IN THE MATTER OF

# FAIR ALLOCATION SYSTEM, INC.

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

*Docket C-3832. Complaint, Oct. 22, 1998--Decision, Oct. 22, 1998*

This consent order prohibits, among other things, the Montana-based association of franchised automobile dealerships from participating in, suggesting, encouraging, or assisting any boycott or threatened boycott of, or refusal to deal with, any automobile manufacturer or consumer. In addition, the consent order requires the respondent to amend its by-laws to incorporate the provisions of this order and to distribute copies of the amended by-laws to each of its members.

*Participants*

For the Commission: *Shane Woods, Charles Harwood, William Baer, William Layher,* and *Jonathan Baker.*

For the respondent: *R. J. Sewell, Smith Law Firm*, Helena, MT.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 41, *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Fair Allocation System, Inc. (hereafter "respondent") has violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Fair Allocation System, Inc. is an incorporated association of franchised automobile dealerships (primarily Chrysler, Plymouth, Dodge, Jeep and Eagle), existing and doing business under and by virtue of the laws of the State of Montana, with a mailing address at P.O. Box 1691, Helena, Montana.

PAR. 2. Respondent was formed by its member dealers as an entity through which its members could communicate with Chrysler Corp. ("Chrysler") concerning Chrysler policies and how those policies might affect respondent's members. Respondent's members were initially concerned about the practices of a competing dealer

whose low prices and Internet advertising were attracting car buyers from a broad geographic area and taking sales from respondent's members. Respondent's members had previously asked Chrysler to reduce the number of vehicles it allocates to this dealer, but Chrysler had refused. Respondent has approximately 25 members, who are generally engaged in the retail sale of new Chrysler, Plymouth, Dodge, Jeep and Eagle automobiles. In addition to new car sales, respondent's members provide service on Chrysler, Plymouth, Dodge, Jeep and Eagle automobiles, including warranty work. Member dealerships are located principally in eastern Washington, northern Idaho and western Montana, where they constitute a substantial percentage of the Chrysler, Plymouth, Dodge, Jeep and Eagle dealerships. In cities and towns along Interstate 90 between Ellensburg, Washington, and Missoula, Montana, for example, seven of 11 such dealerships are members of respondent. Except to the extent that competition has been restrained as alleged herein, respondent's members have been and are now in competition among themselves and with other automobile dealerships.

PAR. 3. Respondent's acts and practices, including the acts and practices alleged herein, are in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 4. Respondent is organized for the purpose of guarding and fostering the interests of its members. Respondent engages in activities that further its members' pecuniary interests. By virtue of its purposes and activities, respondent is a corporation organized for the profit of its members within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 5. Respondent has been and is acting, or has attempted to act, in agreement, combination or conspiracy with some of its members to restrain trade in the sale of new Chrysler, Plymouth, Dodge, Jeep and Eagle automobiles by threatening to boycott particular models and limit warranty service to particular customers unless Chrysler modifies its system for allocating vehicles to its dealers. Instead of allocating vehicles based on each dealer's total sales volume, as Chrysler does now, respondent demanded that Chrysler allocate vehicles based on each dealer's sales volume from within its local area.

PAR. 6. The purposes or effects of respondent's agreement, combination or conspiracy, or attempted agreement, combination or conspiracy, as described in paragraph five, have been and are, or would be, to restrain competition unreasonably and to deprive consumers of the benefits of competition in one or more of the following ways, among others:

A. By foreclosing, reducing and restraining competition among automobile dealers, including Chrysler, Plymouth, Dodge, Jeep and Eagle dealers;

B. By depriving consumers of local access to particular models of new Chrysler, Dodge, Plymouth, Jeep and Eagle automobiles; and

C. By depriving consumers of local access to warranty work on their Chrysler, Plymouth, Dodge, Jeep or Eagle automobiles.

PAR. 7. The aforesaid acts and practices herein alleged were and are to the prejudice and injury of the public, and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. The acts and practices of respondent, as herein alleged, are continuing and will continue in the absence of the relief requested.

## DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of respondent Fair Allocation System, Inc. ("FAS"), and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act; and

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

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

1. FAS is an incorporated association of franchised automobile dealerships (primarily Chrysler, Plymouth, Dodge, Jeep and Eagle), organized, existing and doing business under and by virtue of the laws of the State of Montana, and has a mailing address at P.O. Box 1691, Helena, Montana.

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

ORDER

I.

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

A. "*Respondent*" or "*FAS*" means Fair Allocation System, Inc., its officers, directors, employees, agents and representatives, successors, and assigns, its subsidiaries, divisions, groups and affiliates controlled by FAS, and the respective officers, directors, employees, agents and representatives, successors, and assigns of each.

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

II.

