

FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions, and Orders

IN THE MATTER OF

NOVARTIS CORPORATION, ET AL.

MODIFYING ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9279. Final Order, May 13, 1999—Modifying Order, July 2, 1999

This order modifies the final order, issued in 1999, by revising Part IV of the order concerning the corrective advertising notice for Doan's. Part IV of the order, as modified, will remain in effect for five additional years.

ORDER MODIFYING ORDER,
DENYING PETITION FOR RECONSIDERATION,
AND DENYING AS MOOT APPLICATION FOR STAY

Respondent Novartis Corporation and Novartis Consumer Health, Inc. (collectively "Novartis") have petitioned the Commission, pursuant to Rule 3.55 of the Commission's Rules of Practice, 16 CFR 3.55, to reconsider and to stay Part IV of our final order in this matter.

Rule 3.55 requires that such a petition "must be confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission." 16 CFR 3.55. Novartis argues that reconsideration is appropriate because factual developments since the record has been closed undermine certain factual predicates of our corrective advertising order, and because the contours of the corrective advertising requirements imposed in the order raises issues not addressed by the parties. We are not entirely satisfied that relief pursuant to Rule 3.55 is warranted here. Novartis could have introduced the recent factual developments upon which it now relies before this late stage. Moreover, while the parties in their briefs primarily addressed the propriety of the performance-based standard for the duration of corrective advertising urged by complaint counsel, the durational requirements of prior corrective advertising orders might have alerted Novartis that the information it now adduces would be relevant here. *See FTC v. Warner-Lambert Co.*, 562 F.2d 749, 753, 764 (D.C. Cir. 1977)

(imposing durational requirement based upon extent of prior expenditures), *cert. denied*, 435 U.S. 950 (1978).

Despite these reservations, we have, in any event, the power to modify our order on our own initiative pursuant to Rule 3.72(a) of our Rules of Practice. 16 CFR 3.72(a). In light of the issues raised in Novartis' petition, we have determined to exercise our discretion to modify the order.

The corrective advertising requirements imposed in our order of May 13, 1999 were to continue until Novartis expended on Doan's advertising a sum equal to the average spent annually during the eight years of the deceptive advertising campaign, and in any event for no less than one year. Novartis now contends that, in light of its current business plans, the existing order may have the practical effect of imposing requirements lasting many years. Relying upon the declaration of Barry Cohen, Director of Analgesics, Novartis asserts that it has substantially reduced its advertising and other promotional expenditures for Doan's products and plans greatly to reduce, or to stop altogether, such expenditures in the future. Cohen Decl. ¶¶ 5-8. The result of these changed circumstances, claims Novartis, is that our corrective advertising requirement, including the requirement of placing corrective messages on the product label, may remain in effect for a long and indefinite period.

Some of Novartis' other arguments appear to be premised upon a simple misreading of our final order. Novartis seems to believe that only expenditures on advertising containing the corrective message will count toward the minimum expenditure requirement imposed by that order. Pet. at 4 (asserting that the order requires Novartis to "include the corrective notice on all advertising until it has spent \$8 million on advertising *containing the notice*" (emphasis added)). Thus, Novartis concludes that fifteen-second television advertisements, which it has used exclusively in the past and which are exempted from the corrective requirements of the order, would not count toward that minimum. Novartis argues that the use of such commercials would thereby be deterred. Pet. at 5 (arguing that the order "for all practical purposes forces Novartis to use" thirty-second television advertisements). In fact, the terms of the order plainly count all expenditures for the purpose of "Doan's advertising" toward the minimum, regardless of whether such advertising is or is not required to contain the corrective message. Thus, the order will not penalize Novartis for using fifteen-second television advertisements

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if it chooses to do so. To the contrary, the exception of such advertisements from the corrective advertising requirement was designed precisely to permit the use of the fifteen-second advertisement form at that Novartis has historically favored. Op. at 35, 37.

We also reject Novartis' claim that the mere facts that they have reduced advertising expenditures for Doan's and that sales of Doan's products have decreased undermine the need for corrective advertising as a general matter. Pet. at 9-10. The likelihood of lingering consumer misbeliefs based upon Novartis' *past* conduct is what is relevant in order to determine whether corrective advertising is required. Doan's current sales and advertising budget are not directly relevant to that issue.

We turn now to the question of the duration of the order. A corrective advertising order should not outlast the lingering misconceptions that it is designed to correct. See *Warner-Lambert Co.*, 562 F.2d at 764. In order to ensure that the corrective advertising requirements we impose in this case will not remain in effect beyond the period during which the misbeliefs caused or substantially reinforced by Novartis' deceptive advertising campaign are likely to linger, we will modify the durational provision of the order. Specifically, because Novartis' deceptive advertising campaign lasted for eight years, the corrective advertising order should last no longer than an equivalent number of years after that campaign ended. Three years have already elapsed since June 1996, when Novartis stopped airing the challenged advertisements. Thus, Part IV of the order, as modified, will remain in effect for five additional years. If, as it claims, Novartis will cease its media advertising and consumer promotion expenditures, the order will nonetheless require the corrective message to appear on the product packaging for five years.

Accordingly, *It is ordered*, That the final order in this matter dated May 13, 1999 be, and it hereby is, modified to revise Part IV to read as follows:

It is further ordered, That respondents Novartis Corporation and Novartis Consumer Health, Inc., corporations, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or any device, do forthwith cease and desist from

disseminating or causing the dissemination of any advertisement for Doan's in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, unless the advertising includes the following corrective notice, clearly and prominently, in the exact language that follows:

"Although Doan's is an effective pain reliever, there is no evidence that Doan's is more effective than other pain relievers for back pain."

