. 20, 1998--Decision, Feb. 20, 1998*

This consent order requires, among other things, the Michigan-based chemical company to divest, simultaneously with its acquisition of Sentrachem, Limited, a South African chemical company, the Hampshire Chemical Company's chelant business to Akzo Nobel N.V., which imports small volumes of chelants into the United States.

*Appearances*

For the Commission: *Morris Bloom, Joseph Krauss, Howard Morse and William Baer.*

For the respondent: *Robert Schlossberg and Peter Halle, Morgan, Lewis & Bockius, Washington, D.C. and Scott R. Pennock, in-house counsel, Midland, MI.*

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that the Dow Chemical Company's proposed acquisition of the South African company, Sentrachem Limited ("Sentrachem"), including its U.S. subsidiary, Hampshire Chemical Corporation ("Hampshire"), would violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

## I. THE RESPONDENT

## The Dow Chemical Company

1. Respondent Dow is a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its office

and principal place of business located at 2030 Dow Center, Midland, Michigan. In 1996 Dow had worldwide sales of approximately \$20 billion.

2. Dow produces chemicals, plastics, and agricultural and consumer products. Through its Chemical Division, it is the leading producer in the U.S. of aminopolycarboxylic chelating agents, also known as chelants.

3. At all times relevant herein, Dow has been, and is now, a corporation as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44; and at all times relevant herein, Dow has been, and is now, engaged in commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, and Section 1 of the Clayton Act, 15 U.S.C. 12.

#### II. THE ACQUIRED COMPANY

4. Sentrachem, a South African company, develops, manufactures, and markets a number of different commodity and specialty chemical products. In 1996 Sentrachem had worldwide sales of approximately \$1 billion. Sentrachem competes in the U.S. chelant market through its U.S. subsidiary, Hampshire, a Delaware corporation, with its principal place of business in Lexington, Massachusetts. In 1996, Hampshire's sales were approximately \$200 million.

#### III. THE ACQUISITION

5. On or about August 5, 1997, Dow announced a cash tender offer to acquire all of the shares of Sentrachem for approximately \$425 million.

#### IV. THE RELEVANT MARKET

6. One relevant line of commerce in which to analyze the proposed acquisition is the research, development, manufacture, and sale of chelants, which are chemicals used to inactivate iron, calcium, copper, magnesium and other metal ions in water solutions. Chelants are used in cleaners, pulp and paper, water treatment, photography, agriculture, and food and pharmaceutical applications. Chelant customers use chelants because they are high quality metal ion control chemicals that are cost effective across a wide variety of applications. Chelants are an extremely small part of the customer's overall product or processing costs. Because of the time and cost associated with researching and qualifying an alternative to chelants,

customers do not reformulate away from chelants. There are no economic substitutes for chelants to which customers would switch in response to a price increase in chelants.

7. The United States is one relevant geographic area within which to analyze the likely effect of the proposed acquisition on competition in the chelant market. Chelants produced overseas are not economic substitutes for most chelants sold in the United States, particularly those diluted in water, because shipping costs are high and there are too many uncertainties and delays inherent in long distance shipping. Imports of chelants are less than 4 percent of U.S. consumption.

#### V. CONCENTRATION

8. Based on 1996 dollar sales, Dow and Hampshire are the two leading of only three producers of chelants in the United States, with a combined market share of over 70 percent. The U.S. chelant market is highly concentrated as measured by the Herfindahl-Hirschmann Index ("HHI"). The proposed acquisition would increase the HHI by more than 2,800 points to more than 6,100 points.

#### VI. ENTRY CONDITIONS

9. Entry into the chelant market would not be timely, likely, or sufficient to deter or offset the adverse effects of the proposed acquisition on competition. A new entrant would have to build both a chelant production plant and a plant to produce hydrogen cyanide ("HCN"), a key input in the production of chelants, which would take over two years and entail large fixed, and mostly sunk, costs. In addition to the time to construct these facilities, a new firm must secure the environmental permits to produce HCN, a toxic substance. In order to recoup its investment, a new entrant would need to obtain a market share at least as large as that held by any of the current domestic producers, which would be difficult because of the significant amount of chelant sales that are subject to long term supply agreements. All these factors make entry into the U.S. chelant market unlikely.

#### VII. EFFECT OF THE PROPOSED MERGER ON COMPETITION

10. The proposed acquisition would substantially lessen competition or tend to create a monopoly in the U.S. chelant market, because, among other things:

- a. It increases concentration substantially in a highly concentrated market;
- b. It eliminates actual, direct, and substantial, competition between Dow and Hampshire;
- c. It facilitates the unilateral exercise of market power by the merged firm; and
- d. It will likely result in increased prices for chelants.

