

IN THE MATTER OF

ALPHA ACQUISITION 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-3349. Complaint, Oct. 29, 1991—Decision, Oct. 29, 1991

This consent order requires, among other things, RWE to grant the required technology license used in producing high-purity alumina, and establish other required agreements, subject to prior Commission approval, within six months of the order, or else consent to the appointment of a trustee to effectuate these requirements. In addition, for ten years, RWE is required to obtain prior FTC approval before acquiring any entity that manufactures, distributes, or sells high-purity alumina, with sales in the U.S. of 125,000 pounds or more in any six-month period during the 36 months before the application.

Appearances

For the Commission: *Robert S. Tovsky* and *Marc G. Schildkraut*.

For the respondents: *Wayne D. Collins*, *Shearman & Sterling*, New York, N.Y. *David M. Foster* and *Dan Wellington*, *Fulbright & Jaworski*, Washington, D.C. and *Allen F. Maulsby*, *Cravath, Swaine & Moore*, New York, N.Y.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Alpha Acquisition Corporation, a corporation, RWE-DEA Aktiengesellschaft fur Mineraloel and Chemie, a corporation, and RWE Aktiengesellschaft, a corporation, (collectively "RWE"), have entered into an agreement with Vista Chemical Company ("Vista"), a corporation, that violates said Acts, 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:

DEFINITIONS

PARAGRAPH 1. For purposes of this complaint, "*high-purity alcohol*

process alumina” means the chemical intermediate product, also known as aluminum oxide, which has the chemical formula Al_2O_3 , and is obtained via the hydrolysis of aluminum alkoxide in a manufacturing process that uses aluminum metal as a raw material, and includes all such aluminas regardless of any further processing steps.

THE RESPONDENTS

PAR. 2. Respondent RWE Aktiengesellschaft (“RWE A.G.”) is a corporation organized, existing and doing business under and by virtue of the laws of the Federal Republic of [2] Germany, with its principal office and place of business at Kruppstrasse 5, 4300 Essen 1, Federal Republic of Germany.

PAR. 3. RWE A.G. is a holding company that has interests throughout the world in companies that are engaged in a wide variety of industries. RWE A.G. is comprised of six different divisions: Energy Division; Mining and Raw Materials Division; Petroleum and Chemicals Division; Waste Management Division; Mechanical and Plant Engineering Division; and Construction and Civil Engineering Division.

PAR. 4. RWE A.G.’s net income for the financial year 1989-90 was DM 570 million on sales of DM 44 billion.

PAR. 5. Respondent RWE-DEA Aktiengesellschaft fur Mineraloel und Chemie (“RWE-DEA”) is a corporation organized, existing and doing business under and by virtue of the laws of the Federal Republic of Germany, with its principal office and place of business at Uberseering 40, 2000 Hamburg 60, Federal Republic of Germany. RWE-DEA is a majority-owned subsidiary of RWE Aktiengesellschaft.

PAR. 6. RWE-DEA is engaged in the exploration, production and refining of petroleum and natural gas, petroleum products, and a wide variety of chemical products, including synthetic resins, solvents, fine chemicals, alcohols, surfactants, and alumina. RWE-DEA engages in the manufacture of alumina through its wholly-owned subsidiary, Condea Chemie GmbH (“Condea”).

PAR. 7. RWE-DEA’s net income for the year ending December 31, 1989, was DM 204 million on sales of DM 15.4 billion.

PAR. 8. Respondent Alpha Acquisition Corporation (“Alpha”) is a corporation organized, existing and doing business under the laws of Delaware, with its principal office and place of business at Uberseering 40, 2000 Hamburg 60, Federal Republic of Germany. Alpha is a

wholly-owned subsidiary of RWE-DEA, and was established for the purpose of acquiring the issued and outstanding common stock of Vista Chemical Company.

PAR. 9. Respondent Vista Chemical Company ("Vista") is a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its principal office and place of business at 900 Threadneedle, Houston, Texas.

PAR. 10. Vista is engaged in the manufacture and marketing of a variety of chemical products, including vinyl chloride monomer, polyvinyl chloride, alcohols, surfactants and alumina. [3]

PAR. 11. Vista's net income for the year ending September 30, 1990 was \$63 million on net sales of \$718 million.

PAR. 12. At all times relevant herein, each of the respondents or their predecessors have been engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12; and have been corporations whose business is in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

THE ACQUISITION

PAR. 13. On December 13, 1990, RWE and Vista entered into an agreement for the acquisition by RWE of all of the issued and outstanding common stock of Vista ("the Acquisition"). The purchase price for the Acquisition is \$55 per share, or, together with assumed indebtedness, \$1.3 billion.

THE RELEVANT MARKETS

PAR. 14. For purposes of this complaint, the relevant line of commerce in which to evaluate the effects of the acquisition is high-purity alcohol process alumina.

PAR. 15. For purposes of this complaint, the relevant geographic market is the world.

PAR. 16. In 1989, approximately 90 million pounds of high-purity alcohol process alumina was produced in the world. The relevant market is highly concentrated, whether measured by the Herfindahl-Hirschmann Index ("HHI") or by two-firm concentration ratios.

PAR. 17. It is difficult to enter into the manufacture and sale of high-purity alcohol process alumina.

PAR. 18. At the time of the Acquisition described above, RWE and Vista were actual competitors in the manufacture and sale of high-purity alcohol process alumina in the world.

THE EFFECTS OF THE ACQUISITION

PAR. 19. The effect of the Acquisition may be substantially to lessen competition in each of the relevant markets in the world, 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, as amended, 15 U.S.C. 45, because, among other things, the acquisition eliminates substantial actual competition, between RWE and Vista in the manufacture and sale of high-purity alcohol process alumina in the world. [4]

THE VIOLATIONS CHARGED

PAR. 20. The Acquisition of Vista by RWE, and the agreement to acquire Vista by RWE, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

PAR. 21. The Acquisition of Vista by RWE and the agreement to acquire Vista by RWE violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

Commissioner Yao not participating.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, 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 violations of the Federal Trade Commission Act and Clayton Act; 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;

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, 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, and having duly considered the comments filed thereafter by interested persons pursuant to [2] Section 2.34 of its Rules, 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. Respondent Alpha Acquisition Corp. 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 Uberseering 40, 2000 Hamburg 60, Federal Republic of Germany.

2. Respondent RWE-DEA Aktiengesellschaft fur Mineraloel and Chemie is a corporation organized, existing and doing business under and by virtue of the laws of the Federal Republic of Germany, with its office and principal place of business located at Uberseering 40, 2000 Hamburg 60, Federal Republic of Germany.

3. Respondent RWE Aktiengesellschaft ("RWE A.G.") is a corporation organized, existing and doing business under and by virtue of the laws of the Federal Republic of Germany, with its principal office and place of business at Kruppstrasse 5, 4300 Essen 1, Federal Republic of Germany.

4. Respondent Vista Chemical Company ("Vista") is a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its principal office and place of business at 900 Threadneedle, Houston, Texas.

5. 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.

As used in this order, the following definitions shall apply:

(A) "*Acquisition*" means the agreement and plan of merger entered into on December 13, 1990, by which RWE agreed to make a tender offer for all of the issued and outstanding shares of Vista common stock.

(B) "*Alumina Joint Venture*" means the joint venture established pursuant to either paragraphs IV or VI of this order, between RWE and the Licensee.