*It is further ordered*, That respondent, directly or indirectly, or through any person or any corporate or other device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from carrying out, participating in, inducing, suggesting, urging, encouraging, or assisting any boycott or threatened boycott of, or concerted refusal to deal or threatened concerted refusal to deal with, any automobile manufacturer or consumer.

III.

*It is further ordered*, That respondent shall:

A. Within thirty (30) days after the date this order becomes final, distribute by first-class mail a copy of this order and the complaint to each of its members;

B. Within sixty (60) days after the date this order becomes final, amend its by-laws to incorporate by reference paragraph II of this order, and distribute by first-class mail a copy of the amended by-laws to each of its members;

C. For a period of ten (10) years after the date this order becomes final, provide each new member with a copy of this order, the complaint, and the amended by-laws within thirty (30) days of the new member's admission to FAS; and

D. Within sixty (60) days after the date this order becomes final, and annually thereafter for a period of ten (10) years on the anniversary of the date this order becomes final, file with the Secretary of the Commission a verified written report setting forth in detail the manner and form in which FAS has complied with and is complying with this order.

IV.

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

V.

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

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

B. Upon five days' notice to respondent and without restraint or interference from it, to interview officers, directors, or employees of respondent.

VI.

*It is further ordered*, That this order shall terminate on October 22, 2018.

IN THE MATTER OF

# EXXON CORPORATION, ET AL.

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

*Docket C-3833. Complaint, Oct. 30, 1998--Decision, Oct. 30, 1998*

This consent order, among other things, requires Exxon to sell its viscosity index improver (an essential motor oil additive) business to Chevron Chemical Company or another Commission-approved buyer.

*Participants*

For the Commission: *Philip Eisenstat, Joseph Krauss, William Baer, Leslie Farber,* and *Jonathan Baker.*

For the respondents: *Robert Paul, White & Case*, Washington, D.C. and *Jim Egan, Rogers & Wells*, Washington, D.C.

## COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondents Exxon Corporation, The Shell Petroleum Company Limited, and Shell Oil Company, all corporations subject to the jurisdiction of the Commission, have agreed to form a joint venture, in violation of the provisions of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

### I. THE RESPONDENTS

1. Respondent Exxon Corporation ("Exxon") is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, having its principal offices at 5959 Las Colinas Boulevard, Irving, Texas.

2. Respondent The Shell Petroleum Company Limited is a corporation organized, existing and doing business under and by virtue of the laws of England, having its principal offices at Shell Centre, London SE1 7NA, England.

3. Respondent Shell Oil Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, having its principal offices at One Shell Plaza, Houston, Texas.

## II. JURISDICTION

4. At all times relevant here, respondents have been, and are now, corporations as "corporation" is defined in Section 4 of the FTC Act, 15 U.S.C. 44; and at all times relevant herein, the respondents have been, and are now, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and in Section 4 of the FTC Act, 15 U.S.C. 44.

## III. THE PROPOSED JOINT VENTURE

5. On or about July 10, 1996, Exxon Chemical Company, a division of Exxon, The Shell Petroleum Company Limited, and Shell Oil Company announced an intention to form a joint venture to own and operate the businesses of Exxon Chemical Company, The Shell Petroleum Company Limited, and Shell Oil Company, engaged in the development, manufacture, marketing and sale of additives used in the production of fuels and lubricants (the "Joint Venture"). The value of the businesses to be combined in the Joint Venture is around $1.5 billion.

## IV. THE RELEVANT MARKETS

### *A. Relevant Product Market*

6. The development, manufacture, marketing and sale of viscosity index improver or viscosity modifiers for motor oil for automobiles and trucks ("VI improver") is the relevant line of commerce within which to analyze the competitive effects of the proposed acquisition.

7. VI improvers are synthetic rubber compounds, either polymers or styrenics, that are blended with refined oil to enhance the viscosity properties of the oil for use in motor oil.

8. The viscosity of a fluid is its internal resistance to flow. The higher the viscosity, the more resistance to flow. Lubricating oils must have enough viscosity to maintain a film of the proper thickness on the surfaces that they are intended to protect. Temperatures affect the viscosity of oil, higher temperatures lowering the viscosity. Motor oil, which is used to lubricate the interior of an engine, must

have sufficient viscosity to adhere to the internal surfaces of the engine even after the engine gets hot and reduces the oil's viscosity. At the same time, motor oil must have low enough viscosity to flow through the engine when the engine is cold, particularly in winter weather.

9. Refined oil by itself does not have both the needed high viscosity when the engine is warm and the low viscosity when the engine is cold. An oil with low viscosity which will flow well at low temperatures will lack the required viscosity to protect the engine at high temperatures. An oil with a high viscosity which will protect the engine at high temperatures will not flow well at low temperatures. The "viscosity index" of an oil is the relationship between the viscosity of the oil at two different temperatures, one low and one high. The higher the viscosity index, the smaller the relative change in viscosity with temperature. VI improvers are added to refined oil by companies that blend and market motor oil to give the resulting motor oil more consistent viscosity across changes in temperature and increase the viscosity index.