#### VIII. VIOLATIONS CHARGED

11. The proposed acquisition by Dow of all the shares of Sentrachem, described in paragraph five, would violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

Commissioner Azcuenaga and Commissioner Thompson not participating.

#### DECISION AND ORDER

The Federal Trade Commission ("the Commission"), having initiated an investigation of the proposed acquisition by The Dow Chemical Company ("Dow"), through its wholly-owned subsidiary, Dow South Africa Holdings (Pty) Ltd., of the entire issued share capital of Sentrachem Limited ("Sentrachem"), which in turn owns Hampshire Chemical Corporation ("Hampshire"), and having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

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

The Commission, having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that 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 Dow 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 2030 Dow Center, Midland, Michigan.

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

B. "*Respondent*" or "*Dow*" means The Dow Chemical Company, its directors, officers, employees, agents and representatives, its predecessors, successors, and assigns; subsidiaries, divisions, and groups and affiliates controlled by Dow, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

C. "*Sentrachem*" means Sentrachem Limited, a South African company, with its principal place of business at 5 Protea Place Sandown 2196, 2146 Sandton, Republic of South Africa.

D. "*Hampshire*" means Hampshire Chemical Corporation, a wholly-owned subsidiary of Sentrachem Limited, with its principal place of business at 55 Hayden Avenue, Lexington, Massachusetts.

E. "*Akzo*" means Akzo Nobel N.V., a company located in The Netherlands, with its principal place of business at Velperweg 76, 6800 SB Arnhem, The Netherlands, and its subsidiary Akzo Nobel Chemicals Inc.

F. "*Acquisition*" means the acquisition by Dow, through its subsidiary, Dow South Africa Holdings (Pty) Ltd., of the entire issued share capital of Sentrachem Limited.

G. "*Chelating agents*" means chemicals used to react with metal ions to form ring structures incorporating the metal ion within the molecule.

H. "*Chelant products*" means ethanoldiglycine sodium ("EDG") and diethanolglycine sodium ("DEG") and aminopolycarboxylic acids and salts, including, but not limited to, ethylenediaminetetraacetic acid ("EDTA"), diethylenetriaminepentaacetic acid ("DTPA"), hydroxyethylenediaminetriacetic acid ("HEDTA"), nitrilotriacetic acid ("NTA"), ethylenediaminetriacetic ("ED3A"), and the salts and nitrile precursors of EDTA, DTPA, HEDTA, ED3A, and any other chelating agents, but excluding propylenediaminetetraacetic acid ("PDTA").

I. "*Hampshire Chelant Products*" means all chelant products that have been, at any time in the two (2) years preceding the Acquisition, researched, developed, manufactured, distributed or sold by Hampshire in the United States or Canada, including, but not limited to, all projects in research and development by Hampshire that relate to improving existing or developing new chelant products, or improving processes for manufacturing chelant products.

J. "*Hampshire Non-Chelant Products*" means any product other than Hampshire Chelant Products, that have been, at any time in the two (2) years preceding the Acquisition, researched, developed, manufactured, distributed, or sold at the Lima Facility or Other Hampshire Facilities, including, but not limited to, all projects in research and development by Hampshire that relate to improving existing or developing new Hampshire Non-Chelant Products, or improving processes for manufacturing Hampshire Non-Chelant Products.

K. "*Hampshire Products*" means Hampshire Chelant Products and Hampshire Non-Chelant Products.

L. "*Lima Facility*" means Hampshire's Lima, Ohio manufacturing facility.

M. "*Other Hampshire Facilities*" means Hampshire's facilities located at Deer Park, Texas and Nashua, New Hampshire.

N. "*Akzo Lima Expansion*" means such improvements, additions, and expansions to the Lima Facility to produce no less than 175 million pounds per annum (on a solution pound basis) of chelant

products and to provide sufficient hydrogen cyanide ("HCN"), nitrile, and other raw material storage, chelant products warehouse space and related facilities, to enable the Hampshire Chelant Business to operate at sustained levels of output no less than 175 million pounds per annum (on a solution pound basis) of chelant products.

O. "*Akzo Lima Expansion Milestones*" means: (i) the submission by Akzo of complete applications for any and all federal, state, and local governmental permits that may be required to complete the Akzo Lima Expansion, within twelve (12) months after the date this order becomes final; (ii) the receipt by Akzo of all federal, state, or local governmental permits that are required to complete the Akzo Lima Expansion, within eighteen (18) months after the date this order becomes final; provided, however that if Akzo has not received approval or final disapproval of its permit application(s) within eighteen (18) months after the date this order becomes final, this second milestone shall be extended until Akzo receives approval or final disapproval for a period up to, but in no event longer than, twelve (12) months; (iii) the completion by Akzo of the structural steel installation required for the Akzo Lima Expansion, within twelve (12) months after permitting.