(C) "*Automotive Emissions Control Catalysts*" means catalysts that are employed to provide a catalytic process to control the release of emissions in automotive systems. [3]

(D) "*Chemical Catalysts*" means catalysts that are useful in chemical synthesis processes, excluding catalysts used solely for petroleum refining applications other than 1) catalytic reforming catalysts, 2) isomerization catalysts, and 3) any other petroleum refining catalyst applications which Vista internally delineates as chemical catalyst applications for purposes of alumina pricing.

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

(F) "*Construct*" includes the building of a new facility or modifying of an existing facility.

(G) "*High-Purity Alumina*" means all grades and types of alumina produced or sold by Vista as of the date that this order is accepted by the Commission for public comment.

(H) "*Hold Separate Agreement*" means the Agreement to Hold Separate, attached hereto and made a part hereof as Appendix I.

(I) "*Joint Venture Alumina*" means all grades and types of Catapal B and Catapal CF, other grades of Vista alumina used in Chemical Catalysts and Automotive Emission Control Catalysts, and alumina slurry which the joint venture may use, directly or indirectly, exclusively for the production of Sol Gel Abrasives, in each case manufactured by Vista at its Lake Charles plant as of the date this order is accepted by the Commission for public comment.

(J) "*Lake Charles Plant*" means Vista's alcohol-alumina co-production facility located at Vista's Lake Charles Chemical Plant, Old Spanish Trail Road, Westlake, Louisiana.

(K) "*Licensee*" means the person licensed pursuant to paragraphs II, III, or VI of this order.

(L) "*License Agreements*" means the Vista License Agreement and RWE License Agreement.

(M) "*North America*" means the United States and its territories and possessions.

(N) "*On-purpose*" refers to a plant the principal output of which is alumina or aluminum alkoxide.

(O) "*Or*" includes "any" and may have either disjunctive or conjunctive meaning; *provided, however*, that in sentences where "or" is preceded by "either," "or" has only disjunctive meaning.

(P) "*Precipitated Alumina*" means alumina obtained generally by precipitating dissolved aluminum trihydrate (also known as "gibbsite"), then usually followed by filtering, washing and spray-drying the resulting alumina. [4]

(Q) "*RWE*" means RWE Aktiengesellschaft, RWE-DEA Aktiengesellschaft fur Mineraloel und Chemie, and Alpha Acquisition Corp., their predecessors, subsidiaries, divisions, groups and affiliates controlled by RWE Aktiengesellschaft, RWE-DEA Aktiengesellschaft fur Mineraloel und Chemie, and Alpha Acquisition Corp., and their respective directors, officers, employees, agents, and representatives, and their respective successors and assigns.

(R) "*RWE License Agreement*" means a license agreement pursuant to which RWE Technology and RWE Patent Rights are licensed to the licensee in accordance with paragraphs II, III, or VI of this order.

(S) "*RWE Patent Rights*" means any patent existing or patent application pending, in each case as of the date that this order is accepted by the Commission for public comment, in the United States relating to RWE's process for On-purpose production of aluminum alkoxide for use in High-Purity Alumina, or similar aluminas. For the purposes of this definition, RWE excludes Vista.

(T) "*RWE Technology*" means all general and specific information known to RWE prior to the date this order is accepted by the Commission for public comment, relating to: 1) design, construction, and operation of an On-purpose aluminum alkoxide production facility and 2) production of aluminum alkoxide at an On-purpose facility producing High-Purity Alumina or similar alumina, in each case including (but not limited to) all technical information, data, specifications, drawings, design and equipment specifications, manuals, engineering reports, manufacturing designs and reports, operation manuals, and formulations. For purposes of this definition, RWE excludes Vista.

(U) "*Sol Gel Abrasives*" means the class of abrasives or abrasive grains that employ high dispersible alumina as a raw material, and are used in certain industrial processing applications.

(V) "*Vista*" means Vista Chemical Company, its predecessors, subsidiaries, divisions, groups and affiliates controlled by Vista and their respective directors, officers, employees, agents, and representatives, and their respective successors and assigns.

(W) "*Vista License Agreement*" means a License Agreement

pursuant to which Vista Technology and Vista Patent Rights are licensed to the licensee in accordance with paragraphs II, III, or VI of this order.

(X) "*Vista Patent Rights*" means any Vista patent or patent application pending, in each case, as of the date that this order is accepted by the Commission for public comment, in the United States relating to the production of or applications for Vista's High-Purity Alumina except thickeners, ceramics (excluding [5] Sol Gel Abrasives), and aluminas not produced in commercial quantities (excluding Sol Gel Abrasives).

(Y) "*Vista Technology*" means all general and specific information known to Vista prior to the date this order is accepted by the Commission for public comment relating to: 1) design, construction, and operation of an On-purpose High-Purity Alumina production facility, 2) production at an On-purpose High-Purity Alumina production facility of High-Purity Alumina, except thickeners and ceramics (excluding Sol Gel Abrasives), and aluminas not produced in commercial quantities (excluding Sol Gel Abrasives), and 3) the processing of aluminum alkoxide or alumina slurry into all grades of alumina powder, alumina sol or colloidal alumina for use in all applications except thickeners, ceramics (excluding Sol Gel Abrasives), and aluminas not produced in commercial quantities (excluding Sol Gel Abrasives). Such technology shall include, but shall not be limited to, all technical information, data, specifications, drawings, design and equipment specifications, manuals, engineering reports, manufacturing designs and reports, operating manuals, and formulations.

II.

It is ordered, That not later than six (6) months after the date this order becomes final, RWE shall, absolutely and in good faith, grant a perpetual license of Vista Technology, Vista Patent Rights, RWE Technology, and RWE Patent Rights for the purposes of producing in North America and marketing High-Purity Alumina or similar aluminas to a person that obtains the prior approval of the Commission and only in a manner and pursuant to License Agreements that receive the prior approval of the Commission. Such License Agreements shall permit the Licensee to (1) design, construct or operate one On-purpose alumina production facility utilizing the RWE Technology or RWE Patent Rights and one or more alumina

production facilities utilizing the Vista Technology or Vista Patent Rights and (2) enter into a joint venture or other arrangement controlled by the Licensee with any partners for the purpose of designing, constructing, financing or operating alumina production facilities; *provided, however*, if at any time after three (3) years from the date of the formation of the Alumina Joint Venture the Licensee has not commenced construction of an alumina production facility, then the Licensee may (i) sublicense to a third party (the "Minority Partner") the right to design, construct, or operate one alumina production facility and (ii) enter into a joint venture or other arrangement controlled by the Licensee with the Minority Partner for the exclusive purpose of selling and marketing all or substantially all the alumina produced by the alumina production facility designed, constructed, or operated by the Minority Partner pursuant to such sublicense, subject, in each case, to the approval of RWE, which approval shall not be unreasonably withheld; *provided, further*, that RWE need not approve such sublicense unless the [6] Licensee enters into a joint venture or other arrangement pursuant to clause (ii) above and agrees to forgo the construction of any alumina production facility during the term of the Alumina Joint Venture unless the sublicense is terminated prior to the construction or operation of the Minority Partner's alumina production facility. The purpose of granting such License Agreements is to establish the licensee as a viable competitor in the market for High-Purity Alumina or similar aluminas and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint. Nothing in this order shall prohibit the License Agreements from containing the following provisions:

(A) A provision prohibiting assignment before construction of an alumina production facility; *provided, however*, that the Licensee may assign all of its rights under both License Agreements (1) to any person who is under the control of the owners of such Licenses and, if the Alumina Joint Venture has not been terminated prior to such assignment, to the managing partner of the Alumina Joint Venture, or (2) to any party, approved by RWE, which approval shall not be unreasonably withheld, to whom the Licensee shall also sell its interest in the Alumina Joint Venture pursuant to paragraph IV.(G) of this order. The party so approved for the assignment shall thereafter be the "Licensee" pursuant to this order.