Provided, that respondents' obligation to include the corrective notice shall not be required for any television or radio advertisement of 15 seconds or less in duration;

Provided further, that respondents' obligation to include the corrective notice in all advertising shall continue until respondents have expended on Doan's advertising a sum equal to the average spent annually during the eight years of the challenged campaign, except the obligation shall continue for at least one year and for no longer than five years after this order becomes effective.

It is further ordered, That Part IV of the final order shall not be effective until the sixtieth day after service of this Order Modifying Order.

It is further ordered, That respondents' petition for reconsideration is denied.

It is further ordered, That Novartis' petition for a stay pending appeal is denied as moot.¹

Commissioner Swindle dissenting.

STATEMENT OF COMMISSIONER ORSON SWINDLE
CONCURRING IN PART AND DISSENTING IN PART

The Commission recently issued a decision in this case in which it concluded that the respondents made the unsubstantiated claim that Doan's is superior to other over-the-counter analgesics in treating back pain. To remedy this deception, the Commission ordered the respondents to make a specified corrective statement in Doan's

¹ Novartis' stay motion was directed solely to Part IV of the original final order, which the Commission has now replaced with the revised Part IV. Novartis may, if it chooses, timely file a motion to stay the effect of this revised Part IV of the final order pending appeal.

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advertising (except radio and television ads of 15 seconds or less in duration), including on product packages. The Order requires that the corrective statement be made "for one year and until respondent has expended on Doan's advertising a sum equal to the average amount spent annually during the eight years of the challenged campaign." I dissented from the imposition of this corrective advertising remedy because, among other things, the evidence did not prove that any false belief created by the deceptive advertising had lingered and was likely to continue to linger until July 2000, that is, until the end of the one-year period during which corrective advertising was required. *Novartis Corporation, et al.*, Dkt. No. 9279 (May 13, 1999) (Statement of Commissioner Orson Swindle, concurring in part and dissenting in part).

The respondents have petitioned the Commission to reconsider the corrective advertising requirement, arguing that basing the duration of the requirement on both a fixed one-year period and the amount of Doan's advertising expenditures will have unintended, adverse consequences. The respondents have submitted a declaration stating that they spent only \$30,000 in 1998 on Doan's advertising and plan to spend nothing in 1999 on such advertising. Given these minimal advertising expenditures, the respondents argue that it will be a very long time until they have spent on Doan's advertising an amount equal to the average amount spent annually during the campaign (\$8 million), especially since the annual sales of the product have declined to only about \$11 million. The respondents claim that they are likely to be required to place the corrective statement on packaging for many years to come -- a corrective requirement that will last far longer than the one year that the Commission originally intended. The Commission has denied the petition for reconsideration, and I concur in the denial because the petition does not raise any new questions about the decision and final order that the respondents did not have an opportunity to address in their appeal to the Commission.

The majority, however, has also decided *sua sponte* to reopen the Order and place a five year limitation on the duration of the corrective advertising requirement. The majority concludes that a modification is needed to ensure that the corrective advertising requirement will not outlast whatever lingering false belief the deceptive advertising campaign created. The majority specifically reasons that because the

"deceptive advertising campaign lasted for eight years, the corrective advertising order should last no longer than an equivalent number of years after that campaign ended." *Novartis Corporation, et al.*, Dkt. No. 9279, Order Modifying Order, Denying Petition for Reconsideration, and Denying as Moot Application for Stay at 2 (July 2, 1999). Because the respondents have not run their deceptive advertisements since May 1996, that is, three years ago, the corrective advertising provision "will remain in effect for five additional years." *Id.* The practical effect of the modification is that the respondents very likely will have to make the corrective statement on Doan's packages until five years after the modified Order becomes effective, that is, until September 2004.¹

In support of the conclusion that the false superior efficacy belief is likely to linger until September 2004, the majority has relied exclusively on the general proposition that a false belief is likely to linger for the same period of time after the deceptive advertising has stopped as the period during which the advertising ran. The majority cites nothing in support of this general proposition, nor am I aware of any extrinsic evidence, expert testimony, case law, or other authority that supports it.

The Commission's adoption of this general proposition raises a serious policy question as to how frequently the Commission will order corrective advertising in the future. If false beliefs are to be assumed likely to linger for the same period of time after the deceptive advertising has stopped as the period during which the advertising ran, corrective advertising could be ordered in most deceptive advertising cases. It does not serve the public interest to adopt a new principle for determining lingering effect that could be used to transform corrective advertising from an extraordinary remedy into a commonplace remedy.

The majority deserves credit for its willingness to recognize that the original Order imposed broader relief than intended and to modify the original Order to limit the relief. But the modified Order still imposes what is likely to be a five-year corrective advertising requirement. The evidence in the record does not prove that any false belief is likely to linger in the minds of consumers through the

¹ Absent a stay, the modified Order will take effect in September 1999, sixty days after it is served on the respondents.

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duration of the requirement,² which extends *more than eight years* after the respondents discontinued making their implied deceptive claim. Without proof that any false belief is likely to last this long period of time, the corrective advertising requirement contained in the modified Order serves no remedial purpose and cannot be justified.

I therefore dissent as to the corrective advertising provision included in the modified Order.³

² My separate statement in this case, accompanying the majority's principal opinion, contains a comprehensive discussion of the reasons why the evidence in the record does not prove that a false belief is likely to linger until July 2000, much less September 2004. *Novartis Corporation, et al.*, Dkt. No. 9279 (May 13, 1999) (Statement of Commissioner Orson Swindle, concurring in part and dissenting in part).