P. "*Dow's Competing Chelant Business*" means all assets, properties, business and goodwill, tangible and intangible of Dow relating to the research, development, manufacture, distribution or sale of chelant products, its employees, agents, representatives, and any other personnel assigned to such business, or to whom such persons report directly or indirectly.

Q. "*Dow's Contract Manufacturing Services*" means the Dow business unit engaged in the contract manufacture of chemical and polymer products and services for independent firms.

R. "*Hampshire Chelant Business*" means all assets, properties, business and goodwill, tangible and intangible, of Hampshire relating to the research, development and manufacture in the United States, and the distribution and sale in North America, of Hampshire Chelant Products, including, but not limited to:

1. All rights, title and interest in and to owned or leased real property at the Lima Facility (including completion of the current nitrile expansion project underway), together with its appurtenances, licenses and permits; but excluding real property at (i) the Other Hampshire Facilities; (ii) Hampshire's Lexington, Massachusetts facility; and (iii) Hampshire's Teeside, United Kingdom facility;

2. All machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property located at the Lima Facility, but excluding machinery, fixtures, equipment, transportation facilities located at (i) the Other Hampshire Facilities; (ii) Hampshire's Lexington, Massachusetts facility; and (iii) Hampshire's Teeside, United Kingdom facility;

3. All intangible assets associated with Hampshire Chelant Products, including, but not limited to, processes, process improvements projects, production projects, permits, supporting data and documents, patents, patent applications and other intellectual property relating to any Hampshire Chelant Product;

4. All intellectual property used by Hampshire at the Lima Facility and all intellectual property used for the research, development, manufacture or sale of Hampshire Chelant Products, including, but not limited to, trade secrets, test data, technology and know-how (including, but not limited to, manufacturing know-how and application know-how), and all patents, patent applications, patent rights, licenses, registrations, submissions and approvals;

5. All books, records and files, customer lists, customer records and files, vendor lists, catalogs, sales promotion literature, advertising materials, specifications, designs, drawings, and quality control data;

6. All right, title and interest in and to contracts and agreements entered into in the ordinary course of business with customers (together with associated bid and performance bonds), joint ventures, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees, including, but not limited to, Hampshire's existing contract with BP Chemicals Inc. for the supply of liquid hydrogen cyanide and the related service agreements and land lease; and all existing Hampshire contracts for railcars used in the transport of Hampshire Chelant Products;

7. All projects in research and development by Hampshire as of the date of the Acquisition that relate to improving existing chelant products, or developing chelant products, including, but not limited to, all research materials, technical information, inventions, trade secrets, intellectual property, patents, technology, know-how (including, but not limited to, manufacturing know-how and application know-how), specifications, designs, drawings, processes, quality control data, and formulas, as well as licenses thereto, relating to all such projects in research and development;

8. All research materials and inventions and intellectual property used for research and development relating to Hampshire Chelant Products or processes, including, but not limited to, trade secrets, test data, technology and know-how, and all patents, patent applications, patent rights, licenses, registrations, submissions and approvals;

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

10. All rights, titles and interests in registrations or other governmental approvals for manufacture and sale of any Hampshire Chelant Products or research and development efforts for Hampshire Chelant Products; and

11. All Hampshire (including Hampshire UK) brand names and trademarks for Hampshire Chelant Products worldwide, but excluding the Hampshire corporate name and any brand names or trademarks that include the full word "Hampshire."

In addition, the "Hampshire Chelant Business" shall include all intellectual property used by Hampshire in the research, development, and manufacture in the United States, and the distribution and sale worldwide, of PDTA.

S. "*Hampshire Business Unit*" means the Hampshire Chelant Business and all assets, properties, business and goodwill, tangible and intangible of Hampshire relating to the research, development and manufacture in the United States, and the distribution and sale in North America of Hampshire Products, including, but not limited to:

1. All right, title and interest in and to owned or leased real property at the Lima Facility and Other Hampshire Facilities together with its appurtenances, licenses and permits;

2. All machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property located at the Lima Facility and Other Hampshire Facilities;

3. All inventory and storage capacity;

4. All intangible assets associated with Hampshire Products, including, but not limited to, processes, process improvements projects, production projects, permits, supporting data and documents, patents, patent applications and other intellectual property relating to any Hampshire Product;

5. All intellectual property used for the research, development, manufacture or sale of Hampshire Products, including, but not limited to, trade secrets, test data, technology and know-how (including, but not limited to, manufacturing know-how and application know-how),

and all patents, patent applications, patent rights, licenses, registrations, submissions and approvals;

