

Modifying Order

102 F.T.C.

IN THE MATTER OF

RSR CORPORATION

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT*Docket 8959. Final Order, Dec. 2, 1976—Modifying Order, Sept. 12, 1983*

This order reopens the matter in Docket 8959 and modifies the Commission's order issued on Dec. 2, 1976 (88 F.T.C. 800), *modified*, Nov. 13, 1981 (98 F.T.C. 872), to provide for the appointment of a trustee who shall effect divestiture of all assets (with certain specified exceptions) constituting the lead-recycling plants in Dallas, Tex. and Seattle, Wash. The order also renumbers Paragraphs V, VI, VIII, Paragraphs XVII, XVIII and XIX, respectively.

DECISION AND ORDER MODIFYING CEASE AND DESIST
ORDER IN DOCKET NO. 8959

On December 2, 1976, the Federal Trade Commission, pursuant to Section 11 of the Clayton Act, issued the order in this case against RSR Corporation requiring, among other things, that RSR Corporation divest itself of certain assets. On November 16, 1981, the Commission modified its order to provide that the assets to be divested shall be RSR Corporation's Dallas, Texas, and Seattle, Washington, lead-recycling plants. These plants were to have been divested on or before November 16, 1982, to an acquirer or acquirers approved by the Commission. As of the date of this order, neither plant has been divested by RSR Corporation.

After full consideration of the record and of information provided to it by RSR Corporation and others, the Commission has determined that further modification of the order is in the public interest because, under the circumstances, it will provide an expeditious means of achieving the purpose of its order in this matter, namely, the restoration of competition in the secondary-lead market. The Commission believes that divestiture of the plants was not accomplished within the prescribed period largely because RSR Corporation failed to make a good-faith effort to achieve divestiture. The Commission further believes that entrusting the divestiture to a trustee will ensure that such an effort is made. Moreover, respondent has agreed to a proposed Final Judgment providing for payment of civil penalties in settlement of a complaint alleging that respondent failed to divest the Dallas and Seattle plants by November 16, 1982. The Commission has forwarded the complaint and proposed Final Judgment to the Department of Justice for filing. Accordingly, the Commission on this date has issued

an order to show cause why (1) Paragraphs V, VI, and VIII of the order in Docket No. 8959 should not be modified to renumber those Paragraphs XVII, XVIII, and XIX respectively, and (2) why Paragraphs I, II, III, IV, and VII of the order in Docket No. 8959 should not be modified as set forth below. The proposed modification was accepted by respondent.

Accordingly,

It is ordered, That this matter be, and it hereby is, reopened and that the order in Docket No. 8959 be modified (1) to renumber Paragraphs V, VI, and VIII of the order in Docket No. 8959 Paragraphs XVII, XVIII, and XIX respectively, and (2) that Paragraphs I, II, III, IV, and VII of the order in Docket No. 8959 be modified as set forth below.

I.

As used in this Modified Order:

A. *RSR* means RSR Corporation, a corporation, and its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns.

B. *Assets of the Dallas Plant* means all assets, title, properties, interest, rights and privileges, of whatever nature, tangible and intangible, including without limitation all buildings, machinery, equipment, customer lists, and other property of whatever description, except as listed in Appendix A* hereto, that comprise the Dallas, Texas, lead recycling plant owned by an RSR subsidiary.

C. *Assets of the Seattle Plant* means all assets, title, properties, interest, rights, and privileges, of whatever nature, tangible and intangible, including without limitation all buildings, machinery, equipment, customer lists, and other property of whatever description, except as listed in Appendix A hereto, that comprise the Seattle, Washington, lead recycling plant owned by RSR subsidiaries.

D. *Assets* means the Assets of the Dallas Plant and the Assets of the Seattle Plant.

E. *Environmental Approval* means approval as to the acquirer in all respects from the Environmental Protection Agency and/or other appropriate governmental agency having jurisdiction over environmental matters, including the filing by the acquirer with the Environmental Protection Agency and/or other appropriate governmental agency having jurisdiction over environmental matters of a Part A application for a hazardous waste permit and the affirmative demon-

* Not reproduced herein. Copies of all Appendices and Exhibits are available for inspection in Room 130, Public Reference Branch, Federal Trade Commission, 6th St. and Pa. Ave., N.W., Washington D.C. 20580.

stration to such agencies by the acquirer that it meets the financial responsibility standards pursuant to applicable environmental laws, regulations, and administrative practices.