³ Because the Commission has modified the original Order, I support the Commission's decision to deny the respondents' motion to stay the original Order since the motion is moot.

IN THE MATTER OF
ROHM AND HAAS COMPANY, ET AL.

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

Docket C-3883. Complaint, July 13, 1999--Decision, July 13, 1999

This consent order, among other things, requires the respondents to divest certain assets, they acquired in the purchase of Morton International, Inc., to GenCorp, Inc.

Participants

For the Commission: *Timothy Feighery, Wallace Easterling, William Baer, Jeremy Bulow and Charles Thomas.*

For the respondents: *Ilene Gotts, Wachtell, Lipton, Rosen & Katz, New York, N.Y. and Stephen Stack, Dechert, Price & Rhoads, Philadelphia, PA.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that Rohm and Haas Company has agreed to acquire all of the share capital of Morton International, Incorporated, both corporations 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 ("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. RESPONDENTS

1. Respondent Rohm and Haas Company ("Rohm & Haas") 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 100 Independence Mall West, Philadelphia, Pennsylvania.

2. Respondent Morton International, Incorporated ("Morton") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Indiana, with its office and principal place of business located at 100 North Riverside Plaza, Chicago, Illinois.

3. For purposes of this proceeding, respondents are, and at all times relevant herein have been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and are corporations whose businesses are in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

II. THE ACQUISITION

4. Pursuant to an Agreement and Plan of Merger dated January 31, 1999, Rohm & Haas will acquire all of the issued share capital of Morton for approximately \$4.9 billion ("the Acquisition").

III. THE RELEVANT MARKET

5. For purposes of this complaint, the relevant line of commerce in which to analyze the effect of the proposed Acquisition is the research, development, manufacture and sale of water-based polymers for use in the formulation of floor care products (hereinafter referred to as "Water-Based Floor Care Polymers"). Water-based polymers are essential components of floor care product formulations, such as floor polishes, in that they impart to the floor care product necessary and desired properties such as hardness, gloss, and slip and scuff resistance. There are no economic substitutes for Water-Based Floor Care Polymers to which customers would switch in response to a small but significant price increase in Water-Based Floor Care Polymers.

6. For purposes of this complaint, the relevant geographic area in which to analyze the effects of the proposed Acquisition on competition in Water-Based Floor Care Polymers is North America. Water-Based Floor Care Polymers produced outside North America are not economic substitutes because of the high shipping costs associated with a relatively low-value product consisting largely of water, and because of the delays and uncertainties inherent in long-distance shipping.

7. The relevant market set forth in paragraphs five and six is highly concentrated, whether measured by the Herfindahl-Hirschman Index ("HHI") or by two-firm and four-firm concentration ratios. Rohm & Haas and Morton are two of the three leading sellers of Water-Based Floor Care Polymers in North America.

8. Entry into the relevant market requires significant sunk costs and would not be timely, likely and sufficient to deter or counteract the adverse competitive effects described in paragraphs nine and ten because of, among other things, the length of time and expense necessary to build appropriate chemical production facilities, the difficulty in acquiring the technical expertise necessary to produce the polymers, and the difficulty in gaining recognition in a marketplace in which customers are reluctant to change from proven suppliers. Thus, it is unlikely that a new entrant not already in the Water-Based Floor Care Polymers business could enter successfully so as to counteract a small but significant price increase.

IV. EFFECTS OF THE ACQUISITION

9. The effect of the Acquisition may be substantially to lessen competition and to tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, 15 U.S.C. 45, in the following ways, among others:

- a. By eliminating direct actual competition between Rohm & Haas and Morton;
- b. By increasing the likelihood that the firm created by the merger of Rohm & Haas and Morton will unilaterally exercise market power;
- c. By increasing the likelihood of coordinated interaction between the remaining competitors in the relevant market;
- d. By increasing the likelihood that purchasers of Water-Based Floor Care Polymers in the relevant market will be forced to pay higher prices;
- e. By increasing the likelihood that technical and sales services provided to purchasers of Water-Based Floor Care Polymers will be reduced; and
- f. By increasing the likelihood that innovation will be reduced.

10. All of the above increase the likelihood that the Acquisition would result in increased prices or reduced services in the near future and in the long term.

V. VIOLATIONS CHARGED

11. The acquisition agreement described in paragraph four constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

12. The Acquisition described in paragraph four, 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.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition by Rohm and Haas Company of Morton International, Incorporated (collectively referred to as "respondents") and respondents having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration, and which, if issued by the Commission, would charge respondents with violations of the Clayton Act and Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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 Rohm & Haas 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 100 Independence Mall West, Philadelphia, Pennsylvania.

2. Respondent Morton is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its office and principal place of business located at 100 North Riverside Plaza, Chicago, Illinois.

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

ORDER

I.

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

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

B. "*Rohm & Haas*" means Rohm and Haas Company, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Rohm and Haas Company, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "*Morton*" means Morton International, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Morton International, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "*Acquisition*" means the acquisition by Rohm & Haas of more than fifty (50) percent of the common stock of Morton.

E. "*Respondents*" means Morton and Rohm & Haas, individually and collectively.

F. "*GenCorp*" means GenCorp, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the state of Ohio, with its office and principal place of business located in Fairlawn, Ohio.

G. "*New Acquirer*" means the entity to whom the Divestiture Trustee shall divest the Assets To Be Divested pursuant to paragraph IV. of this order.