6. All books, records and files, customer lists, customer records and files, vendor lists, catalogs, sales promotion literature, advertising materials, specifications, designs, drawings, and quality control data;

7. All right, title and interest in and to contracts and agreements entered into in the ordinary course of business with customers (together with associated bid and performance bonds), joint ventures, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees including, but not limited to, all existing contracts with BP Chemicals Inc. for the supply of liquid hydrogen cyanide and the related service agreements and land lease; and all existing contracts for railcars used in the transport of Hampshire Products;

8. All projects in research and development as of the date of the divestiture required by this order pursuant to paragraph IV.B that relate to improving existing, or developing new, Hampshire Products, including, but not limited to, all research materials, technical information, inventions, trade secrets, intellectual property, patents, technology, know-how (including, but not limited to, manufacturing know-how and application know-how), specifications, designs, drawings, processes, quality control data, and formulas, as well as licenses thereto, relating to all such projects in research and development;

9. All research materials and inventions and intellectual property used for research and development relating to Hampshire Products, including, but not limited to, trade secrets, test data, technology and know-how, and all patents, patent applications, patent rights, licenses, registrations, submissions and approvals;

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

11. All items of prepaid expense;

12. All rights, titles and interests in registrations or other governmental approvals for manufacture and sale of any Hampshire Non-Chelant Products, or research and development efforts for Hampshire Non-Chelant Products; and

13. All Hampshire (including Hampshire UK) brand names and trademarks for Hampshire Products worldwide, including the Hampshire corporate name and any brand names or trademarks that include the full word "Hampshire."

## II.

*It is further ordered, That:*

A. Respondent shall divest, absolutely and in good faith, as an ongoing business, simultaneously with consummation of the Acquisition, the Hampshire Chelant Business to Akzo pursuant to the agreement between Dow and Akzo dated as of November 15, 1997. Provided, however, that respondent may retain (i) a non-exclusive, fully-paid and global license from Akzo to intangible assets and intellectual property used by the Hampshire Chelant Business in the research, development or manufacture of Hampshire Chelant Products to make, have made, use and sell Hampshire Non-Chelant Products; and (ii) a non-exclusive, fully-paid and global license relating to the manufacture of ED3A to make, have made, use and sell ED3A for use as a precursor for surfactants; and (iii) a non-exclusive, fully-paid, and global license to intellectual property used in the manufacture of PDTA to make, have made, use and sell PDTA in any part of the world.

B. The purpose of the divestiture of the Hampshire Chelant Business is to ensure the continuation of the Hampshire Chelant Business as an ongoing, viable business engaged in the research, development, manufacture, distribution and sale of chelant products independent of Dow, and in competition with Dow, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

C. On reasonable notice to respondent, respondent shall provide technical assistance and know-how to Akzo with respect to the Hampshire Chelant Business. Such technical assistance shall include, without limitation, consultation with knowledgeable employees of Hampshire and training at the manufacturing facilities of Hampshire. Respondent may charge the reasonable costs incurred in providing such technical assistance, including reimbursement (commensurate with the salary and benefits of Hampshire personnel involved) for the time plus expenses of Hampshire personnel providing the technical assistance. Hampshire shall continue to provide such technical assistance until Akzo is satisfied that it is capable of producing, and of developing for production, commercially saleable chelant products utilizing the assets of the Hampshire Chelant Business; provided, however, Hampshire shall not be required to continue providing such technical assistance and training after the earlier of (i) one (1) year

after the Akzo Lima Expansion is fully operational and released to production; or (ii) three (3) years after the date this order becomes final.

### III.

*It is further ordered, That:*

A. Respondent shall exclusively toll manufacture for Akzo Hampshire Chelant Products at the Other Hampshire Facilities, at no more than Hampshire's historical cost as provided for in the agreement between Dow and Akzo dated as of November 15, 1997, in order to provide Akzo with sufficient time to accomplish the Akzo Lima Expansion for such period as Akzo may request, but in no event to extend beyond the earlier of (i) the date the Akzo Lima Expansion is fully operational and released to production or (ii) four (4) years after the date this order becomes final. Upon the Akzo Lima Expansion being released to production, respondent shall not manufacture at the Other Hampshire Facilities any chelant products for a period of one (1) year.

B. Dow's Contract Manufacturing Services shall (i) oversee the production of Hampshire Chelant Products at the Other Hampshire Facilities for Akzo, and (ii) administer and control the supply and allocation of HCN from Akzo at Lima, Ohio to respondent. Dow's Contract Manufacturing Services shall maintain any information arising from its obligations under paragraph III.B as confidential and not disclose such information to Dow's Competing Chelant Business. Any Dow or Hampshire employees supervised by Dow's Contract Manufacturing Services in carrying out the obligations of this paragraph III.B shall also maintain such information as confidential and not disclose such information to Dow's Competing Chelant Business.