F. *Commission Approval* means acquirer approval from the Federal Trade Commission.

G. *Approvals* means Environmental Approval and Commission Approval.

II.

RSR shall divest the Assets in accordance with and subject to the terms and provisions of this Modified Order to an acquirer(s) approved in advance by the Federal Trade Commission. The Assets may be divested as a unit or the Assets of the Dallas Plant may be divested to one acquirer and the Assets of the Seattle Plant to another acquirer.

III.

The Commission shall appoint a Trustee for the purpose of effecting divestiture(s) of the Assets in accordance with the provisions of this Modified Order to an acquirer(s) who represent(s) in good faith that the Assets will be used as plants engaged in the production of recycled bulk lead, lead alloys, and lead products. RSR will transfer to the Trustee, within one week of the Trustee's appointment all powers necessary to permit the Trustee to execute on behalf of RSR the deeds and assignments contained in Exhibit III annexed hereto and otherwise to divest the Assets as provided in this Modified Order. In connection with such divestiture, RSR shall be required to make no warranties other than warranties of title.

IV.

The Trustee shall be empowered to find a prospective acquirer(s) for and, upon receipt of all Approvals, to sell, transfer, and convey the Assets to such acquirer(s) in accordance with this Modified Order (unless in either case, prior to the appointment of the Trustee hereunder, RSR shall have divested the Assets of the Dallas Plant or the Assets of the Seattle Plant). The Trustee shall hold such power in Trust for purposes of effecting divestiture(s) of the Assets, pursuant to and in accordance with the terms of this Modified Order. The Trustee shall find a single acquirer for the Assets of the Dallas Plant and a single acquirer for the Assets of the Seattle Plant, except that one acquirer may acquire both the Assets of the Dallas Plant and the

Assets of the Seattle Plant. The Trustee shall attempt to find an acquirer(s) for the Assets as soon as possible and shall attempt to obtain the best possible price for the Assets, *provided, however*, the Trustee is not required to obtain a minimum price.

V.

The Trustee shall allow a prospective acquirer(s) to exclude from the acquisition of the Assets specific leases (with the exception of the lease between Murph Metals Incorporated and Bestolife Corporation) and operating contracts and arrangements (except that applicable NLRB rules and regulations shall govern regarding the acquirer(s)'s rights of excluding labor contracts from the acquisition of the Assets). The leases and operating contracts and arrangements included in the Assets of the Dallas Plant and in the Assets of the Seattle Plant to be transferred (unless excluded pursuant to this Paragraph) to the acquirer(s) pursuant to this Modified Order are listed in Exhibits I and II hereto, respectively. The acquirer(s) shall notify the Trustee (who shall immediately notify RSR) in writing at the time the acquirer(s) commits to acquire the Assets of the Dallas Plant or the Assets of the Seattle Plant, or both, whether the acquirer(s) elects to exclude from the acquisition some or all of the leases and operating contracts and arrangements of the plant(s) being acquired and shall irrevocably specify which leases and operating contracts and arrangements are to be excluded at such time of commitment. If no such notification is received by the Trustee at the time of commitment, the acquirer(s) shall be deemed to have agreed to take assignment of all the leases and operating contracts and arrangements. If the acquirer(s) elects not to take assignment of any said lease or contractual obligation, then RSR shall not be required to transfer the related leased assets or any rights thereunder to the acquirer(s). In the event the acquirer of the Assets of the Dallas Plant elects not to include the Dallas plant oxygen contract in the Assets to be acquired, then RSR, upon reasonable notice to the acquirer, may exercise whatever rights RSR has under the Dallas plant oxygen contract to remove the machinery and equipment leased by RSR from Airco under that contract, provided that RSR shall do so in such a way that no material damage is done to the remaining Assets of the Dallas Plant. The acquirer shall permit RSR at no charge to enter the property during normal working hours to remove such machinery and equipment. RSR shall be under no obligation to renew any lease or operating contract that expires during the Trusteeship.

VI.