H. "*Acquirer*" means GenCorp, the New Acquirer, and the acquirer approved by the Commission pursuant to paragraph II.B. of this order.

I. "*GenCorp Agreement*" means the Asset Purchase Agreement dated April 8, 1999 and the First Amendment To Asset Purchase Agreement dated April 11, 1999, by and between GenCorp and Morton.

J. "*Divestiture Agreement*" means, as applicable under the terms of this order, the following:

1. The GenCorp Agreement,
2. The agreement for the sale of the Assets To Be Divested to the New Acquirer pursuant to paragraph IV. of this order, or
3. The agreement for the sale of the Assets To Be Divested to an acquirer approved by the Commission pursuant to paragraph II.B. of this order.

K. "*Water-Based Polymers For Floor Care Applications*" means water-based polymers used in the formulation of floor care products.

L. "*Water-Based Polymers For Other Applications*" means water-based polymers used for applications other than the formulation of floor care products.

M. "*Water-Based Polymer Unit of Morton*" means the existing business unit of Morton that is part of Morton's Adhesives and Polymers Group and that develops, produces, markets, and sells Water-Based Polymers For Floor Care Applications and Water-Based Polymers For Other Applications.

N. "*Morton Floor Care Products*" means

1. Any Water-Based Polymers For Floor Care Applications,
2. Any products that enhance the performance of Water-Based Polymers For Floor Care Applications, and
3. Any other products or services that have been sold, or intended to be sold, to customers that purchase Water-Based Polymers For Floor Care Applications, by Morton employees who sell Water-Based Polymers For Floor Care Applications, that, at any time during the two (2) years immediately preceding the Acquisition, have been manufactured, distributed, or sold by Morton, or have been the subject of research or development by Morton, anywhere in the world.

O. "*Patents*" means any patents and patent rights, patent applications, patents of addition, re-examinations, reissues, extensions, granted supplementary protection certificates, substitutions, confirmations, registrations, revalidations, revisions, additions and the like, of or to said patents and patent rights and any and all continuations and continuations-in-part and divisionals.

P. "*Intellectual Property*" means any form of intellectual property, including, but not limited to, trademarks, Patents, trade secrets, research materials, technical information, management information systems, software, inventions, test data, technology, know-how, licenses, registrations, submissions, approvals, technology, specifications, designs, drawings, processes, recipes, protocols, formulas, customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, quality control data, books, records, and files.

Q. "*Permits and Approvals*" means licenses, permits, registrations or other governmental approvals.

R. "*Non-Technical Documents*" means documents that do not contain any technical information concerning Morton Floor Care Products and Water-Based Polymers For Floor Care Applications.

S. "*Assets To Be Divested*" means:

1. All rights, titles, and interest in and to Intellectual Property relating in any way to the research, development, manufacture, or sale of Morton Floor Care Products anywhere in the world, regardless of whether such Intellectual Property relates exclusively to such purposes;

2. All rights, title, and interest in and to inventory of Morton Floor Care Products;

3. All rights, title, and interest in and to agreements, express or implied, relating in any way to the research, development, manufacture, or sale of Morton Floor Care Products anywhere in the world, regardless of whether such agreements relate exclusively to such purposes, including, but not limited to, warranties, guarantees, and contracts with joint venture partners, suppliers, personal property lessors, personal property lessees, licensors, licensees, consignors, consignees, and customers;

4. All rights, title and interest in and to Permits and Approvals relating in any way to the research, development, manufacture, or sale of Morton Floor Care Products anywhere in the world, regardless of

whether such Permits and Approvals relate exclusively to such purposes, to the extent permitted by law; and

5. All rights, title, and interest in and to businesses and assets, tangible and intangible, of the Water-Based Polymer Unit of Morton relating in any way to the research, development, manufacture, or sale of Morton Floor Care Products, regardless of whether such business and assets are used exclusively for such purposes.

Provided that the definition of "Assets To Be Divested" shall not include:

- (i) Real property, buildings, and improvements to real property or buildings, whether owned or leased;
- (ii) Manufacturing equipment;
- (iii) Quality control equipment;
- (iv) Accounts receivable;
- (v) Office equipment, including telephones, copiers, typewriters, facsimile machines, cellular telephones, and pagers;
- (vi) Office furniture, including desks, chairs, tables, and lamps;
- (vii) Office supplies;
- (viii) Computer hardware, including personal computers, laptop computers, printers, modems, and other computer peripherals;
- (ix) Nonproprietary personal computer software, including Microsoft Windows, Microsoft Word, and Microsoft Excel;
- (x) Automobiles, whether owned or leased;
- (xi) Non-Technical Documents, and portions of such documents, that do not relate to Morton Floor Care Products or to Water-Based Polymers For Floor Care Applications and that contain proprietary information;
- (xii) The trademarks "Morton," "Morez," "Morcryl," and Morton Globe design;
- (xiii) Intellectual Property (other than the trademark "Conrez") relating exclusively to the Conrez, Morcryl, and Morez resins;
- (xiv) Any substandard/off spec finished goods inventory, and any Conrez inventory not in a container packaged for sale;
- (xv) Raw materials used in the production of Morton Floor Care Products;
- (xvi) Laboratory equipment, other than (a) James machines, (b) Jablonski III machines, and (c) laboratory equipment relating

exclusively to the research, development, manufacture, or sale of Morton Floor Care Products;

(xvii) Agreements with public and private warehouses for the storage of finished products;

(xviii) Agreements with common and contract carriers;

(xix) Raw material supply contracts;

(xx) Contracts or non-contractual arrangements with sales representatives, distributors, or agents; provided, however, that respondents shall not take any action to prohibit or impede Acquirer from entering into any contract or non-contractual arrangements relating to the sale or distribution of Morton Floor Care Products with any sales representative, distributor or agent currently offering for sale Morton Floor Care Products; and

(xxi) Cash or cash equivalents.