C. Respondent shall use information relating to the Hampshire Chelant Business only to fulfill its obligations in paragraphs II.C and III.A, and shall not provide, disclose or otherwise make available to Dow's Competing Chelant Business, any information relating to Hampshire Chelant Products or the Hampshire Chelant Business, including information obtained as a result of the Acquisition, or directly or indirectly from Dow's Contract Manufacturing Services, or from respondent's operations of the Other Hampshire Facilities, and Dow shall not use any such information in Dow's Competing

Chelant Business, until respondent has fulfilled all obligations under paragraph III.A, above.

#### IV.

*It is further ordered, That:*

A. In the event that any of the Akzo Lima Expansion Milestones is not achieved, respondent shall acquire back from Akzo, within thirty (30) days, the Hampshire Chelant Business pursuant to the agreement between Dow and Akzo dated as of November 15, 1997.

B. Upon its acquisition of the Hampshire Chelant Business pursuant to paragraph IV.A, above, respondent shall divest, absolutely and in good faith, within sixty (60) days after respondent has obtained from Akzo all assets pursuant to paragraph IV.A the Hampshire Business Unit as a viable and competitive business. Provided, however, respondent may seek Commission approval to divest, in lieu of the divestiture of the Hampshire Business Unit, less than all assets of the Hampshire Business Unit and/or such other assets if such divestiture meets the purpose of paragraph IV.C, below. Respondent shall divest the Hampshire Business Unit or such other assets approved by the Commission only to an Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

C. The purpose of the divestiture of the Hampshire Business Unit is to ensure the continuation of the Hampshire Chelant Business as an ongoing, viable enterprise engaged in the research, development, manufacture, distribution and sale of chelant products independent of Dow, and in competition with Dow, and to remedy the lessening of competition alleged in the Commission's complaint.

D. Respondent shall take such actions as are necessary to maintain the viability and marketability of the Hampshire Business Unit and shall not cause or permit the destruction, removal, wasting, deterioration, or impairment of the Hampshire Business Unit, except in the ordinary course of business and except for ordinary wear and tear, until the Akzo Lima Expansion Milestones are achieved, or until the divestiture required by paragraph IV.B, above.

## V.

*It is further ordered, That:*

A. In the event that any of the Akzo Lima Expansion Milestones is not achieved, and if respondent has not divested, absolutely and in good faith and with the Commission's prior approval, the Hampshire Business Unit or such other assets approved by the Commission pursuant to paragraph IV.B within the time required by paragraph IV of this order, then the Commission may appoint a trustee to divest the Hampshire Business Unit. The trustee shall have all rights and powers necessary to permit the trustee to effect the divestiture of the Hampshire Business Unit in order to assure the viability, competitiveness, and marketability of the Hampshire Business Unit so as to expeditiously accomplish the remedial purposes of this order. In the event the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, 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 (including, but not limited to, a court-appointed trustee) pursuant to the Federal Trade Commission Act or any other statute, for any failure by respondent 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, 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 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 Hampshire Business Unit in order to accomplish the divestiture required by this order.

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 of the Hampshire Business Unit, and to divest such additional ancillary assets of Sentrachem and effect such additional arrangements, in order to assure the viability, competitiveness, and marketability of the Hampshire Business Unit so as to expeditiously accomplish the remedial purposes of this order.

4. The trustee shall have twelve (12) months to accomplish the divestiture required by this order, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) 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 for no more than two (2) additional terms.

5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the Hampshire Business Unit, 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 divestiture. Any delays in divestiture caused by the respondent shall extend the time for divestiture under this paragraph V 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 respondent's absolute and unconditional obligation to divest expeditiously at no minimum price. The divestiture shall be made in the manner, and to the acquirer or acquirers, as set out in paragraph IV of this order; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission approves more than one such acquiring entity, then 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 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 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 (based on sales price) contingent on the trustee's accomplishing the divestiture required by this order.

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, recklessness, 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 Hampshire Business Unit.

12. The trustee shall report in writing to respondent and the Commission every thirty (30) days concerning the trustee's efforts to accomplish the divestiture.

## VI.

*It is further ordered,* That within thirty (30) days after the date this order becomes final, and every ninety (90) days thereafter until respondent has fully complied with the provisions of paragraphs II and III of this order, respondent shall submit to the Commission verified written reports setting forth in detail the manner and form in which respondent intends to comply, is complying, and has complied with paragraphs II and III of this order. Provided, however, that within ten (10) days of Akzo's failure to meet any of the Akzo Lima Expansion Milestones, and every thirty (30) days thereafter until respondent has fully complied with the provisions of paragraphs IV and V of this order, respondent shall submit to the Commission verified written reports setting forth in detail the manner and form in which respondent intends to comply, is complying, and has complied with paragraphs IV and V. 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, III, IV and V of the order, including a description of all substantive contacts or negotiations for any divestiture required under paragraph IV and the identity of all parties that have contacted respondent or that have been contacted by respondent. 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.

