

Complaint

117 F.T.C.

IN THE MATTER OF

ALVEY HOLDINGS, INC., 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-3488. Complaint, Mar. 30, 1994--Decision, Mar. 30, 1994

This consent order requires, among other things, a Missouri-based corporation and its wholly-owned subsidiary to divest, to a Commission-approved buyer, its own horizontal carousel business within six months of acquiring White Storage & Retrieval Systems, Inc., otherwise, a Commission-appointed trustee will complete the divestiture. In addition, the respondents are required to comply with all the terms of a Hold Separate Agreement, and are prohibited, for a period of ten years, from acquiring, without prior Commission approval, any interest in any entity engaged in the manufacture or sale of horizontal carousels in the United States within the previous two years.

Appearances

For the Commission: *M. Howard Morse, Allee A. Ramadhan and Morris A. Bloom.*

For the respondents: *James Clark and Kenneth Doran, Gibson, Dunn & Crutcher, Los Angeles, CA.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that respondents Alvey Holdings, Inc., and Alvey, Inc. (collectively Alvey), have entered into a Stock Purchase Agreement in which Alvey agreed to purchase from Donald J. Weiss 100% of the voting securities of White Storage & Retrieval Systems, Inc. ("White"), in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 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 Alvey Holdings, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware.

2. Respondent Alvey, Inc. is a corporation which is a wholly-owned subsidiary of Alvey Holdings, Inc., and is organized, existing, and doing business under and by virtue of the laws of the State of Missouri. Both Alvey Holdings, Inc. and Alvey, Inc. have their principal places of business located at 9301 Olive Boulevard, St. Louis, Missouri.

3. The Buschman Company, a wholly-owned subsidiary of Alvey Inc., makes and sells horizontal carousels through its Diamond Machinery Division headquartered in Lewiston, Maine.

4. Respondents 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 affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

II. THE ACQUISITION

5. Respondents have agreed to acquire the stock of White Storage & Retrieval Systems, Inc. (White), a New Jersey corporation, for approximately \$17 million in cash. White makes and sells automated storage and retrieval systems used by manufacturers and distributors in warehouse and industrial settings. White is the United States' leading horizontal carousel producer.

III. THE RELEVANT MARKET

6. The relevant line of commerce within which to analyze the effects of Alvey's proposed acquisition is the manufacture and sale of horizontal carousels. Horizontal carousels are continuous loop, horizontally revolving devices for materials handling storage, generally consisting of drive mechanisms, power sources, controls,

and related software, and automatic load/unload devices. Horizontal carousels are used to store and retrieve medium to high-activity items for warehouse shipping or manufacture.

7. The relevant section of the country within which to analyze the effects of the proposed acquisition is the United States. No foreign made horizontal carousels are sold in the United States. Customers are unwilling to gamble on a manufacturer's ability to supply quick and reliable service when it is not supported by a U.S. based service network. No foreign makers of horizontal carousels have established a sales and service network in the U. S., and to do so would be both time consuming and expensive.

IV. MARKET STRUCTURE

8. There are only four competitors in the United States horizontal carousel market -- White, Alvey's Diamond Machinery Division, Raymond Corporation, and Richards-Wilcox, Inc. -- which collectively make approximately \$20 million in sales annually.

9. White is the leading manufacturer and seller of horizontal carousels in the United States with approximately 55% of dollar sales. Alvey is a significant competitor to White in horizontal carousels with around 23% of dollar sales in the U.S. The other firms in the market, both of which have small market shares are perceived as weak competitors.

10. The U.S. horizontal carousel market is already highly concentrated, whether measured by the Herfindahl-Hirschmann Index or four-firm concentration ratios. Alvey's acquisition of White will substantially increase concentration in an already highly concentrated market.

V. ENTRY CONDITIONS

11. Entry into the U.S. horizontal carousel market sufficient to undermine an anticompetitive price increase would take well in excess of two years because of the need for competitors to have reference sites, software, an installed base of customers, and the need to develop an effective reputation for competency in developing system integration capabilities. The risk to customers of purchasing an inadequate system results in a strong emphasis on the reputation of the firms in the bidding process.