Provided further that respondents may retain from the Assets To Be Divested:

(xxii) A non-exclusive, perpetual, royalty-free right to the use of Intellectual Property (other than the trademark "Morglo") used by Morton prior to the Acquisition in research, development, manufacture or sale of products other than Morton Floor Care Products, provided that such right is limited to use in connection with products other than Morton Floor Care Products and other than Water-Based Polymers For Floor Care Applications;

(xxiii) A non-exclusive, perpetual, royalty-free right to the use of Permits and Approvals used by Morton in the research, development, manufacture or sale of products other than Morton Floor Care Products, provided that such right is limited to products other than Morton Floor Care Products and other than Water-Based Polymers For Floor Care Applications and that respondents' use of any such Permits and Approvals does not diminish or jeopardize in any way the right of the Acquirer to use such Permits and Approvals; and

(xxiv) A right to continue contractual and non-contractual relationships currently in effect with Morton's sales representatives, distributors, and agents with respect to products other than Morton Floor Care Products, provided that respondents' continuation of such relationships does not diminish or jeopardize in any way the ability or willingness of such sales representatives, distributors, and agents

to serve the Acquirer in the sale of Morton Floor Care Products and Water-Based Polymers For Floor Care Applications.

T. "*Additional Assets To Be Divested*" means:

1. The Morton manufacturing facility located in Greenville, South Carolina, including, but not limited to:

(a) All real property, buildings, production facilities and storage facilities, whether owned or leased,

(b) All fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property, excluding equipment used solely and exclusively in the production of the Conrez, Morez, and Morcryl products, provided that the removal of such equipment does not diminish or jeopardize in any way the acquirer's ability to use the Additional Assets To Be Divested,

(c) All permits and approvals relating to the production of Morton Floor Care Products, and

(d) All inventory and storage capacity; and

2. All raw material supply contracts to the extent permitted by such contracts; provided, however, that respondents may continue such contractual relationships with respect to the purchase of raw materials for the manufacture of products other than Morton Floor Care Products to the extent that respondents' continuation of such contractual relationships does not diminish or jeopardize in any way the ability or willingness of such suppliers to supply the New Acquirer with raw materials for the manufacture of Morton Floor Care Products and Water-Based Polymers for Floor Care Applications.

U. "*Supply Agreements*" means the agreements required by paragraphs II.C.1. and II.C.2. of this order.

V. "*Divestiture Trustee*" means the trustee(s) appointed pursuant to paragraph IV. of this order, as applicable.

W. "*Interim Trustee*" means the trustee(s) appointed pursuant to paragraph III. of this order, as applicable.

X. "*Commercial Capability to Manufacture and Sell*" means the manufacture and sale during a six (6) month time period of seventy (70) percent of the quantity (measured in wet pounds) of Morton Floor Care Products manufactured and sold by Morton during the six (6) months immediately preceding the Acquisition.

Y. "*Reimbursable Costs*" means the reasonable, direct, out-of-pocket expenses incurred by respondents in providing referenced assistance.

II.

It is further ordered, That:

A. No later than ten (10) days after the date on which the Acquisition is consummated, respondents shall divest, absolutely and in good faith, the Assets To Be Divested as a competitively viable, on-going product line to GenCorp. The purpose of the divestiture of the Assets To Be Divested is to ensure the continued research, design, development, manufacture, marketing and sale of Morton Floor Care Products and to remedy the lessening of competition resulting from the Proposed Acquisition as alleged in the Commission's complaint.

B. If respondents have divested the Assets To Be Divested to GenCorp pursuant to the GenCorp Agreement prior to the date this order becomes final, and if the Commission notifies respondents that GenCorp is not an acceptable acquirer or that the GenCorp Agreement is not an acceptable manner of divestiture, then respondents shall rescind the transaction with GenCorp, and shall divest the Assets To Be Divested, and such of the Additional Assets To Be Divested as appropriate to assure that the purpose of the divestiture, as set forth above, is likely to be achieved, within five (5) months of the date respondents receive such notice from the Commission, absolutely and in good faith, at no minimum price, to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

C. The Divestiture Agreement shall include, and respondents shall comply with, the following provisions:

1. For a period not to exceed two (2) years from the date of the divestiture, respondents shall manufacture and deliver to the Acquirer who purchases the Assets To Be Divested or the Additional Assets To Be Divested, in a timely manner, under reasonable terms and conditions, and at prices equal to or below those agreed and set forth in the GenCorp Agreement, a supply of those Morton Floor Care Products that Morton does not purchase for resale. Respondents shall supply no less than Acquirer's full requirement of Morton Floor Care Products except to the extent a lesser amount is requested by the Acquirer. In the event that the Acquirer does not choose to purchase

one or more Morton Floor Care Products from respondents because the Acquirer does not require such supply in order to manufacture or sell the Morton Floor Care Products in a competitive manner, respondents shall not be required to supply those Morton Floor Care Products that the Acquirer does not require.