## VII.

*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 Dow that may affect compliance obligations arising out of the order.

## VIII.

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

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence,

memoranda and other records and documents in the possession or under the control of respondent relating to any matters contained in this order; and

B. Upon five (5) days' notice to respondent, and without restraint or interference, the right to interview officers, employees, or agents of respondent.

IX.

*It is further ordered,* That this order shall terminate on February 20, 2008.

Commissioner Azcuenaga and Commissioner Thompson not participating.

IN THE MATTER OF  
SEARS, ROEBUCK AND CO.

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

*Docket C-3786. Complaint, Feb. 20, 1998--Decision, Feb. 20, 1998*

This consent order prohibits, among other things, the Illinois-based retail corporation from misrepresenting that any reaffirmation agreement it obtains will be filed with the bankruptcy court, that any reaffirmation agreement is binding, or any other material fact while attempting to collect debts subject to a pending bankruptcy proceeding. In addition, the consent order prohibits the respondent from collecting debts that have been discharged in bankruptcy proceedings. The consent order also preserves the Commission's right to file an action in federal district court to seek full redress for consumers if Sears' refunds to debtors pursuant to a separate class action lawsuit settlement total less than \$100 million.

*Appearances*

For the Commission: *Paul Block, John Dugan and Phoebe Morse.*

For the respondent: *Stephen H. Olesky, Hale & Dorr, Boston, MA. Theodore N. Mirvis, Wachtell, Lipton, Rosen & Katz, New York, N.Y. and Ronald L. Rose, Dykema Gossett, Bloomfield Hills, MI.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Sears, Roebuck and Co., a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Sears, Roebuck and Co. is a New York corporation with its principal office or place of business at 3333 Beverly Road, Hoffman Estates, Illinois. Respondent is engaged in, among other things, the consumer retail business. In the course and conduct of its business, respondent has regularly extended credit for the purpose of facilitating consumers' purchase of respondent's products and services (hereinafter referred to as "consumer credit accounts").

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

#### THE UNITED STATES BANKRUPTCY CODE

3. Under the United States Bankruptcy Code (11 U.S.C. 1-1330), a debtor may be granted a discharge in a Chapter 7 bankruptcy proceeding from debts that have arisen prior to the filing of the bankruptcy petition (hereinafter referred to as "pre-petition debts"), meaning that the debtor is no longer individually liable for these debts. The granting of a discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived. . . ." 11 U.S.C. 523(a)(2). The purpose of the injunction is to protect the debtor's "fresh start" by ensuring that no debt collection efforts are taken against the debtor personally for pre-petition debts.

4. The United States Bankruptcy Code provides, however, that a debtor may agree with a creditor that the creditor can enforce what would otherwise be a discharged debt. In other words, a debtor may reaffirm his or her pre-petition debts, as long as certain requirements are met. These so-called "reaffirmation agreements" are enforceable only if, among other things, the agreement is filed with the bankruptcy court. If the debtor is not represented by an attorney, the bankruptcy court must hold a hearing to determine that the reaffirmation agreement would not impose an undue hardship on the debtor and is in the best interest of the debtor, and must approve the reaffirmation agreement before it becomes enforceable. 11 U.S.C. 524(c) and (d).

5. If the requirements of 11 U.S.C. 524(c) and (d) are not met, an agreement to reaffirm a debt is not binding and a creditor violates the bankruptcy code if it attempts to collect that debt. 11 U.S.C. 524(a).

#### VIOLATIONS OF SECTION 5(a) OF THE FEDERAL TRADE COMMISSION ACT

6. From at least 1985 to 1997, respondent regularly induced consumers who had filed for protection under Chapter 7 of the United States Bankruptcy Code to enter into agreements reaffirming some or all of their pre-petition consumer credit account debts that would otherwise be discharged through bankruptcy proceedings.

7. In numerous instances, respondent represented, expressly or by implication, to consumers that their reaffirmation agreements would be filed with the bankruptcy courts, as required by the United States Bankruptcy Code.

8. In truth and in fact, in many cases respondent did not intend to file, and in fact did not file, the reaffirmation agreements with the bankruptcy courts. Therefore, the representation made in paragraph seven was, and is, false or misleading.

9. In numerous instances, respondent represented, expressly or by implication, to consumers that their reaffirmation agreements were legally binding on the consumers and that the consumers were legally required to pay their pre-petition debts.