VI. EFFECTS OF THE ACQUISITION

12. The effects of the proposed acquisition, if consummated, may be substantially to lessen competition or to tend to create a monopoly in the relevant market in the following ways, among others:

(a) It will eliminate White as a substantial independent competitive force in the relevant market;

(b) It will eliminate actual, direct and substantial competition between Alvey and White;

(c) It will substantially increase the already high concentration in the relevant market;

(d) It will increase the opportunity for coordinated interaction in the relevant market; and

(e) It will allow a combined White/Alvey to unilaterally exercise market power, which will result in higher prices being paid by customers for horizontal carousels.

VII. VIOLATIONS CHARGED

13. The acquisition agreement described in paragraph five of this complaint constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

14. The proposed acquisition of White by Alvey, 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 Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission, having initiated an investigation of the proposed acquisition by Alvey Holdings, Inc. and Alvey, Inc. (collectively "Alvey" or respondents) of White Storage and Retrieval Systems, Inc. ("White"), and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Clayton Act and the Federal Trade Commission Act; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of the 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 the complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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 Alvey Holdings, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware.

2. Respondent Alvey, Inc. is a corporation which is a wholly-owned subsidiary of Alvey Holdings, Inc., and is organized, existing, and doing business under and by virtue of the laws of the State of Missouri. Both Alvey Holdings, Inc. and Alvey, Inc. have their principal places of business located at 9301 Olive Boulevard, St. Louis, Missouri.

3. The Buschman Company, a wholly-owned subsidiary of Alvey Inc., makes and sells horizontal carousels through its Diamond Machinery Division headquartered in Lewiston, Maine.

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

ORDER

I.

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

A. "*Alvey*" means collectively Alvey Holdings, Inc., a Delaware corporation, and Alvey, Inc., a Missouri corporation, their predecessors, successors and assigns, divisions, subsidiaries, affiliates, companies, groups, partnerships, and joint ventures that they control, directly or indirectly, and their directors, officers, employees, agents and representatives, and their respective successors and assigns.

B. "*Buschman*" means The Buschman Company, a Delaware corporation, and a wholly-owned subsidiary of Alvey, Inc., and Buschman's predecessors, successors and assigns, divisions, subsidiaries, affiliates, companies, groups, partnerships, and joint ventures that Buschman controls, directly or indirectly, and their directors, officers, employees, agents and representatives, and their respective successors and assigns.

C. "*Diamond*" means the Diamond Machinery Division of Buschman headquartered in Lewiston, Maine, and specifically includes all assets used in or relating to the business of horizontal carousels of Alvey, without regard to title ownership of such assets, including the manufacturing, production, marketing, warehousing, distribution, and research and development facilities, and all other assets, properties, interests, business and goodwill, rights and privileges, tangible and intangible, related thereto, including, without limitation, the following assets attributable to or used by Diamond:

- (1) All machinery, fixtures, equipment, vehicles, furniture, tools and all other tangible personal property;
- (2) All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, management information systems, and software;
- (3) Technical information, intellectual property rights, trademarks and trade names other than any trademark or trade name which includes in any form the name "Buschman," patents, inventions, trade

secrets, technology, know-how, specifications, designs, drawings, processes and quality control data;

(4) Inventory;

(5) Accounts and notes receivable;

(6) All right, title and interest in and to owned or leased real property, together with appurtenances, licenses and permits;

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

(8) All rights under warranties and guarantees, express or implied;

(9) All books, records and files;

(10) All items of prepaid expense;

(11) All known and unknown, liquidated or unliquidated, contingent or fixed, rights or causes of action which Diamond has or may have against any third party and all such rights which Diamond has or may have in or to any asset; and

(12) All customer (except Buschman Europe A/S) agreements or understandings, whether formal or informal, and all customer records and files.