(B) A provision prohibiting assignment of the License Agreements

after the construction of one or more alumina production facilities described in paragraph II of this order except by the Licensee to (1) any person who is under the control of the owners of such Licenses or (2) any owners of each such alumina production facility; *provided, however*, that in no event may any License Agreement be assigned to a person who does not own an alumina production facility utilizing the applicable technology and patent rights licensed under such License Agreement in accordance with paragraph II of this order.

(C) A provision prohibiting the Licensee from disclosing Vista Technology, Vista Patent Rights, RWE Technology or RWE Patent Rights to any non-licensee, except if such non-licensee needs to know, and agrees to restrict the use of, such information for the purpose of designing, constructing, financing the construction of, or operating one or more alumina production facilities.

III.

It is further ordered, That, in the event the first Licensee who has held the Licenses for four (4) years either does not, within four (4) years of the date of the grant of the licenses set out in paragraph II of this order, commence construction of an alumina production facility utilizing RWE Technology, RWE Patent Rights, [7] Vista Technology or Vista Patent Rights, or does not complete construction within six (6) years of the date of the grant of the licenses set out in paragraph II of this order, or the Alumina Joint Venture terminates for any reason other than those set out in paragraph IV.(A) of this order ("failure dates"), RWE shall grant new licenses, or shall cause the granting of new licenses, to a new Licensee within six (6) months of the first such failure date, under the terms and conditions set out in paragraph II of this order and may terminate the perpetual licenses granted under paragraph II of this order.

IV.

It is further ordered, That at the same time it grants the licenses under paragraph II of this order, RWE shall absolutely and in good faith, enter into an Alumina Joint Venture and an agreement to supply Joint Venture Alumina consistent with paragraphs IV.(A) through IV.(M) of this order with a Licensee that obtains the prior approval of the Commission and only in a manner that receives the

prior approval of the Commission. The purposes of the Alumina Joint Venture and supply agreement are to impart the practical, technological and business skills the Licensee may need to produce and sell High-Purity Alumina or similar aluminas, to establish the Licensee as a viable competitor in the market for High-Purity Alumina or similar aluminas, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

(A) The initial term of the Alumina Joint Venture shall be four (4) years; *provided, however*, the Alumina Joint Venture term shall be extended at the request of the Licensee for two (2) additional years if the Licensee has started construction of a High-Purity Alumina or similar alumina manufacturing facility within the first four (4) years; *provided, further*, the Alumina Joint Venture shall in all events terminate no later than sixty (60) days after the Licensee has finished construction and commenced commercial operation of either (1) an alumina production facility utilizing the Vista Technology, Vista Patent Rights, RWE Technology or RWE Patent Rights or (2) a Precipitated Alumina production facility.

(B) Upon thirty (30) days prior notice to the Commission, RWE also may terminate the Alumina Joint Venture agreement, the supply agreement, or the License Agreements due to the bankruptcy, insolvency or receivership of the Licensee or the Alumina Joint Venture or material breach of any such agreement by the Licensee. If the Alumina Joint Venture terminates for any reason other than those set out in paragraph IV.(A) of this order, RWE shall, within six (6) months of the termination of the Alumina Joint Venture, either cause the Licensee to assign its rights, title and interest in the Alumina Joint Venture to a new Licensee with the prior approval of the Commission, or shall form a new Alumina Joint [8] Venture with a new Licensee under the terms and conditions of paragraphs II-IV of this order.

(C) Any material breach of the License Agreements, the Alumina Joint Venture agreement, or supply agreement by RWE shall constitute a violation of this order. In the event that the Alumina Joint Venture terminates due to the breach of RWE, then within six (6) months of the termination, RWE shall form a new Alumina Joint Venture with a Licensee under the terms and conditions of paragraphs II-IV of this order.

(D) The Licensee either shall be the managing partner of the Alumina Joint Venture, or otherwise have the managing responsibility for day-to-day administrative control of the Alumina Joint Venture

and with the authority to make all marketing, pricing and other decisions not specifically delegated to the management committee or subject to the approval of the limited or minority partner as set out in the Alumina Joint Venture agreement that receives the prior approval of the Commission. The Licensee shall be reimbursed by the Alumina Joint Venture for all accounting, tax and other administrative services it provides.

(E) The Alumina Joint Venture may have a management committee. The Licensee shall designate a majority of the members of the management committee. The management committee may consider and decide issues concerning substantial borrowing, contractual obligations, capital expenditures, disposition of assets, incurring of administrative expenses, incurring of research and development expenses, incurring working capital obligations, and the maintenance of reserves.

(F) The Licensee shall own a 51% interest in the Alumina Joint Venture. That interest shall increase to the extent the Licensee makes disproportionate capital contributions to the Alumina Joint Venture.

(G) The Licensee may sell its interest in the Alumina Joint Venture only to a party approved by RWE, which approval shall not be unreasonably withheld, with the prior approval of the Commission; *provided, however*, that the License Agreements are assigned to such party.

(H) RWE shall make available to the Alumina Joint Venture all Vista customer-specific marketing information, including copies of Vista customer files, as of the date that this order is accepted by the Commission for public comment, relating to Chemical Catalysts, Automotive Emissions Control Catalysts, and Sol Gel Abrasives (including prospective North American customer files relating to such abrasives), except to the extent that a customer prohibits disclosure of information provided to Vista pursuant to a confidentiality agreement, or that a customer prohibits disclosure of information provided to Vista on the basis that such information [9] constitutes such customer's trade secrets. RWE shall use its best efforts to secure authority from customers to provide such information to the Licensee. The Licensee may disclose any information made available by RWE to the Alumina Joint Venture pursuant to this paragraph IV.(H) (other than information independently known to Licensee on a non-confidential basis from sources other than RWE) only to a person who needs to know, and agrees to use, such information for the purpose of

designing, constructing, financing the construction of, or operating one or more alumina manufacturing facilities in a manner consistent with paragraph II of this order. At the request of the Licensee, RWE shall provide engineering services and customer technical services, from its North American operations, during the term of the Alumina Joint Venture. In addition, RWE shall provide to the Alumina Joint Venture, at the request of the Licensee, marketing, logistics and distribution personnel, from its North American operations, for no more than six months after the establishment of the Alumina Joint Venture. RWE shall be reimbursed by the Alumina Joint Venture for the services and personnel it provides. If, at the end of Alumina Joint Venture term, the Licensee has employed the license to construct a facility for the manufacture of High-Purity Alumina or similar alumina, the file and information provided to or generated by the Alumina Joint Venture pursuant to this paragraph shall become the property of the Licensee.

(I) RWE shall supply the Alumina Joint Venture with grades and types of Joint Venture Alumina in the quantities the Licensee specifies. In the initial year of the Alumina Joint Venture, RWE shall supply up to [the specified volume] of Joint Venture Alumina. Thereafter, until the expiration of the Alumina Joint Venture, RWE's supply obligation shall increase by [the specified number] of pounds per year, but in all events, its total obligation shall not exceed [the specified volume] of Joint Venture Alumina. RWE is not required to provide more than ten (10) percent of the supply obligation in the form of alumina slurry. The quality of the alumina slurry supplied shall be comparable to that used by Vista, on or before the date this order is accepted by the Commission for public comment, to produce test quantities of alumina for Sol Gel Abrasive applications. There shall be no limitations on the applications for which the Alumina Joint Venture may sell Joint Venture Alumina, except as provided in paragraph I.(I) of this order.