10. In truth and in fact, in many cases, the reaffirmation agreements were not legally binding on the consumers and the consumers were not legally required to pay their pre-petition debts for reasons including, but not necessarily limited to, the following: (a) respondent did not file the reaffirmation agreements with the bankruptcy courts; or (b) respondent filed the reaffirmation agreements, but the agreements were then not approved by the bankruptcy courts. Therefore, the representation made in paragraph nine was, and is, false or misleading.

11. In the course and conduct of its business, respondent regularly collected from consumers debts that had been legally discharged in bankruptcy proceedings and that respondent was not permitted by law to collect. Respondent's actions have caused or were likely to cause substantial injury to consumers that is not offset by any countervailing benefits and is not reasonably avoidable by these consumers. 15 U.S.C. 5(n). Therefore, respondent's collection of debts that it was not permitted by law to collect was, and is, unfair.

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

Commissioner Azcuenaga not participating.

#### DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a

copy of a draft of complaint which the Boston Regional Office and the Division of Credit Practices proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent had 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, 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 Sears, Roebuck and Co. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its offices and principal place of business located at 3333 Beverly Road, Hoffman Estates, Illinois.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

#### ORDER

#### DEFINITIONS

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

1. Unless otherwise specified, "*respondent*" shall mean Sears, Roebuck and Co., a corporation, its successors and assigns, and its officers, agents, representatives, and employees.
2. "*Debt*" shall mean any obligation or alleged obligation of a consumer to pay money arising out of any transaction.

3. "*Reaffirmation agreement*" shall mean any agreement between a creditor and debtor in bankruptcy whereby a debt that is otherwise dischargeable with respect to the personal liability of the debtor is reaffirmed by the debtor.

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

I.

*It is ordered*, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the collection of any debt, shall not:

A. Misrepresent, expressly or by implication, to consumers who have filed petitions for bankruptcy protection under the United States Bankruptcy Code that reaffirmation agreements will be filed in bankruptcy court;

B. Misrepresent, expressly or by implication, to consumers who have filed petitions for bankruptcy protection under the United States Bankruptcy Code that any reaffirmation agreement is legally binding on the consumer; or

C. Collect any debt (including any interest, fee, charge, or expense incidental to the principal obligation) that has been legally discharged in bankruptcy proceedings and that respondent is not permitted by law to collect.

II.

*It is further ordered*, That respondent, directly or through any corporation, subsidiary, division, or other device, shall not make any material misrepresentation, expressly or by implication, in the collection of any debt subject to a pending bankruptcy proceeding.

III.

*It is further ordered*, That respondent Sears, Roebuck and Co., and its successors and assigns, for five (5) years after the date of issuance of this order, shall maintain and upon request make available to the Federal Trade Commission business records demonstrating their compliance with the terms and provisions of this order, including but not limited to all reaffirmation agreements signed by consumers and records sufficient to show that such reaffirmation agreements were filed in bankruptcy courts and were subsequently

approved by bankruptcy courts as part of the underlying bankruptcy proceedings, if required by the United States Bankruptcy Code.

#### IV.

*It is further ordered,* That respondent Sears, Roebuck and Co., and its successors and assigns, for five (5) years after the date of issuance of this order, shall deliver a copy of this order to all current and future principals, officers, directors, managerial employees, and bankruptcy court representatives having debt collection responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall, for five (5) years after each such statement acknowledging receipt of the order is signed and dated, maintain and upon request make available to the Federal Trade Commission for inspection and copying such statements. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within ninety (90) days after the person assumes such position or responsibilities.

#### V.

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

## VI.

*It is further ordered*, That respondent, and its successors and assigns, shall provide notification of all proposed settlement terms relating to the action filed by the United States Attorney for the District of Massachusetts in *United States of America v. Sears, Roebuck and Co.*, Civil No. 97- 10839JLT, allegations made by the Attorneys General of various states and any other currently pending legal actions by government entities not cited herein, and all currently pending class action lawsuits, against respondent or any of its predecessors or affiliates, that challenge conduct similar to that challenged by the Commission in this proceeding, to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, in writing, at least ten (10) days before any such proposed settlement is submitted to a court for final approval.

## VII.

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

## VIII.

This order will terminate on February 20, 2018, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

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

Commissioner Azcuenaga not participating.