D. "*White*" means White Storage & Retrieval Systems, Inc., a New Jersey corporation.

E. "*Acquisition*" means the stock acquisition of White by Alvey from Donald J. Weiss, as referenced in Commission Premerger Report Number 93-1624.

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

G. "*Horizontal Carousels*" means continuous loop, horizontally revolving devices for materials handling and storage, and generally consisting of drive mechanisms, power sources, controls, related software, and automatic load/unload devices.

II.

It is further ordered, That, Alvey shall comply with all the terms of the Hold Separate Agreement attached hereto as Appendix A and made a part of this order. The Hold Separate Agreement shall continue in effect until such time as Alvey or the trustee has

accomplished the divestiture required by paragraphs IV and V of this order or until such time as the Hold Separate Agreement provides.

III.

It is further ordered, That, pending divestiture of Diamond, Alvey shall take such action as is necessary to maintain the viability and marketability of Diamond, and shall not cause or permit the destruction, removal, wasting, deterioration or impairment of Diamond, except in the ordinary course of business that does not affect the viability and marketability of Diamond, ordinary wear and tear excepted.

IV.

It is further ordered, That, within six (6) months after the date that this order becomes final, Alvey shall divest, absolutely and in good faith, Diamond. The divestiture shall be made only in a manner that receives the prior approval of the Commission and only to an acquirer that receives the prior approval of the Commission. The purpose of the divestiture is to ensure the continuation of the assets as an ongoing viable business engaged in the manufacture and sale of horizontal carousels, to maintain Diamond as an independent competitor in the horizontal carousel business, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

V.

It is further ordered, That:

A. If Alvey has not fully complied, absolutely and in good faith, with paragraph IV of this order within the time period provided in such paragraph, Alvey shall consent to the appointment by the Commission of a trustee to divest Diamond. In the event the Commission or the Attorney General brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission, Alvey shall similarly consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a

trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(1) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Alvey to comply with this order.

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

(1) The Commission shall select the trustee, subject to the consent of Alvey, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Alvey has not opposed the selection of a proposed trustee within fifteen (15) days after notice by the Commission's staff to Alvey of the identity of the proposed trustee, Alvey 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 Diamond, and to make any further arrangements that may be reasonably necessary to maintain the viability and competitiveness of Diamond's business.

(3) The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph V.B(8) to accomplish the divestiture. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that the divestiture can be accomplished 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 only extend the trustee's divestiture period two (2) times for such reasonable time as the trustee may request, not to exceed one (1) additional year.

(4) The trustee shall have full and complete access to the personnel, books, records, and facilities related to Diamond, or to any other relevant information, as the trustee may request. Alvey shall develop such financial or other information as such trustee may request and shall cooperate with any request of the trustee. Alvey shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in the divestiture

caused by Alvey shall extend the time for divestiture under paragraph V.B(3) in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

(5) Subject to Alvey's absolute and unconditional obligation to divest at no minimum price, and the purpose of the divestiture as stated in paragraph IV of this order, the trustee shall use his or her best efforts to negotiate the most favorable price and terms available for the divestiture. The divestiture shall be made in the manner set out in paragraph IV of this order, provided, however, that if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by Alvey from among those approved by the Commission.

(6) The trustee shall serve, without bond or other security, at the cost and expense of Alvey, on such reasonable and customary terms and conditions as the Commission or, in the case of a court-appointed trustee, the court, may set. The trustee shall have authority to employ, at the cost and expense of Alvey, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account to Alvey 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 Alvey and the trustee's power shall be terminated. The trustee's compensation shall be based in significant part on a Commission arrangement contingent on the trustee's divesting Diamond.

(7) Alvey 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 trusteeship, 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, negligence, willful or wanton acts, or bad faith by the trustee.

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

(9) If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph 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 Diamond.

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

VI.