(J) In connection with the formation of the Alumina Joint Venture, RWE shall, on an expedited basis, use its best efforts to assign to the Alumina Joint venture all Vista customers and contracts, as of the date that this order is accepted by the Commission for public comment, pertaining to Joint Venture Alumina used in Chemical Catalysts and Automotive Emissions Control Catalysts. Without the consent of the Licensee, RWE shall not supply customers assigned to the Alumina Joint Venture with any Joint Venture Alumina manufac-

tured in North America, other than [10] alumina for Sol Gel Abrasives.

(K) The base price of the alumina or alumina slurry supplied to the Alumina Joint Venture shall be [the specified price]; *provided, however*, that the pricing formula may contain reasonable adjustments for inflation.

(L) No RWE employee on the management committee or assigned to the Alumina Joint Venture on a temporary basis shall disclose to RWE "material confidential information" relating to the Alumina Joint Venture's assets and businesses not in the public domain, except as such information would be available to RWE in the normal course of business. "Material confidential information," as used herein, means competitively sensitive or proprietary information not independently known to RWE from sources other than the Alumina Joint Venture, and includes but is not limited to customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets. If upon dissolution of the Alumina Joint Venture, the Licensee is not operating or is not in control of a joint venture or other arrangement that is operating an alumina production facility pursuant to a License Agreement (or is not in control of a joint venture or other arrangement that will market and sell the output of an alumina production facility that has been constructed pursuant to a sublicense permitted by paragraph II of this order), all marketing, research and development and technical services files created by the Alumina Joint Venture or transferred pursuant to paragraph IV.(H) of this order will become the exclusive property of RWE.

(M) RWE shall neither restrict nor limit the ability of the Alumina Joint Venture or the Licensee to hire personnel employed by Vista as of the date this order is accepted by the Commission for public comment or thereafter; *provided, however*, RWE may enforce existing confidentiality agreements covering information outside the scope of Vista Technology and Vista Patent Rights, and the RWE Technology and RWE Patent Rights.

V.

It is further ordered, That:

(A) RWE shall not, without prior approval of the Commission, make or agree to any modifications to the License Agreements, Alumina Joint Venture agreement, or agreement to supply Joint Venture

Alumina or any other instruments approved by the Commission pursuant to this order, other than those modifications permitted by the License Agreements, Alumina Joint Venture agreement, or agreement to supply Joint Venture Alumina or any other instruments approved by the Commission pursuant to this order.

(B) RWE shall provide to the Commission, as promptly as [11] possible and in any event no later than thirty (30) days after either their receipt or transmittal, copies of all communications between RWE and the Licensee or Alumina Joint Venture regarding breaches of the License Agreements, Alumina Joint Venture agreement, or agreement to supply Joint Venture Alumina or any other instruments approved by the Commission pursuant to this order.

VI.

It is further ordered, That:

(A) If RWE has not licensed the RWE Technology, RWE Patent Rights, Vista Technology and Vista Patent Rights absolutely and in good faith and with the Commission's approval as set out in paragraphs II and III of this order, and established the Alumina Joint Venture and supply agreement as set out in paragraph IV of this order, within six (6) months of the date this order becomes final, or within six months of the first to occur of a failure date as set out in paragraph III of this order, or within six (6) months of the date the Alumina Joint Venture terminates as set out in paragraph IV.(B) or IV.(C), (i) RWE shall consent to the appointment by the Commission of a trustee or (ii) 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, RWE shall consent to the appointment of a trustee in such action. In each case, the trustee shall be authorized to license the Vista Technology, Vista Patent Rights, the RWE Technology, and RWE Patent Rights, consistent with the provisions of paragraph II of this order, and, unless the Alumina Joint Venture has terminated pursuant to paragraph IV.(A) of this order, establish an Alumina Joint Venture and supply agreement consistent with the provisions of paragraph IV of this order. 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 RWE to comply with this order.

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

1. The Commission shall select the trustee, subject to the consent of RWE, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions, divestitures and licensing agreements. [12]

2. The trustee shall, subject to the prior approval of the Commission, have the exclusive power and authority to license the Vista Technology, Vista Patent Rights, RWE Technology and RWE Patent Rights, on terms and conditions consistent with paragraph II of this order and such license shall contain the provisions contained in paragraphs II.(A), II.(B) and II.(C) of this order.

3. If applicable, the trustee shall, subject to the prior approval of the Commission, have the exclusive power and authority to establish the Alumina Joint Venture and supply agreement on terms and conditions consistent with paragraph IV of this order. The Alumina Joint Venture agreement shall provide that without the consent of the limited or minority partner neither the managing partner nor the management committee may take any of the following actions: (a) enter into contracts with, or in favor of, Licensee or any of its respective affiliates; (b) transfer, sell or dispose of any of the Alumina Joint Venture's assets (other than the sale of alumina in the ordinary course of business) or merge the Alumina Joint Venture with another entity; (c) require the limited partner to make any capital contribution (net of aggregate cash distributions to the limited partner) in excess of \$500,000; (d) admit any other person as a partner; (e) execute or deliver any general assignment for the benefit of creditors of the Alumina Joint Venture or file a voluntary petition in bankruptcy on behalf of the Alumina Joint Venture or fail to contest the filing of any involuntary petition in bankruptcy against the Alumina Joint Venture (or involving a substantial portion of its assets) within a reasonable time.

4. The trustee shall have twelve (12) months from the date of appointment to license the Vista Technology, Vista Patent Rights, RWE Technology and RWE Patent Rights, and, if applicable, establish

the Alumina Joint Venture and supply agreement. If, however, at the end of the twelve-month period the trustee has submitted a plan to accomplish these objectives, or believes that they can be accomplished within a reasonable time, the Commission may extend the period.

5. The trustee shall have full and complete access to the personnel, books, records and facilities necessary to fulfill the trustee's obligations. RWE shall develop such financial or other information as such trustee may reasonably request and shall [13] cooperate with any reasonable request of the trustee. RWE shall take no action to interfere with or impede the trustee's licensing of the technology and, if applicable, the establishment of the Alumina Joint Venture and supply agreement. Any delays caused by RWE shall extend the time under this paragraph in an amount equal to the delay, as determined by the Commission or the court for a court-appointed trustee.

6. Consistent with RWE's absolute and unconditional obligations under paragraph II and paragraph IV of this order, the trustee shall use his or her best efforts to negotiate the most favorable price and terms available with the Licensee, consistent with the provisions of paragraph II and paragraph IV of this order and the trustee's obligations under paragraph VI of this order.

7. The trustee shall serve, without bond or other security, at the cost and expense of RWE, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have authority to employ, at the cost and expense of RWE, 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 for all monies derived or received from the new Licensee 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 RWE and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's accomplishing the objectives set out in paragraph VI.(A) of the order.

8. RWE shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, or liabilities arising in any manner out of, or in connection with, the trustee's duties under 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 VI.(A) of this order. [14]

10. Within sixty (60) 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, RWE either shall execute a trust agreement or shall cause the execution of a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to license the Vista Technology, Vista Patent Rights, RWE Technology, and RWE Patent Rights and, if applicable, establish the Alumina Joint Venture and supply agreement required by this order.

11. The Commission and, 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 not inconsistent with paragraphs II, IV, or VI of this order as may be necessary or appropriate to license the Vista Technology, Vista Patent Rights, RWE Technology, and RWE Patent Rights and, if applicable, set up the Alumina Joint Venture and supply agreement required by this order.