## IN THE MATTER OF

## AMERICA ONLINE, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SEC. 907 OF THE ELECTRONIC FUND TRANSFER ACT, REGULATION  
E AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3787. Complaint, March 16, 1998--Decision, March 16, 1998*

This consent order prohibits, among other things, the Virginia-based Internet service provider from: misrepresenting the terms or conditions of any online service trial offer; or representing that online service is free or otherwise representing that consumers need not pay for the online service, unless any obligation to cancel or to take other action to avoid charges is disclosed clearly and prominently in the instructional materials, and all other advertisements include a statement directing consumers to where this disclosure is available. In addition, the consent order requires the respondent to disclose the manner in which fees or charges are assessed or calculated and prohibits misrepresentations concerning the terms or conditions of any electronic fund transfer from a consumer account.

*Appearances*

For the Commission: *Lucy Morris, David Medine, Nina Chang*  
and *Steven Silverman*.

For the respondent: *Kevin Duke*, in-house counsel, Dulles, VA.

## COMPLAINT

The Federal Trade Commission, having reason to believe that America Online, Inc. ("America Online" or "respondent") has violated the provisions of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45-58, as amended, as well as the Electronic Fund Transfer Act ("EFTA"), 15 U.S.C. 1693-1693r, as amended, and its implementing Regulation E, 12 CFR 205, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. America Online is a Delaware corporation with its principal office or place of business at 22000 AOL Way, Dulles, Virginia.
2. America Online has developed, advertised, offered for sale, sold, and distributed to the public its online service for personal computer users. Through its online service, America Online provides consumers with a range of options including electronic mail,

interactive magazines and newspapers, transactional services, and access to the Internet.

3. America Online has been and is now engaged in the regular practice of making "electronic fund transfer[s]" from "consumer" "account[s]" as those terms are defined in the EFTA and its implementing Regulation E.

4. The acts and practices of America Online alleged in this complaint have been in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act.

#### AMERICA ONLINE'S COURSE OF BUSINESS

5. America Online has disseminated or has caused to be disseminated advertisements for its online service through various media including, but not limited to, print, television, direct mail, promotional materials, and instructional materials. These advertisements include, but are not limited to, the attached Exhibits A and B, which contain the following statements:

#### Exhibit A

OPEN HERE TO BEGIN YOUR FREE TRIAL

It Just Takes 3 Easy Steps . . . To explore America Online® for TEN Hours on us. So, go for it and we'll see you online soon!

\* \* \*

You NEED America Online . . . To access the Internet with graphical ease . . . to download over 120,000 software files and get computing support . . . To investigate your special interests or discover new ones AND MUCH MORE! All For Ten Hours, FREE!

The advertisement contains a statement at the bottom of an inside panel, in fine print, that provides:

Use of America Online requires a major credit card or checking account. Users outside the United States pay an additional per-minute surcharge at all times, including trial time. . . . Additional phone charges may apply. Your free trial time must be used within 30 days of your initial sign-on. Limit one free trial per household.

#### Exhibit B

Open Here For Free Software.

Try America Online FREE For 10 Hours! Try the nation's most exciting online service -- FREE.

\* \* \*

Just Use This Software To Try America Online Free. . . . Start using your 10 FREE hours today.

\* \* \*

Special Trial Offer 10 FREE Hours To Explore America Online....

The advertisement contains a statement at the bottom of an inside panel, in fine print, that provides:

Communication surcharges may apply. See online registration information for details on your free trial offer. Use of America Online requires a major credit card or checking account. Limit one free trial per household. Your free trial time must be used within 30 days of your initial sign-on. Members outside the 48 contiguous United States may pay a surcharge at all times, including trial time. . . .

6. Consumers choosing to participate in the free trial offer do so by connecting to the America Online service through a telecommunication modem attached to their personal computers. Upon their initial connection to the service, consumers view a series of registration screens including, but not limited to, the attached Exhibits C and D. The registration screens obtain identification and billing information from consumers, prompt consumers to select screen names and passwords for future access to the online service, and provide basic information about the online service, including the following details about the terms of the free trial offer:

#### Exhibit C

##### HERE'S HOW YOUR FREE TRIAL WORKS:

So you can explore America Online at no risk:

Your first TEN hours of connect time are free.

The monthly membership fee of \$9.95 has been waived for your first month.

Your free trial time must be used within 30 days of your first sign-on. You will not be charged unless you use more than your 10 free hours.

In addition, the registration screens display basic membership terms including the monthly charges incurred by America Online members:

#### Exhibit D

##### YOUR AMERICA ONLINE MEMBERSHIP . . . .

Your monthly membership fee of \$9.95 (charged at the end of your first month)

INCLUDES FIVE free hours of connect time EACH month.

After your five free hours, you may use additional time at the rate of \$2.95 per hour. . . .

7. Upon completion of the registration process, consumers are provided an opportunity to review America Online's Terms of Service Agreement and Rules of the Road. To do so, consumers must access the Members' Service area, available online. These documents, along with the Membership Conditions viewed during the registration process, are collectively referred to by America Online as the Terms