If the Trustee obtains a prospective acquirer(s) for the Assets of the Dallas Plant and/or the Assets of the Seattle Plant and all the necessary Approvals are obtained within the required period (as provided in Paragraph XI herein), the Trustee shall, at the Closing (herein referred to as the "Closing") of such sale(s), execute and deliver warranty deeds and assignments necessary to transfer and convey the Assets to the acquirer(s) in the forms annexed as Exhibit III hereto, appropriately completed to insert therein only the name of the transferees, dates, any inventories to be purchased (pursuant to Paragraph VIII), and leases and operating contracts and arrangements not to be transferred (pursuant to Paragraph V). Such documents and the license agreement referred to in Paragraph VII shall constitute the sole instruments of conveyance and transfer and the sole agreements which the Trustee on behalf of RSR shall be required to execute and deliver for purposes of consummating divestiture of the Assets pursuant to this Modified Order. Prior to Closing, the acquirer(s) shall perform such inspection of the Assets as may be necessary to determine, to the acquirer's(s) satisfaction, that the Assets to be conveyed and transferred to the acquirer(s) at Closing hereunder conform in all respects to the requirements of this Modified Order and, absent fraud, acceptance by the acquirer(s) at Closing of such warranty deeds and assignments shall constitute conclusive acknowledgement by the acquirer of such conformance, *provided however*, nothing in this paragraph shall affect the Commission's right to seek civil penalties for violation of any provision of this Modified Order. All sale proceeds shall be paid to the Trustee by the acquirer(s) upon delivery to the acquirer(s) of the executed warranty deeds and assignments. Pending distribution of the sale proceeds, the Trustee shall deposit the same in an interest bearing account at InterFirst Bank in Dallas, Texas. The Closing shall be held at a place determined by the Trustee and shall occur within 20 business days following receipt of all Approvals provided for under Paragraph XI. After approval by the Commission of the Trustee's account and payment to the Trustee of any outstanding monies due to the Trustee, any remaining monies including any interest thereon shall be paid to RSR.

VII.

The Trustee shall be empowered to grant on behalf of RSR to the acquirer(s) of the Assets, at the option of such acquirer(s), a non-exclusive license (in the form annexed as Exhibit IV), subject to a reasonable royalty not to exceed 2%, to all of RSR's patented sulphur

removal and battery recycling processes; *provided, however*, that in the event the acquirer(s) of either the Assets of the Dallas Plant or the Assets of the Seattle Plant is a battery manufacturer, RSR shall only be required to grant such patent licenses to such an acquirer(s) for use at the acquired plant; and *further provided*, that RSR is not required to grant such licenses to an acquirer(s) that is a primary lead producer.

VIII.

The Trustee shall be empowered to make available for purchase to a prospective acquirer(s) of the Assets some or all (at the acquirer's(s') option) of the respective Plant's inventories (other than inventories required to be returned by RSR and its subsidiaries under tolling contracts) for consideration (payable to the Trustee at the Closing in lawful currency of the United States) in addition to any amounts that may be paid for the Assets. For purposes, hereof, inventories shall include all categories listed in RSR's letter to the Federal Trade Commission dated February 9, 1983 and shall include the specific types of items set forth in the enclosures to that letter. The February 9th letter, along with enclosures, is annexed as Exhibit V hereto. The acquirer(s) shall notify the Trustee (who shall immediately notify RSR) in writing within five business days after Approvals as to the specific inventory items and quantities the acquirer(s) shall purchase. If no such notification is received by the Trustee, the acquirer(s) shall be deemed to have agreed to purchase no inventory. Approximately five days prior to Closing, RSR shall conduct a physical inventory of the inventories to be purchased by the acquirer(s) at the Closing. The acquirer(s) shall verify the quantities of inventory at the time of the physical inventory and shall confirm such verification in writing. The price to be paid by the acquirer(s) to the Trustee for said inventories shall be the First-In, First-Out (FIFO) cost as carried on the respective accounting records of the Dallas or Seattle plant at the end of the month preceding the time of Closing, and shall be payable to the Trustee at the time of Closing in lawful currency of the United States in addition to the amount that is paid for the Assets. The value and amount of inventory may increase or decrease in the normal course of business, except only that the value of the "Maintenance Stores Inventories" and "Inventoried Supply Items" to be made available to a purchaser shall not be less than the total value of such items as of December 31, 1982 as presented in the above said February 9th letter and enclosures, *provided* that RSR shall replace in kind any item that is removed from "Maintenance Stores Inventories" and "Inventoried Supply Items" for any purposes other than maintenance or supply of

the plant to which the item belongs. RSR shall have the right to remove other items from the categories labeled "Maintenance Stores Inventories" and "Inventoried Supply Items" as long as RSR replaces the value of the items removed. In addition, RSR shall make available to the acquirer(s) prior to the Closing at no charge enough space to bring in and store its (their) own inventory and shall grant the acquirer(s) reasonable access to the Assets to bring in and store such inventory.