12. The trustee shall report in writing to RWE and to the Commission every sixty (60) days concerning the trustee's efforts to license the Vista Technology, Vista Patent Rights, RWE Technology, and RWE Patent Rights and, if applicable, set up the Alumina Joint Venture and supply agreement.

VII.

It is further ordered, That:

(A) 1) within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until RWE has received the prior approvals of the Commission pursuant to paragraphs II and IV of this order and 2) within sixty (60) days after the date any obligation of RWE arises under paragraphs III, IV.(B), or IV.(C) of this order and every sixty (60) days thereafter until RWE has received the prior approvals required by paragraphs II and IV, RWE shall submit to the Federal Trade Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying and has complied with the order. RWE shall include in its compliance reports, among other things that are required from time to time, a full description of substantive contacts or negotiations concerning licens-

ing the technology or establishing the Alumina Joint Venture and supply agreement, including the identity of all parties contacted. RWE also shall include in its compliance reports copies of all written communications to and from such parties, memorializations of all [15] oral communications, all internal memoranda, and reports and recommendations concerning licensing, joint ventures or supply agreements.

(B) One year from the date this order becomes final and annually for the period of the Alumina Joint Venture and supply agreement, as set out in paragraph IV of this order, RWE shall file a verified written report setting forth in detail the manner and form in which it is complying with the requirements of paragraph IV. RWE shall include in its reports a full description of the Alumina Joint Venture and its own participation, including its ownership share of the Alumina Joint Venture, the profits it has obtained from the Alumina Joint Venture, and any financial or other information that RWE has obtained from the Alumina Joint Venture. RWE shall also include in its reports a full description of the volumes of High-Purity Alumina or similar alumina specified by the Licensee on behalf of the Alumina Joint Venture, the pricing of alumina to the Alumina Joint Venture (including any price changes and the reasons for), and any product performance deficiencies identified by the managing partner. RWE shall further include in its reports copies of all written correspondence between itself and the Alumina Joint Venture or the managing partner and the minutes of management committee meetings.

VIII.

It is further ordered, That, for a period commencing on the date this order becomes final and continuing for ten (10) years, RWE shall cease and desist from acquiring, without the prior approval of the Federal Trade Commission, directly or indirectly, through subsidiaries or otherwise, assets located anywhere in the world used for the production, distribution or sale of High-Purity Alumina or similar aluminas in or into North America in an amount exceeding 125,000 pounds in any six (6) month period in the 36 months prior to the application. RWE also shall cease and desist from acquiring, without the prior approval of the Commission, directly or indirectly, through subsidiaries or otherwise, any interest in, or the stock or share capital of any entity that owns or operates assets located anywhere in the

world engaged in the production, distribution or sale of High-Purity Alumina or similar aluminas and which has sold more than 125,000 pounds of High-Purity Alumina or similar aluminas that were consumed in North America in any six (6) month period in the 36 months prior to the application; *provided, however*, these prohibitions shall not relate to the construction of new facilities. One year from the date this order becomes final and annually for nine years thereafter, RWE shall file with the Commission a verified written report of its compliance with this paragraph. [16]

IX.

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 RWE as practicable, made to its principal office, RWE shall permit any duly authorized representatives of the Federal Trade 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 RWE, as applicable, relating to any matters contained in this order; and

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

X.

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

XI.

It is further ordered, That RWE shall comply with all terms of the Agreement to Hold Separate, attached hereto and made a part hereof as Appendix I.

Commissioner Yao not participating.

APPENDIX I

Agreement to Hold Separate

This Agreement to Hold Separate (the "Agreement") is by and among Alpha Acquisition Corp., a Delaware corporation, ("Alpha Acquisition"), RWE-DEA Aktiengesellschaft für Mineralöl und Chemie ("RWE-DEA"), a German corporation, RWE Aktiengesellschaft ("RWE") a German corporation (collectively the "Acquiring Parties"), Vista Chemical Company ("Vista"), a Delaware corporation, 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").

Whereas, Alpha Acquisition, a wholly-owned subsidiary of RWE-DEA, over 99 percent of whose voting securities are currently held by RWE, commenced a tender offer on December 18, 1990, for all of the issued and outstanding shares of Vista, with the intent of effecting a merger of Vista into Alpha Acquisition, pursuant to which Vista would become a subsidiary of RWE-DEA, all as contemplated by and provided for in that certain Agreement And Plan Of Merger entered into among Alpha Acquisition, RWE-DEA and Vista as of December 13, 1990; and

Whereas, the Commission is now investigating the transaction to determine if the Acquisition 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 [2] 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 consent order provides for the disposition by RWE and Vista of the RWE Patent Rights, the RWE Technology, the Vista Patent Rights, and the Vista Technology to a Licensee approved by the Commission and further provides for the formation of an Alumina Joint Venture with such Licensee and an arrangement to supply the Alumina Joint Venture with Joint Venture Alumina (such patent, technology and contract rights collectively the "Subject Assets"); and

Whereas, RWE has submitted to the Commission an application for the approval of Discovery Aluminas, Inc., a Louisiana Corporation

("Discovery") pursuant to paragraphs II and IV of the consent order; and

Whereas, the Commission is concerned that if an understanding is not reached, preserving the viability and independence of the Subject Assets during the period prior to the final acceptance of the consent order by the Commission (after the 60-day public notice period), relief 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 effective relief and the Commission's right to seek to establish a viable competitor; and

Whereas, the purpose of this Agreement and the consent order is to preserve an independent competitor pending the license of technology as required by the consent order, in order to remedy any anticompetitive effects of the Acquisition; and

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

Whereas, the Acquiring Parties understand 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 not yet determined whether the Acquisition will be challenged, 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 the Acquiring Parties with [3] respect to the Acquisition, 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 Subject Assets have not been transferred to a Licensee approved by the Commission, to seek the transfer of such assets as are held separate pursuant to this Agreement, as follows:

1. The Acquiring Parties agree to execute and be bound by the attached consent order.

2. In the event the Acquiring Parties or Vista fail to comply with the terms of this Agreement, the Parties agree that the Commission or the Attorney General may seek, in addition to any other remedies that

may be available, any remedies, including civil penalties, that would be available pursuant to Section 5(1) of the Federal Trade Commission Act, or any other statute enforced by the Commission, as if this Agreement were a final order of the Commission.

3. Upon the execution by the Parties of this Agreement, Vista, will enter into the Alumina Joint Venture agreement, supply agreement and License Agreement annexed as exhibits to the Application of Discovery; and RWE will enter into the License Agreement and transfer agreement annexed as exhibits to the Application of Discovery. The Alumina Joint Venture agreement, supply agreement and License Agreements shall be consistent with, except for the duration of such agreements and the provisions requiring Commission prior approval (each of which shall be governed by this Agreement), the provisions of paragraphs II and IV of the agreement containing consent order. Any material breach of the License Agreements, the Alumina Joint Venture agreement, or the supply agreement executed as part of the Alumina Joint Venture by RWE shall constitute a breach of this Agreement.