10. Consumers rely on motor oil containing VI improver to protect their car engines. There are no economic substitutes for VI improver.

11. Exxon Chemical Company and The Shell Petroleum Company Limited and Shell Oil Company develop, manufacture, market, and sell VI improver.

*B. Relevant Geographic Market*

12. The relevant geographic area in which to analyze the effects of the Joint Venture in the relevant line of commerce is North America.

13. Automobile and truck engine manufacturers, oil companies that produce motor oil, and companies that produce chemical additives to enhance the performance of motor oil jointly develop industry standards for the minimum performance of motor oil. These industry standards vary in different parts of the world. The VI improver marketed in North America is designed so that when combined with motor oil and other chemical additives, the motor oil will meet industry minimum standards for North America. VI improver marketed in other parts of the world may not allow motor oil to meet the minimum industry standards for North America.

14. The relatively low value to weight ratio of VI improver makes it generally uneconomic to transport VI improver from other parts of the world to North America for use in motor oil.

## V. MARKET STRUCTURE

15. As measured by current sales to customers in North America, the relevant market is highly concentrated, whether measured by the Herfindahl-Hirschmann Index (or "HHI") or by two-firm or four-firm concentration ratios. Exxon Chemical Company, The Shell Petroleum Company Limited, and Shell Oil Company collectively account for over one-half of the sales of VI improver for use in motor oil in North America. The proposed Joint Venture, if consummated, would significantly increase the HHIs in an already highly concentrated market.

## VI. ENTRY CONDITIONS

16. Entry into the development, manufacture, marketing, and sale of VI improver requires more than two years. Entry into the VI improver market is difficult and would not be timely to prevent anticompetitive effects in the relevant markets.

17. The development of a VI improver that will enable motor oil to meet the applicable industry standards is very difficult and time consuming. It takes over two years to develop a marketable VI improver product.

18. The economies of scale in the manufacturing of synthetic rubbers of the type that can be used for VI improver require a manufacturing facility that is much larger than is needed to compete in the VI improver market. A new entrant into the market for VI improver must either build a plant for the production of synthetic rubber many times the size that is needed to compete in the VI improver market and simultaneously enter other markets to market the remaining production of the plant, or find an existing supplier of synthetic rubbers who will provide a supply of synthetic rubber of the design needed to make VI improver. Many of the current producers of VI improver have exclusive supply arrangements with suppliers of synthetic rubber to manufacture the synthetic rubber that the producer of the VI improver uses.

19. Building a new manufacturing facility for the production of synthetic rubber of the type that can be used in the production of VI improver is time consuming. It would take over two years to build a new synthetic rubber facility. There are few, if any, producers of

synthetic rubber of the types that can be used for VI improver that do not already have an exclusive supply arrangement with a producer of VI improver that precludes that producer of synthetic rubber from supplying another VI improver producer.

## VII. ACTUAL COMPETITION

20. Exxon Chemical Company, The Shell Petroleum Company Limited, and Shell Oil Company are actual competitors in the relevant lines of commerce in the relevant area.

## VIII. EFFECTS OF THE PROPOSED MERGER ON COMPETITION

21. The effect of the Joint Venture, if consummated, 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, as amended, 15 U.S.C. 45, in the following ways, among others:

A. By eliminating actual, direct, and substantial competition between Exxon Chemical Company, The Shell Petroleum Company Limited, and Shell Oil Company in the relevant markets;

B. By increasing the likelihood of or facilitating collusion or coordinated interaction between the Joint Venture and the remaining competitors;

C. By increasing the likelihood that customers of VI improver would be forced to pay higher prices; and

D. By reducing innovation, quality, service, and product availability in the relevant markets.

## IX. VIOLATIONS CHARGED

22. The proposed formation of a joint venture by Exxon Chemical Company, The Shell Petroleum Company Limited, and Shell Oil Company violates Section 5 of the FTC Act, as amended, 15 U.S.C. 45, and would, if consummated, violate 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 ("Commission"), having initiated an investigation of the proposed formation of a joint venture between Exxon Chemical Company, a division of Exxon Corporation, The Shell Petroleum Company Limited and Shell Oil Company, hereinafter sometimes referred to as the "respondents," and having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

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

The Commission, having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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 Exxon Corporation is a corporation organized and existing under the laws of the State of New Jersey, having its principal offices at 5959 Las Colinas Boulevard, Irving, Texas.

2. Respondent The Shell Petroleum Company Limited is a corporation organized under the laws of England, having its principal offices at Shell Centre, London SE1 7NA, England.