2. For a period not to exceed four (4) years from the date of the divestiture, respondents shall manufacture and deliver to the Acquirer who purchases the Assets To Be Divested or the Additional Assets To Be Divested, in a timely manner, under reasonable terms and conditions, and at prices equal to or below those agreed and set forth in the GenCorp Agreement, a supply of Conrez, Morcryl, and Morez resin. Respondents shall supply no less than Acquirer's full requirement of Conrez, Morcryl, and Morez resin for floor care applications.

3. Commencing at such time as respondents commence delivery of the Morton Floor Care Products to the Acquirer pursuant to the Divestiture Agreement, respondents shall produce the Morton Floor Care Products only for sale to the Acquirer.

4. Respondents shall make representations and warranties that the products supplied pursuant to the Supply Agreement (i) were produced in accordance with the applicable recipes, (ii) meet all applicable product specifications, and (iii) are merchantable so as to pass without objection in the trade under the product description and the product trademark. Respondents shall agree to indemnify, defend and hold the Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses resulting from the failure of the products supplied by respondents to the Acquirer to comply with such representations and warranties. Respondents may condition this obligation upon the Acquirer giving respondents prompt, adequate notice of such claim, cooperating fully in the defense of such claim, and permitting respondents to assume the sole control of all phases of the defense and/or settlement of such claim, including the selection of counsel; provided, however, any such defense and/or settlement shall be consistent with the obligations assumed by respondents under this order. This obligation shall not require respondents to be liable for any negligent act or omission of the Acquirer or for any representations and warranties, express or implied, made by the Acquirer that exceed the representations and warranties made by respondents to the Acquirer.

5. Respondents shall make representations and warranties that respondents will hold harmless and indemnify the Acquirer for any liabilities or loss of profits resulting from the failure by respondents to deliver products in a timely manner as required by the Supply Agreements unless respondents can demonstrate that such failure was entirely beyond the control of respondents and was in no part the result of negligence or willful misconduct on respondents' part.

6. During the term of the Supply Agreements, upon request by the Acquirer or the Interim Trustee, respondents shall make available to the Interim Trustee all records that relate to the manufacture and delivery of the Morton Floor Care Products, Conrez, Morcryn, and Morez resins.

7. Upon reasonable notice and request from the Acquirer to respondents, respondents shall provide in a timely manner: (a) assistance to the Acquirer as necessary to enable the Acquirer to obtain the Commercial Capability to Manufacture and Sell the Morton Floor Care Products; and (b) consultation with knowledgeable employees of respondents and training, at the request of and at the facility of the Acquirer's choosing, until the Acquirer has the Commercial Capability to Manufacture and Sell the Morton Floor Care Products or abandons its efforts to obtain the Commercial Capability to Manufacture and Sell such products, reasonably sufficient to satisfy the management of the Acquirer that its personnel are adequately trained in the manufacture of the Morton Floor Care Products. Such assistance shall, at the Acquirer's request, include on-site inspections of any of respondents' facilities that relate to the Supply Agreements required by paragraph II.C.1. of this order, or that otherwise relate to the research, development, manufacture, or sale of Morton Floor Care Products. Respondents may require reimbursement from the Acquirer for all their Reimbursable Costs incurred in providing the services required by this paragraph II.C.7.

8. The Divestiture Agreement shall require the Acquirer to submit to the Commission and to the Interim Trustee periodic verified written reports, setting forth in detail the efforts of the Acquirer to sell the Morton Floor Care Products obtained pursuant to the Divestiture Agreement and the efforts of the Acquirer to obtain the Commercial Capability to Manufacture and Sell such products. The Divestiture Agreement shall require the first such report to be submitted 60 days from the date the Divestiture Agreement is accepted for public comment by the Commission and every 60 days thereafter until the

Acquirer has obtained the Commercial Capability to Manufacture and Sell such products. The Divestiture Agreement shall also require the Acquirer to report the following events to the Commission and to the Interim Trustee within ten (10) days of their occurrence: the Acquirer ceasing the sale in the United States of Morton Floor Care Products for any time period exceeding sixty (60) days, the Acquirer abandoning its efforts to sell the Morton Floor Care Products, or the Acquirer abandoning its efforts to obtain the Commercial Capability to Manufacture and Sell Morton Floor Care Products. The Acquirer shall provide the Interim Trustee access to all records and all facilities that relate to its efforts, pursuant to the Divestiture Agreement, to sell or manufacture the Morton Floor Care Products.

9. The Divestiture Agreement shall provide that if it is terminated, the Assets To Be Divested shall revert back to respondents and that the Assets To Be Divested and the Additional Assets To Be Divested shall be divested to an acquirer pursuant to the provisions of paragraph II.B. of this order.

D. During the pendency of any Patent dispute that: (1) challenges or seeks to render invalid any of the Patents divested pursuant to paragraphs II.A., II.B. or IV. of this order; and (2) could affect the manufacture or sale of the Morton Floor Care Products, respondents shall cooperate, at their own expense, in the defense of rights they have transferred to the Acquirer.

E. On or before the date the Divestiture Agreement is signed, respondents shall provide the Acquirer with a complete list of all employees engaged at any time on or after April 8, 1999, in the research, development or sale of Morton Floor Care Products, and shall supplement that list on the date this order is accepted for public comment with the names of any additional employees who at such time fall within the above description. If the Additional Assets To Be Divested are required to be divested, the list(s) to be provided shall include all employees engaged in the manufacture of Morton Floor Care Products at Morton's Greenville, South Carolina manufacturing facility. Such list(s) shall state each such individual's name, position, address, business telephone number, or if no business telephone number exists, a home telephone number, if available and with the consent of the employee, and a description of the duties and work performed by the individual in connection with the Assets To Be

Divested and, if applicable, the Additional Assets To Be Divested. Respondents shall provide the Acquirer the opportunity to enter into employment contracts with such individuals provided that such contracts are contingent upon the Commission's approval of the Divestiture Agreement. With respect to individuals who accept employment with the Acquirer, respondents shall not enforce any confidentiality or non-compete restrictions relating to Water-Based Polymers for Floor Care Applications or to Morton Floor Care Products.