4. If within one hundred fifty (150) days of the date the Application of Discovery goes on the public record (i) Discovery becomes bankrupt or goes into receivership before the Application is approved by the Commission, (ii) the Alumina Joint Venture agreement, supply agreement and License Agreements annexed as exhibits to the Application of Discovery terminate for any reason, or (iii) the Commission rejects the Discovery application, the Acquiring Parties shall, as soon as practicable but in any event within thirty (30) days of the occurrence of either (i), (ii), or (iii) cause to be created a new corporation ("Newco") on the following terms and conditions:

a. Newco shall be incorporated under the laws of Delaware and shall have its principal place of business either in Texas or Louisiana. Newco's Certificate of Incorporation and By-laws shall be substantially in the form of Exhibits A and B attached hereto. [4]

b. The purposes of Newco shall be to purchase from Discovery its interest in the Subject Assets pursuant to the Transfer Agreement, to hold and exploit such interest and to maintain a competitive presence in the production and marketing of High Purity Alumina until such time as RWE has complied with paragraphs II and IV of the agreement containing consent order or a trustee has complied with paragraph VI of the consent order.

c. In connection with the formation of Newco, the Acquiring Parties

shall purchase from Newco all its authorized common stock for \$1.6 million pursuant to a subscription agreement substantially in the form of Exhibit C attached hereto.

d. The Board of Directors of Newco shall consist of at least three members, no more than one of which shall be an officer or director of, or otherwise affiliated with, the Acquiring Parties.

e. RWE shall cause Newco to employ or shall otherwise furnish to Newco suitable and sufficient personnel to carry out the purposes of Newco; such personnel shall have appropriate skills, experience and abilities to carry out the duties for which they have been employed.

5. The Acquiring Parties agree that, in the event Newco is created pursuant to paragraph 4, the Acquiring Parties shall hold all of Newco's assets and business operations separate and apart on the following terms and conditions:

a. The Newco assets and businesses shall be operated independently of the Acquiring Parties and independently of any other Parties owned in whole or in part by any of the Acquiring Parties, except to the extent that RWE must exercise discretion and control over any Newco assets to assure compliance with this Agreement or the consent order.

b. RWE shall not exercise direction or control over, or influence directly or indirectly, any of Newco's assets and businesses.

c. Except for the single RWE director, officer, employee, or agent serving on the "New Board" (as defined in subparagraph 5.h), RWE shall not permit any director, officer, employee, or agent of RWE to also be a director, officer or employee of Newco.

d. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating the Acquisition, or by virtue of RWE's or [5] Vista's participation in the Alumina Joint Venture pursuant to the Alumina Joint Venture agreement, defending investigations or litigation, obtaining legal advice, or acting to assure compliance with this Agreement or the consent order, RWE shall not receive or have access to, or the use of, any "material confidential information" relating to Newco's assets and businesses not in the public domain, except as such information would be available to the Acquiring Parties in the normal course of business as if RWE and Newco were separate and unrelated entities. 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

the Acquiring Parties from sources other than Newco, and includes but is not limited to customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets.

e. The Acquiring Parties shall not change the composition of the management of Newco except that the directors serving on the "New Board" (as defined in paragraph 5.h), excluding the director who is an officer, partner, employee or agent of RWE, shall have the power to remove employees for cause and fill any vacancies which may arise.

f. RWE shall do nothing to diminish the viability and marketability of Newco and shall not sell, transfer, encumber, or otherwise impair the marketability or viability of its assets (other than in the normal course of business or as provided herein).

g. All material transactions out of the ordinary course of business and not otherwise precluded shall be subject to a majority vote of the New Board (as defined in paragraph 5.h).

h. RWE may cause Newco to adopt new Articles of Incorporation and By-laws, provided that they are not inconsistent with other provisions of this Agreement, and may cause the election of a new board of directors of Newco ("New Board"). RWE may elect the directors to the New Board. Except as permitted by this Agreement, the director of Newco who is also a partner, officer, employee or agent of RWE shall not receive in his capacity as director of Newco material confidential information relating to Newco's business in high-purity alumina, and shall not disclose any such information received under this Agreement to RWE or to any company owned in whole or in part by RWE. Nor shall such [6] director use such information to obtain any advantage for RWE or for any company owned in whole or in part by RWE. Said director of Newco shall enter into a confidentiality agreement prohibiting disclosure of confidential information relating to Newco's business in high-purity alumina. Such director may participate in matters that come before the New Board that do not concern Newco's business in high-purity alumina. Such director may participate in matters that come before the New Board concerning carrying out RWE's and Vista's responsibility to complete the technology license, establish a joint venture and make a supply agreement. Except as permitted by this Agreement, such director shall not participate in, or attempt to influence the vote of any other director with respect to, any matters that would involve a conflict of interest if RWE and Newco were separate and independent entities. Meetings of the Board during the term of this Agreement shall be

stenographically transcribed and the transcripts shall be retained for two (2) years after the termination of this Agreement.

i. All earnings and profits of Newco shall be accounted for and retained separately in Newco.

j. Should the Commission seek in any proceeding to compel RWE to divest itself of the shares of stock or assets of Vista or Newco, or to compel RWE to divest any assets or businesses they may hold, or to seek any other injunctive or equitable relief, RWE shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted Vista stock to be acquired. RWE also waives all rights to contest the validity of this Agreement.

k. Newco shall provide the Commission and RWE with quarterly financial statements in the same form and content as Newco would be required to file periodically with the Securities and Exchange Commission and the New York Stock Exchange if Newco was a publicly-held company whose stock was listed and traded on the New York Stock Exchange.

6. If the Commission disapproves the consent order after public comment, then within six (6) months of the closing date of the transfer of Discovery's interests in the Subject Assets to Newco (the "Closing Date"), RWE shall submit for Commission approval a plan to divest all the stock or assets of Newco. RWE shall have an absolute and unconditional obligation to divest all the stock or assets and assign all licensing and other agreements of Newco in accordance with such plan within six (6) months of approval of such plan by the Commission. If within eighteen (18) [7] months of the Closing Date the Commission has not approved a plan submitted by RWE, RWE shall consent to the appointment by the Commission of a trustee who shall be authorized to sell and make assignments, consistent with the provisions of paragraph VI of the consent order, all the stock or assets of Newco. *Provided, however*, that the duration of each agreement shall be extended by the amount of time that Newco is owned by RWE, less the time between the submission of such plan to, and approval of such plan by, the Commission.

7. This Agreement, except paragraph 2, shall terminate if any of the following four events occurs:

a. The Commission approves the Application of Discovery;

b. If RWE has become obligated to create Newco pursuant to paragraph 4 above, on the date on which RWE has performed the acts

set forth in paragraphs II and IV of the agreement containing consent order, whether or not the consent order has received final approval of the Commission;

c. If RWE has become obligated to create Newco pursuant to paragraph 4 above, on the date on which the trustee pursuant to paragraph VI of the consent order has satisfied paragraphs II and IV of the consent order;

d. In the event the Commission has not acted upon the Application of Discovery within one hundred fifty (150) days of the date the Application of Discovery goes on the public record, the Acquiring Parties may, at their option, terminate this Agreement by delivering written notice of termination to the Commission, which termination shall be effective no earlier than ten (10) days after the Commission's receipt of such notice, and this Agreement shall thereafter be of no further force and effect. If this Agreement is so terminated, the Commission may take such action as it deems appropriate, including but not limited to an action pursuant to Section 13 (b) of the Federal Trade Commission Act, 15 U.S.C. 53(b).

Termination of this Agreement shall in no way operate to terminate the agreement containing consent order to cease and desist that the Acquiring Parties have entered into in this matter.

8. For the purpose of determining or securing compliance with this Agreement, subject to any legally recognized privilege, and upon written request with reasonable notice to the Acquiring Parties made to their offices, RWE shall permit any duly authorized representative or representatives of the Commission: [8]

a. Access during the office hours of RWE or Newco 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 RWE and Newco relating to compliance with this Agreement; and

b. Upon five (5) days notice to RWE or Newco, and without restraint or interference from them, to interview partners, officers, directors or employees of RWE or Newco, who may have counsel present, regarding any such matters. [9]

9. This Agreement shall not be binding until approved by the Commission.

EXHIBIT A

Certificate of Incorporation of [NEWCO]

ARTICLE FIRST

The name of the corporation is [NEWCO] (the "Corporation").