It is further ordered, That, within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until Alvey has fully complied with the provisions of paragraphs II, III, IV and V of this order, Alvey shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, or has complied with those provisions. Alvey shall include in its compliance reports, among other things that are required from time to time, a full description of all substantive contacts or negotiations for the divestiture, including the identity of all parties contacted. Alvey also 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 for a period of ten (10) years from the date on which this order becomes final, Alvey shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any stock, share capital, equity or other interest in any concern, corporate or noncorporate, then engaged in, or within the two years prior to such acquisition engaged in, the manufacture or sale of horizontal carousels in the United States.

B. Except in the ordinary course of business, acquire any assets used for, or previously used for (and still suitable for use for) the manufacture of horizontal carousels from any concern, corporate or non-corporate, then engaged in, or within the two years prior to such acquisition engaged in, the manufacture or sale of horizontal carousels in the United States.

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

VIII.

It is further ordered, That, for the purposes of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to Alvey, Alvey 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 Alvey relating to any matters contained in this order; and

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

IX.

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

APPENDIX A

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate (the "Agreement") is by and between Alvey Holdings, Inc., a corporation organized and existing under the laws of the State of Delaware, and Alvey, Inc., a corporation organized and existing under the laws of the State of Missouri (collectively "Alvey"), both with their principal offices and places of business located at 9301 Olive Boulevard, St. Louis, Missouri, and the Federal Trade Commission (the "Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.*, (collectively, the "Parties").

Premises

Whereas, on August 6, 1993, Alvey entered into a Stock Purchase Agreement in which Alvey agreed to purchase from Donald J. Weiss 100% of the voting securities of White Storage & Retrieval Systems, Inc. ("White"), a New Jersey corporation (hereinafter the "Acquisition"); and

Whereas, Alvey and White both own and operate facilities in the United States for the manufacture and sale of horizontal carousels; and

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

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

Whereas, the Commission is concerned that if an understanding is not reached, preserving the *status quo ante* with respect to the horizontal carousel manufacturing facilities owned by Alvey during the period prior to the final acceptance of the consent order by the Commission (after the 60-day public notice period), divestiture resulting from any proceeding challenging the legality of the

Acquisition might not be possible, or might be less than an effective remedy; and

Whereas, the Commission is concerned that if the Acquisition is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of the Diamond Machinery Division ("Diamond") of Alvey's The Buschman Company ("Buschman") subsidiary as described in paragraph I of the consent order and the Commission's right to seek to restore Diamond as a viable competitor in the horizontal carousel business in the United States; and

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

- (i) Preserve Diamond as an independent business pending its divestiture as an ongoing enterprise,
- (ii) Remedy any anticompetitive effects of the Acquisition, and
- (iii) Preserve Diamond as an ongoing entity engaged in the horizontal carousel business in the United States in the event that divestiture is not achieved; and

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

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

Now, therefore, the Parties agree, upon understanding that the Commission has determined that it has reason to believe the acquisition may substantially lessen competition, and in consideration of the Commission's agreement that, unless the Commission determines to reject the consent order, it will not seek further relief from Alvey with respect to effects of the Acquisition on horizontal carousel manufacturing and sales in the United States, except that the Commission may exercise any and all rights to enforce this Agreement and the consent order to which it is annexed and made a part thereof, and, in the event the required divestiture is not accomplished, to seek divestiture of Diamond pursuant to the consent Agreement, and other relief, as follows:

1. Alvey agrees to execute and be bound by the attached consent order.

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

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

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

c. The day after the divestiture required by the consent order have been completed.

3. Alvey will hold Diamond, as it is to be reconstituted in accordance with this Agreement, separate and apart on the following terms and conditions:

a. Prior to Alvey acquiring White and within thirty (30) days of the date that this Agreement is accepted by the Commission, Alvey shall cause Diamond to be incorporated as a corporation, separate and distinct from Alvey and/or Buschman, duly organized under and existing by virtue of the laws of the State of Maine, and will effect all formalities and legal requirements necessary to accomplish such incorporation.

b. Diamond shall be held separate and apart and shall be operated independently of Alvey (meaning here and hereinafter, Alvey excluding Diamond and excluding all personnel connected with Diamond as of the date this Agreement was signed) except to the extent that Alvey must exercise direction and control over Diamond to assure compliance with this Agreement or the consent order, or with respect to the services to be provided by Alvey and/or Buschman pursuant to contract, as provided in subparagraph 3.f hereof.