F. Within no more than five (5) business days after the respondents and the Acquirer have signed the Divestiture Agreement and subject to the consent of the employees, respondents shall provide the Acquirer with an opportunity to inspect the personnel files and other documentation relating to the individuals identified pursuant to paragraph II.E. of this order to the extent possible under applicable laws. For a period of two (2) months following the divestiture, respondents shall provide the Acquirer with a further opportunity to interview such individuals and to negotiate employment contracts with them.

G. Respondents shall provide each employee identified in Schedule A of this order, and to other similarly experienced Morton employees reasonably acceptable to the Acquirer, with reasonable financial incentives to continue in his or her employment position prior to the divestiture, and to accept employment with the Acquirer at the time of the divestiture. Such incentives shall include, but not be limited to:

1. Vesting of all pension benefits under the Morton pension plan and Morton's 401(k) Employees Savings and Investment Plan;
2. Continuation of all employee benefits offered by Morton until the Divestiture is completed;
3. A bonus equal to one hundred (100) percent of the targeted FY 1999 bonus from Morton, payable upon the beginning of employment by Acquirer;
4. A bonus equal to thirty (30) percent of the employee's annual base salary at the time of divestiture, provided that the employee remains in the employ of the Acquirer for a one (1) year period, payable upon the completion of one-year's employment with the Acquirer;
5. For Michael Virostek only, an additional bonus equal to thirty (30) percent of Mr. Virostek's annual base salary at the time of

divestiture, provided that Mr. Virostek remains in the employ of the Acquirer for a two (2) year period, payable upon the completion of two-year's employment with the Acquirer; and

6. A severance payment if, less than 12 months after the date on which such employee commences employment with the Acquirer, the Acquirer terminates the employment of such employee for reasons other than cause. The amount of such severance payment shall be equal to the payment that such employee would have received had he or she remained in the employ of Morton and been terminated at such time, less any severance payment actually paid by the Acquirer.

H. For a period of one (1) year commencing on the date of an individual's employment by the Acquirer, respondents shall not solicit for employment any of the individuals identified pursuant to paragraph II.E. of this order who accept employment with the Acquirer, unless such individual has been separated from employment by the Acquirer against that individual's wishes.

I. Prior to divestiture, respondents shall not transfer, without consent of the Acquirer, any of the individuals identified pursuant to paragraph II.E. of this order to any other position.

J. Until respondents have satisfied the obligations imposed by paragraphs II.A., II.B., or IV. of this order and while respondents are in possession of any of the Assets To Be Divested and any of the Additional Assets To Be Divested, respondents shall take such actions as are necessary to maintain the viability and marketability of those Assets To Be Divested and Additional Assets To Be Divested, and to prevent the destruction, removal, wasting, deterioration or impairment of those Assets To Be Divested and Additional Assets To Be Divested, except for ordinary wear and tear.

K. Respondents may use information relating to Morton Floor Care Products, to the Assets To Be Divested, or to the Additional Assets To Be Divested, only to fulfill their obligations under this order and under the Divestiture Agreement, shall not otherwise use such information, and shall not disclose such information to anyone inside or outside respondents' businesses, except as necessary to fulfill respondents' obligations under this order and under the Divestiture Agreement; provided, however, that respondents may use and disclose such information relating to rights, titles, interests and licenses for such assets as this order permits respondents to retain.

III.

It is further ordered, That at any time after respondents sign the Agreement Containing Consent Order in this matter, the Commission may appoint an Interim Trustee to ensure that respondents and the Acquirer expeditiously perform their respective responsibilities as required by this order and the Divestiture Agreement approved by the Commission. Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Trustee appointed pursuant to this paragraph III.:

A. The Commission shall select the Interim Trustee, subject to the consent of respondents, which consent shall not be unreasonably withheld. If respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondents of the identity of any proposed trustee, respondents shall be deemed to have consented to the selection of the proposed trustee.

B. The Interim Trustee shall have the power and authority to monitor respondents' compliance with the terms of this order and with the terms of the Divestiture Agreement.

C. Within ten (10) days after appointment of the Interim Trustee, respondents shall execute a trust agreement that, subject to the prior approval of the Commission, confers on the Interim Trustee all the rights and powers necessary to permit the Interim Trustee to monitor respondents' compliance with the terms of this order and with the Divestiture Agreement and to monitor the compliance of the Acquirer under the Divestiture Agreement. The Interim Trustee shall sign a confidentiality agreement prohibiting the use, or disclosure to anyone other than the Commission, of any competitively sensitive or proprietary information gained as a result of his or her role as Interim Trustee.

D. The Interim Trustee shall serve for two (2) years from the date the respondents and GenCorp have signed the Divestiture Agreement, or in the event that there is a New Acquirer pursuant to the provisions of paragraph IV. of this order, the Interim Trustee shall serve for two (2) years from date the respondents and the New Acquirer have signed the Divestiture Agreement; provided however, that the term shall end earlier if the Interim Trustee has reported that the Acquirer has obtained the Commercial Capability to Manufacture and Sell the Morton Floor Care Products, and the Commission has accepted that report.