ARTICLE SECOND

The address of the registered office of the Corporation in the State of Delaware is 1209 Orange Street, in the City of Wilmington, County of New Castle. The name of the registered agent of the Corporation at such address is The Corporation Trust Company.

ARTICLE THIRD

The purpose of the Corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of the State of Delaware (the "GCL").

ARTICLE FOURTH

The total number of shares of stock which the Corporation shall have authority to issue is 1,000 shares of the par value of \$.01 per share. All such shares shall be of one class and shall be designated "Common Stock".

ARTICLE FIFTH

The name and mailing address of the sole incorporator is as follows:

Name	Address
[NAME]	[ADDRESS]

ARTICLE SIXTH

For the management of the business and the conduct of the affairs of the Corporation, and for further definition, limitation and regulation of the powers of the Corporation and of its directors and stockholders, it is further provided that:

(1) The business and affairs of the Corporation shall be managed by or under the direction of the Board of Directors;

(2) The directors shall have concurrent power with the stockholders to make, alter, amend, change, add to or repeal the By-Laws of the Corporation;

(3) The number of directors of the Corporation shall be as from time to time fixed by, or in the manner provided in, the By-Laws of the Corporation. Election of directors need not be by written ballot unless the By-Laws so provide;

(4) No director shall be personally liable to the Corporation or any of its stockholders for monetary damages for breach of fiduciary duty as a director, except for liability (i) for any breach of the director's duty of loyalty to the Corporation or its stockholders, (ii) for acts or omissions not in good faith or which involve intentional

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misconduct or a knowing violation of law, (iii) pursuant to Section 174 of the GCL or (iv) for any transaction from which the director derived an improper personal benefit. Any repeal or modification of this Article Sixth by the stockholders of the Corporation shall not adversely affect any right or protection of a director of the Corporation existing at the time of such repeal or modification with respect to acts or omissions occurring prior to such repeal or modification;

(5) Any director or any officer elected or appointed by the stockholders or by the Board of Directors of the Corporation, or any committee thereof, may be removed at any time by a unanimous written consent of the stockholders of the Corporation or in such other manner as shall be provided in the By-Laws of the Corporation; and

(6) In addition to the powers and authority hereinbefore or by statute expressly conferred upon them, the directors are hereby empowered to exercise all such powers and do all such acts and things as may be exercised or done by the Corporation, subject, nevertheless, to the provisions of the GCL, this Certificate of Incorporation, and any By-Laws adopted by the stockholders; *provided, however*, that no By-Laws hereafter adopted by the stockholders shall invalidate any prior act of the directors which would have been valid if such By-Laws had not been adopted.

ARTICLE SEVENTH

The Corporation shall, to the full extent permitted by Section 145 of the GCL as presently in effect or as it may hereafter be amended, indemnify all persons whom it may indemnify pursuant thereto and advance expenses of litigation to directors and officers when so requested.

ARTICLE EIGHTH

Meetings of stockholders may be held within or without the State of Delaware, as the By-Laws may provide. The books of the Corporation may be kept (subject to any provision contained in the GCL) outside the State of Delaware at such place or places as may be designated from time to time by the Board of Directors or in the By-Laws of the Corporation.

ARTICLE NINTH

The Corporation reserves the right to amend, alter, change or repeal any provision contained in this Certificate of Incorporation, in the manner now or hereafter prescribed by statute, and all rights conferred upon stockholders herein are granted subject to this reservation.

IN WITNESS WHEREOF, I, [NAME], the sole incorporator of [NEWCO], have executed this Certificate of Incorporation on this ____ day of _____, 1991, and DO HEREBY CERTIFY under the penalties of perjury that the facts stated in this Certificate of Incorporation are true.

[NAME]

Sole Incorporator

EXHIBIT B

By-Laws of [NEWCO]

(a Delaware corporation) Adopted , 1991

ARTICLE I

Offices

Section 1. Registered Office. The registered office of [NEWCO] (the "Corporation") in the State of Delaware shall be in the City of Wilmington, County of New Castle, and the registered agent in charge thereof shall be The Corporation Trust Company.

Section 2. Other Offices. The Corporation may have such other offices in such places, either within or without the State of Delaware, as the Board of Directors (the "Board" or the "Board of Directors") may from time to time determine or the business of the Corporation may require.

ARTICLE II

Meetings of Stockholders

Section 1. Place of Meetings. Meetings of the stockholders for the election of directors or for any other purpose shall be held at such time and place, either within or without the State of Delaware, as shall be designated from time to time by the Board of Directors and stated in the notice of the meeting or in a duly executed waiver of notice thereof.

Section 2. Annual Meetings. The annual meetings of stockholders of the Corporation (the "Annual Meetings") shall be held on such date and at such time as shall be designated from time to time by the Board of Directors and stated in the notice of the meeting, at which meetings the stockholders shall elect by a plurality vote a Board of Directors, and transact such other business as may properly be brought before the meeting. Written notice of the Annual Meeting stating the place, date and hour of the meeting shall be given to each stockholder entitled to vote at such meeting not less than ten nor more than sixty days before the date of the meeting.

Section 3. Special Meetings. Unless otherwise prescribed by law or by the Certificate of Incorporation, special meetings of stockholders of the Corporation ("Special Meetings"), for any purpose or purposes, may be called by either (i) the Chairman, if there be one, or (ii) the President, (iii) any Vice President, if there be one, (iv) the Secretary or (v) any Assistant Secretary, if there be one, and shall be called by any such officer at the request in writing of a majority of the Board of Directors or at the request in writing of stockholders owning a majority of the capital stock of the Corporation issued and outstanding and entitled to vote. Such request shall state the purpose or purposes of the proposed meeting. Written notice of a Special Meeting stating the place, date and hour of the meeting and the purpose or purposes for which the meeting is called shall be given not less than ten nor more than sixty days before the date of the meeting to each stockholder entitled to vote at such meeting.

Section 4. Quorum. Except as otherwise provided by law or by the Certificate of Incorporation, the holders of a majority of the capital stock issued and outstanding and entitled to be voted at the meeting, present in person or represented by proxy, shall constitute a quorum at all meetings of the stockholders for the transaction of business. If, however, such quorum shall not be present or represented at any meeting of the stockholders, the stockholders entitled to vote at the meeting, present in person or represented by proxy, shall have power to adjourn the meeting from time to time, without notice other than announcement at the meeting, until a quorum shall be present or represented. At such adjourned meeting at which a quorum shall be present or represented, any business may be transacted which might have been transacted at the meeting as originally noticed. If the adjournment is for more than thirty days, or if after the adjournment a new record date is fixed for the adjourned meeting, a notice of the adjourned meeting shall be given to each stockholder entitled to vote at the meeting.

Section 5. Voting. Unless otherwise required by law, the Certificate of Incorporation or these By-Laws, any question brought before any meeting of stockholders shall be decided by the vote of the holders of a majority of the stock represented and entitled to vote at the meeting. Each stockholder represented at a meeting of stockholders shall be entitled to cast one vote for each share of the capital stock entitled to vote at the meeting held by such stockholder. Such votes may be cast in person or by proxy but no proxy shall be voted on or after three years from its date, unless such proxy provides for a longer period. The Board of Directors, in its discretion, or the officer of the Corporation presiding at a meeting of stockholders, in his discretion, may require that any votes cast at such meeting shall be cast by written ballot.