c. Alvey shall not exercise direction or control over, or influence directly or indirectly, Diamond; provided, however, that Alvey may exercise only such direction and control over Diamond as is necessary to assure compliance with this Agreement or the consent order.

d. Alvey shall maintain the viability and marketability of Diamond, and shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair its marketability or viability.

e. Except for the single Alvey director, officer, employee, or agent serving on the "Diamond Board" (as defined in subparagraph 3.j hereof), Alvey shall not permit any director, officer, employee, or agent of Alvey or White also to be a director, officer or employee of Diamond.

f. Except as required by law or except to the extent that necessary information is exchanged in the course of defending investigations or litigation, obtaining legal advice, acting to assure compliance with this Agreement or the consent order (including accomplishing the divestiture), and except to the extent that certain designated individuals on Alvey's accounting and order confirmation staff may provide accounting and order confirmation services to Diamond on the basis of a contractual arrangement between Alvey and Diamond, Alvey shall not receive or have access to, or the use of, any of Diamond's "material confidential information" not in the public domain. Any such information that is obtained pursuant to this subparagraph shall only be used for the purposes set out in this subparagraph. ("Material confidential information," as used herein, means competitively sensitive or proprietary information not independently known to Alvey, and includes, but is not limited to, customer lists, customers, price lists, prices, individual transactions, marketing methods, patents, technologies, processes, or other trade secrets.)

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

h. Alvey shall not change the composition of the management of Diamond except that: (1) the non-Alvey (as Alvey is defined in subparagraph 3.b hereof) directors or members serving on the Diamond Board (as defined in subparagraph 3.j hereof) shall have the power to remove employees; (2) within five (5) days of the incorporation referred to in paragraph 3.a hereof, Alvey shall be permitted to name and appoint Diamond's corporate officers; and (3)

Richard Anderson, currently Operations Manager for Diamond, and a long-time Buschman employee, may be permitted to transfer back to Cincinnati as had been previously agreed upon.

i. All material transactions out of the ordinary course of business and not precluded by subparagraphs 3.a - 3.h hereof, shall be subject to a majority vote of the Diamond Board (as defined in subparagraph 3.j hereof). The Diamond management shall prepare capital and operating budgets each six (6) months, which shall be subject to approval of a majority of the Diamond Board (as defined in subparagraph 3.j hereof).

j. Alvey shall elect a new three-person board of directors of Diamond ("Diamond Board") once the incorporation referred to in subparagraph 3.a hereof has occurred. The Diamond Board shall have the exclusive authority for managing Diamond. Alvey may elect the directors to the Diamond Board provided, however, that no director of the Diamond Board shall have had prior responsibility for, or knowledge of confidential information regarding Alvey's or White's horizontal carousel business, and no more than one Alvey director, officer, employee, or agent shall be a director of the Diamond Board ("Alvey Director"). Except as permitted by this Agreement, no Alvey Director, so long as he or she serves as a director, shall receive, in his or her capacity as a director of the Diamond Board, material confidential information and shall not disclose any such information received under this Agreement to Alvey or use it to obtain any advantage for Alvey. Such Alvey Director shall participate in matters which come before the Diamond Board only for the limited purpose of considering a capital investment, the hiring of outside services, or lease transactions in amounts exceeding \$10,000, and carrying out Alvey's responsibilities under this Agreement or the consent order. Except as permitted by this Agreement, such Alvey Director shall not participate in any matter, or attempt to influence the votes of the other directors with respect to matters, that would involve a conflict of interest if Alvey and Diamond were separate and independent entities. Meetings of the Diamond Board during the term of this Agreement shall be stenographically transcribed and the transcripts retained for two (2) years after the termination of this Agreement.

k. Any Alvey employee who obtains or may obtain confidential information under this Agreement shall enter a confidentiality agreement prohibiting disclosure of confidential information until the