IX.

RSR shall provide reasonable information and assistance as may be requested by the Trustee and as required by this Modified Order. Such assistance shall include providing written information and data, allowing access to the Dallas and Seattle plants, allowing access to records relating to the Assets of the Dallas Plant and the Assets of the Seattle Plant, providing personnel for tours and inspections, and providing personnel for answering questions. The Trustee or its agents shall be present at all times during any interaction between representatives of RSR and prospective acquirers. The prospective acquirer(s) shall agree to RSR's usual confidentiality provisions and tour procedures. The Trustee shall have access to all information and data previously provided by RSR or its agents to the Commission relating to prior efforts to divest the Assets.

X.

RSR shall continue to operate the Dallas and Seattle Assets for its own account during the Trusteeship and shall not knowingly cause or permit the deterioration of the Dallas and Seattle Assets in a manner that impairs the marketability of any such Assets. RSR may, but shall not be required to, make capital expenditures for the improvement of any such Assets.

XI.

The term of the Trusteeship shall be 150 days, commencing from the day following the Commission appointment of the Trustee or from September 15, 1983, whichever occurs first, and ending at 11:59 p.m. (Dallas time) on the 150th day. The Trustee shall have 150 days to find an acquirer(s) for the Assets and to obtain acquirer Approvals. The Trustee shall require any prospective acquirer to demonstrate that such acquirer has present financial capability to acquire and operate the Assets proposed to be acquired by such acquirer. If no acquirer(s)

has been found or if Approvals have not been obtained within the 150 days, the Trusteeship shall automatically end at the expiration of such 150 day period. The Trustee shall require that a prospective acquirer file any necessary requests, applications, or notices in connection with obtaining the Approvals not later than 30 days after the Trustee's acceptance of the acquirer's written, binding and enforceable commitment to acquire the Assets proposed to be acquired by such acquirer, unless the Commission for good cause shown, shall extend such 30 day period. The term of the Trusteeship may be extended by 60 days beyond such 150 day period if the Trustee demonstrates to the Commission that such an extension is necessary to enable the Trustee to obtain the Approvals, *provided* that a prospective acquirer has made a written, binding and enforceable commitment to acquire the Assets of the Dallas Plant or the Assets of the Seattle Plant, or both, subject only to the three conditions specified below, within such 150 day term of the Trusteeship. The period of time may be further extended for an additional 30 days if the Trustee demonstrates to the Commission that such extension is necessary to enable the Trustee to obtain Environmental Approval, *provided* that all requirements for the first 60 day extension have been met and *provided* the Commission has approved the acquirer. *Provided* that all Approvals have been given, the term of the Trusteeship shall be extended to (and solely for purposes of consummating) the Closing as provided in Paragraph VI. No other extension shall be granted. These timing restrictions and extensions apply individually to each plant being sold. The Trustee or prospective acquirer shall not request Approvals unless a prospective acquirer has made a written, binding and enforceable commitment to purchase the Assets of the Dallas Plant or the Assets of the Seattle Plant, or both, subject only to the following three conditions: 1) transfer and conveyance of the Assets at Closing in substantially the same condition as at the time of the acquirer's commitment, except for ordinary wear and tear, 2) Commission Approval of said acquirer, and 3) Environmental Approval of said acquirer.

Provided, however, That if the acquirer shall have made a written, binding and enforceable commitment (subject only to the three conditions specified above) in a time less than the 150 day period, and if Commission Approval or Environmental Approval has been denied, then the Trustee shall be granted the number of days equal to 150 days minus the number of days expired to the date when the prospective acquirer made a written, binding and enforceable commitment to acquire the Assets of the Dallas Plant or the Assets of the Seattle Plant, or both, subject only to the three conditions specified above, in order for the Trustee to again seek to obtain another acquirer. This process (including extensions for Approvals) may repeat itself until a

full 150 days, on a cumulative basis, shall have been expired, at which time the provisions in Paragraph XII apply. This process applies to the Assets of each of the Plants individually.

XII.