3. Respondent Shell Oil Company is a corporation organized and existing under the laws of the State of Delaware, having its principal offices at One Shell Plaza, Houston, Texas.

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. "*Exxon Corporation*" means Exxon Corporation, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Exxon Corporation, and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each. For purposes of this order, Exxon Corporation does not include the Joint Venture (as defined below).

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

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

D. "*Respondents*" means Exxon Corporation, The Shell Petroleum Company Limited, and Shell Oil Company, individually and collectively.

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

F. "*Chevron*" means Chevron Chemical Company LLC, a subsidiary of Chevron Oil Company. Chevron is a limited liability company organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 6001 Bollinger Canyon Road, San Ramon, California.

G. "*Chevron Agreement*" means the *Purchase and Sale Agreement By And Between Chevron Chemical Company LLC, As Purchaser, And Exxon Chemical Company, A Division Of Exxon Corporation, As Seller, Regarding The Crankcase OCP VII Business of ECC's Paramins Division*, dated May 14, 1998.

H. "*Assets Identified in the Chevron Agreement*" means the assets that Exxon Chemical Company, a division of Exxon Corporation, has agreed to sell, and Chevron has agreed to buy, as embodied in the Chevron Agreement.

I. "*Vistalon*" means the business unit of Exxon Chemical Company whose principal business is the design, manufacture, marketing, and sale of polymers, including, among other products, OCP Polymer for Viscosity Index Improver Applications.

J. "*Joint Venture*" means the joint venture or ventures to be formed between Exxon Corporation, The Shell Petroleum Company Limited and Shell Oil Company pursuant to the *Additives Joint Venture Agreement Among Exxon Chemical Company, A Division of Exxon Corporation, the Shell Petroleum Company Limited, and Shell Oil Company*, dated May 15, 1998.

K. "*Consummation of the Joint Venture*" means the earlier of (1) the closing date of the Joint Venture in the United States or (2) the commencement of joint manufacturing by the Joint Venture anywhere in the world.

L. "Viscosity Index Improver" means products made from polymers or styrenics, including olefin co-polymers, that are added to lubricants, including motor oils, to modify the impact of changes in temperature on the viscosity of the lubricants.

M. "*OCP-based Viscosity Index Improver*" means Viscosity Index Improver products for crankcase applications that are made from olefin co-polymers (OCP).

N. "*OCP Polymer for Viscosity Index Improver Applications*" means commercially viable grades of olefin co-polymer manufactured by Vistalon, a business unit of Exxon Chemical Company, a division of Exxon Corporation, which have utility in Viscosity Index Improvers, including, without limitation, current grades of olefin co-polymers designated Vistalon grades 457, 785, 703, 878P, and 878, MDV 91-9, and Exxelor grades 8900 and 8950.

O. "*Paramins*" means the business unit of Exxon Chemical Company, whose principal business is in the design, manufacture,

marketing, and sale of fuel and lubricant additive products, including without limitation, Viscosity Index Improvers.

P. "*Paratone*" means the OCP-based Viscosity Index Improvers designed, manufactured, marketed and sold by Paramins.

Q. "*Non-public Information*" means material proprietary commercial or technical information related to Chevron's Oronite Division, Vistalon products for OCP-based Viscosity Index Improvers, OCP-based Viscosity Index Improvers, or OCP Polymer for Viscosity Index Improver Applications. Non-public Information does not include: (1) information that falls within the public domain through no violation of this order by any respondent, (2) information to be retained by Exxon Corporation or to be transferred to the Joint Venture as permitted by the Chevron Agreement, (3) the residual knowledge of former Paramins employees who become employees of the Joint Venture, or (4) information relating to OCP polymer to the extent the polymer is used for applications other than Viscosity Index Improver.

R. "*Chevron's Oronite Division*" means the division of Chevron Chemical Company LLC that manufactures and markets lubricant additives worldwide, with principal offices in Houston, Paris, and Singapore.

S. "*Viscosity Index Improver Business*" means Exxon Corporation's business of developing and selling OCP-based Viscosity Index Improvers, and includes all assets used by Paramins in the research, development, manufacturing, marketing and sale of OCP-based Viscosity Index Improvers in North America and Europe, regardless of where the assets are located in the world, and regardless of whether included in the Chevron Agreement, including, without limitation, the following:

1. All trademarks, including the Paratone trademark, brand names, customer lists, vendor lists, catalogs, sales promotion literature, and advertising materials;

2. All research materials, technical information, management information systems, software, inventions, trade secrets, intellectual property, patents, technology, know-how, specifications, designs, drawings, processes and quality control data;

3. All inventory of raw materials and finished goods;

4. All rights, titles and interests in and to the contracts entered into in the ordinary course of business with customers (together with