E. The Interim Trustee shall have full and complete access to respondents' personnel, books, records, documents, facilities and technical information relating to the research, design, development, manufacture, importation, marketing, distribution and sale of the Morton Floor Care Products, or to any other relevant information, as the Interim Trustee may reasonably request, including, but not limited to, all documents and records kept in the normal course of business that relate to the manufacture of the Morton Floor Care Products. Respondents shall cooperate with any reasonable request of the Interim Trustee. Respondents shall take no action to interfere with or impede the Interim Trustee's ability to monitor respondents' compliance with paragraphs II., III. and IV. of this order and with the Divestiture Agreement.

F. The Interim Trustee shall serve, without bond or other security, at the expense of respondents, on such reasonable and customary terms and conditions as the Commission may set. The Interim Trustee shall have authority to employ, at the expense of respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Trustee's duties and responsibilities. The Interim Trustee shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission.

G. Respondents shall indemnify the Interim Trustee and hold the Interim Trustee harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Interim Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparations 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 Interim Trustee.

H. If the Commission determines that the Interim Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in paragraph III.A. of this order.

I. The Commission may on its own initiative or at the request of the Interim Trustee issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this order and with the Divestiture Agreement.

J. The Interim Trustee shall evaluate reports submitted to it by the Acquirer with respect to the efforts of the Acquirer to obtain the Commercial Capability to Manufacture and Sell the Morton Floor Care Products. The Interim Trustee shall report to the Commission in writing, concerning compliance by respondents and the Acquirer with the provisions of paragraphs II. and III. of this order at least once every sixty (60) days until the Acquirer obtains, or abandons efforts to obtain, the Commercial Capability to Manufacture and Sell Morton Floor Care Products. Such reports shall include at least the following:

1. Whether respondents have supplied Morton Floor Care Products in conformity with the requirements of paragraph II.C. of this order;
2. Whether respondents have given the Interim Trustee access to records in conformity with paragraph III.E. of this order;
3. Whether the Acquirer has given the Interim Trustee reports and access pursuant to paragraph III.J. of this order;
4. Whether the Acquirer is making good faith efforts to sell the Morton Floor Care Products and to obtain the Commercial Capability to Manufacture and Sell such products; and
5. Whether respondents have maintained the Assets To Be Divested and Additional Assets To Be Divested as required in paragraph II.J. of this order.

IV.

It is further ordered, That:

A. If respondents fail to complete the divestitures required by paragraphs II.A. and II.B. of this order within the time periods specified therein, then the Commission may terminate any executed Divestiture Agreement and may appoint a Divestiture Trustee to divest the Assets To Be Divested and the Additional Assets To Be Divested to a buyer other than GenCorp and to execute a new Divestiture Agreement that satisfies the requirements of paragraph II. of this order. The Divestiture Trustee may be the same person as the Interim Trustee and will have the authority and responsibility to divest the Assets To Be Divested and the Additional Assets To Be Divested absolutely and in good faith, and with the Commission's prior approval. Neither the decision of the Commission to appoint a Divestiture Trustee, nor the decision of the Commission not to

appoint a Divestiture Trustee, to divest any of the assets under this paragraph IV.A. shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(I) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the respondents to comply with this order.

B. If a Divestiture Trustee is appointed by the Commission or a court pursuant to paragraph IV.A. of this order to divest the Assets To Be Divested and the Additional Assets To Be Divested to a New Acquirer, respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the Divestiture Trustee, subject to the consent of respondents, which consent shall not be unreasonably withheld. If respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to respondents of the identity of any proposed Divestiture Trustee, respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

2. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest the Assets To Be Divested and the Additional Assets To Be Divested to a New Acquirer pursuant to the terms of this order and to enter into a Divestiture Agreement with the New Acquirer pursuant to the terms of this order, which Divestiture Agreement shall be subject to the prior approval of the Commission.

3. Within ten (10) days after appointment of the Divestiture Trustee, respondents shall execute a (or amend the existing) 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 Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to divest the Assets To Be Divested and the Additional Assets To Be Divested to a New Acquirer and to enter into a Divestiture Agreement with the New Acquirer.

4. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph IV.B.3. of this order to divest the Assets To Be Divested

and the Additional Assets To Be Divested and to enter into a Divestiture Agreement with the New Acquirer that satisfies the requirements of paragraph II. of this order. If, however, at the end of the applicable twelve-month period, the Divestiture Trustee has submitted to the Commission a plan of divestiture or believes that divestiture can be achieved within a reasonable time, such 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 such divestiture period only two (2) times.

5. The Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities of respondents related to the manufacture, distribution, or sale of the Assets To Be Divested and the Additional Assets To Be Divested, or to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of his or her responsibilities.

6. The Divestiture Trustee shall use reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondents' absolute and unconditional obligation to divest at no minimum price and the Divestiture Trustee's obligation to expeditiously accomplish the remedial purpose of this order; to assure that respondents enter into a Divestiture Agreement that complies with the provisions of paragraph II.B. of this order; to assure that respondents comply with the remaining provisions of paragraphs II., III. and IV. of this order; and to assure that the New Acquirer obtains the Commercial Capability to Manufacture and Sell all of the Morton Floor Care Products. The divestiture shall be made to, and the Divestiture Agreement executed with, the New Acquirer in the manner set forth in paragraph II. of this order; provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one (1) such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by respondents from among those approved by the Commission.

7. The Divestiture Trustee shall serve, without bond or other security, at the expense of respondents, on such reasonable and customary terms and conditions as the Commission or a court may