Upon the divestiture of the Assets of both the Dallas and Seattle Plants, or if either or both the Dallas or Seattle Assets have not been divested to an acquirer(s) within the time periods as provided in Paragraph XI, then the Trusteeship shall automatically terminate and RSR shall be completely relieved of all further divestiture requirements in Docket 8959. The term of the Trusteeship (including any extensions thereof as hereinabove provided) shall apply to the Assets of each plant individually, not jointly.

XIII.

The Trustee shall be compensated and reimbursed by RSR in a manner as follows:

1. The Trustee shall be paid a flat fee of \$35,000, payable \$7,000 per month commencing 30 days after appointment.
2. The Trustee shall be paid an incentive of \$40,000, to be paid to the Trustee in proportion to the number of plants available to the Trustee to divest for which the Trustee accomplishes divestiture.
3. The Trustee shall be reimbursed monthly for all expenses, the aggregate of which shall not exceed \$25,000.
4. The Trustee shall be reimbursed for an additional \$25,000 of expenses if such expenditures are approved by the Commission.
5. Under no circumstances shall RSR be required to pay and/or reimburse in aggregate an amount greater than \$125,000 to the Trustee.

XIV.

Pursuant to the above requirements, none of the assets, properties, rights, privileges and interest of whatever nature, tangible or intangible, acquired or added by RSR, shall be divested, directly or indirectly, to anyone who is at the time of the divestiture an officer, director, employee or agent of, or under the control, direction or influence of RSR, or anyone who owns or controls, directly or indirectly, more than one (1) percent of the outstanding shares of the capital stock of RSR or to anyone who is not approved in advance by the Federal Trade Commission.

XV.

Within forty-five (45) days from the effective date of this Modified Order and every thirty (30) days thereafter until the Trusteeship shall have terminated (as provided in Paragraph XII), the Trustee shall submit a verified report in writing to the Commission with copies to RSR, setting forth (a) a specification of the steps taken by the Trustee to make public the availability for purchase of the Assets, (b) a list of all persons or organizations to whom notice of availability for purchase has been given, (c) a summary of all discussions and negotiations together with the identity and address of all interested persons or organizations, and (d) copies of all internal memoranda, offers, counter-offers, communications and correspondence concerning said divestiture. Such information shall be marked confidential and shall be afforded confidentiality according to the Commission's Rules of Practice. Additionally, the Trustee shall provide such other reports of efforts to divest the Assets as may be required by the Commission.

XVI.

In the event RSR, as a result of the enforcement of a bona fide lien, mortgage, deed of trust or other form of security, reacquires possession of any of the divested Assets, RSR shall so notify the Commission within 30 days of such repossession, and within one year thereafter shall divest the reacquired Assets in accordance with the terms and conditions set by the Commission.

IN THE MATTER OF

THE ECHLIN MANUFACTURING COMPANY, INC., ET AL.

Docket 9157. Interlocutory Order, Sept. 13, 1983

ORDER

By motion dated September 1, 1983, respondent Echlin Manufacturing Co., Inc. requested that the Honorable Montgomery K. Hyun, an administrative law judge of this Commission, disqualify and remove himself from this proceeding pursuant to Section 3.42(g)(2) of the Commission's Rules of Practice in Adjudicative Proceedings. On September 2, 1983, Judge Hyun declined to disqualify himself and certified Echlin's motion to the Commission together with a statement of the reasons for his decision not to disqualify himself.

Respondent's motion to disqualify fails to state any legally cognizable basis for the disqualification of Judge Hyun or to identify any reason why Judge Hyun would be unable to afford all parties a fair and unbiased hearing in this matter.

The real concern underlying respondents' motion is the pretrial substitution of the administrative law judge assigned to this matter. Respondents' challenge to this interlocutory decision of the Chief Administrative Law Judge has not been certified to the Commission and is, therefore, not properly before us for review. Nevertheless, we note that the Chief Administrative Law Judge is authorized by Section 3.43(b) of the Commission's Rules to assign the presiding administrative law judge to each proceeding. Judge Barnes has stated that he reassigned Judge Hyun in this case to assure the effective and efficient operation of the Office of Administrative Law Judges. This is a permissible reason for the exercise of the ALJ's discretion. *See Tractor Training Service v. FTC*, 227 F.2d 420 (9th Cir. 1955) (substitution of hearing examiners after trial commenced approved in the interests of economy).

Accordingly, respondent Echlin's motion to disqualify is hereby denied.

It is so ordered.