Section 6. Consent of Stockholders in Lieu of Meeting. Unless otherwise provided in the Certificate of Incorporation, any action required or permitted to be taken, by the laws of the State of Delaware, at any Annual or Special Meeting may be taken without a meeting, without prior notice and without a vote, if a consent in writing, setting forth the action so taken, shall be signed by the holders of outstanding stock having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all shares entitled to vote thereon were present and voted. Prompt notice of the taking of the corporate action without a meeting by less than unanimous written consent shall be given to those stockholders who have not consented in writing.

Section 7. List of Stockholders Entitled to Vote. The officer of the Corporation who has charge of the stock ledger of the Corporation shall prepare and make, at least ten days before every meeting of stockholders, a complete list of the stockholders entitled to vote at the meeting, arranged in alphabetical order, and showing the address of each stockholder and the number of shares registered in the name of each stockholder. Such list shall be open to the examination of any stockholder, for any purpose germane to the meeting, during ordinary business hours, for a period of at least ten days prior to the meeting, either at a place within the city where the meeting is to be held, which place shall be specified in the notice of the meeting, or, if not so specified, at the place where the meeting is to be held. The list shall also be produced and kept at the time and place of the meeting during the whole time thereof, and may be inspected by any stockholder of the Corporation who is present.

Section 8. Stock Ledger. The stock ledger of the Corporation shall be the only

evidence as to who are the stockholders entitled to examine the stock ledger, the list required by Section 7 of this Article II or the books of the Corporation, or to vote in person or by proxy at any meeting of stockholders.

ARTICLE III

Board of Directors

Section 1. General Powers. The property, business and affairs of the Corporation shall be managed by or under the direction of the Board, which may exercise all such powers of the Corporation and do all such lawful acts and things as are not by law or by the Certificate of Incorporation directed or required to be exercised or done by the stockholders.

Section 2. Number and Election of Directors. The Board of Directors shall consist of not less than one nor more than fifteen members, the exact number of which shall initially be fixed by the Incorporator and thereafter from time to time by the Board of Directors. Except as provided in Section 5 of this Article, directors shall be elected by a plurality of the votes cast at Annual Meetings, and each director so elected shall hold office until the next Annual Meeting and until his successor is duly elected and qualified, or until his earlier resignation or removal. Any director may resign at any time upon notice to the Corporation. Directors need not be stockholders of the Corporation.

Section 3. Organization and Order of Business. At each meeting of the Board, the President, if the President shall be a director, shall act as chairman of the meeting and preside thereat. In the case of the absence of the President, or if the President shall not be a director, any director chosen by a majority of the directors present at the meeting shall act as chairman of the meeting and preside at the meeting. The Secretary of the Corporation or, in the case of his absence, any person (who shall be an Assistant Secretary, if an Assistant Secretary shall be present at the meeting) whom the chairman shall appoint, shall act as secretary of such meeting and keep the minutes thereof.

Section 4. Removal of Directors. Any director or the entire Board may be removed, with or without cause, at any time by the holders of a majority of the shares then entitled to vote at an election of directors.

Section 5. Vacancies. Vacancies and newly created directorships resulting from any increase in the authorized number of directors may be filled by a majority of the directors then in office, though less than a quorum, or by a sole remaining director, and the directors so chosen shall hold office until the next annual election and until their successors are duly elected and qualified, or until their earlier resignation or removal.

Section 6. Duties and Powers. The business of the Corporation shall be managed by or under the direction of the Board of Directors which may exercise all such powers of the Corporation and do all such lawful acts and things as are not by statute or by the Certificate of Incorporation or by these By-Laws directed or required to be exercised or done by the stockholders.

Section 7. Meetings. The Board of Directors may hold meetings, both regular and special, either within or without the State of Delaware. Regular meetings of the Board of Directors may be held without notice at such time and at such place as may

from time to time be determined by the Board of Directors. Special meetings of the Board of Directors may be called by the Chairman, if there be one, the President, or any director. Notice thereof stating the place, date and hour of the meeting shall be given to each director either by mail not less than forty-eight hours before the date of the meeting, by telephone or telegram on twenty-four hours' notice, or on such shorter notice as the person or persons calling such meeting may deem necessary or appropriate in the circumstances.

Section 8. Quorum. Except as may be otherwise specifically provided by law, the Certificate of Incorporation or these By-Laws, at all meetings of the Board of Directors, one third of the total number of directors constituting the Board of Directors shall constitute a quorum for the transaction of business, except that if one director constitutes the Board of Directors, then one director shall constitute a quorum, and the act of a majority of the directors present at any meeting at which there is a quorum shall be the act of the Board of Directors. If a quorum shall not be present at any meeting of the Board of Directors, the directors present thereat may adjourn the meeting from time to time, without notice other than announcement at the meeting, until a quorum shall be present.

Section 9. Actions of Board by Written Consent. Unless otherwise provided by the Certificate of Incorporation or these By-Laws, any action required or permitted to be taken at any meeting of the Board of Directors or of any committee thereof may be taken without a meeting, if all the members of the Board of Directors or committee, as the case may be, consent thereto in writing, and the writing or writings are filed with the minutes of proceedings of the Board of Directors or committee.

Section 10. Meetings by Means of Conference Telephone. Unless otherwise provided by the Certificate of Incorporation or these By-Laws, members of the Board of Directors, or any committee designated by the Board of Directors, may participate in a meeting of the Board of Directors or such committee by means of a conference telephone or similar communications equipment by means of which all persons participating in the meeting can hear each other, and participation in a meeting pursuant to this Section 10 shall constitute presence in person at such meeting.

Section 11. Committees. The Board of Directors may, by resolution passed by a majority of the entire Board of Directors, designate one or more committees, each committee to consist of one or more of the directors of the Corporation. The Board of Directors may designate one or more directors as alternate members of any committee, who may replace any absent or disqualified member at any meeting of any such committee. In the absence or disqualification of a member of a committee, and in the absence of a designation by the Board of Directors of an alternate member to replace the absent or disqualified member, the member or members thereof present at any meeting and not disqualified from voting, whether or not he or they constitute a quorum, may unanimously appoint another member of the Board of Directors to act at the meeting in the place of any absent or disqualified member. Any committee, to the extent allowed by law and provided in the resolution establishing such committee, shall have and may exercise all the powers and authority of the Board of Directors in the management of the business and affairs of the Corporation. Each committee shall keep regular minutes and report to the Board of Directors when required.

Section 12. Compensation. The directors may be paid their expenses, if any, of attendance at each meeting of the Board of Directors and may be paid a fixed sum for attendance at each meeting of the Board of Directors or a stated salary as director.

No such payment shall preclude any director from serving the Corporation in any other capacity and receiving compensation therefor. Members of special or standing committees may be allowed like compensation for attending committee meetings.

Section 13. Interested Directors. No contract or transaction between the Corporation and one or more of its directors or officers, or between the Corporation and any other corporation, partnership, association, or other organization in which one or more of its directors or officers are directors or officers, or have a financial interest, shall be void or voidable solely for this reason, or solely because the director or officer is present at or participates in the meeting of the Board of Directors or committee thereof which authorizes the contract or transaction, or solely because his or their votes are counted for such purpose, if (i) the material facts as to his or their relationship or interest and as to the contract or transaction are disclosed or are known to the Board of Directors or the committee, and the Board of Directors or committee in good faith authorizes the contract or transaction by the affirmative votes of a majority of the disinterested directors, even though the disinterested directors be less than a quorum; (ii) the material facts as to his or their relationship or interest and as to the contract or transaction are disclosed or are known to the stockholders entitled to vote thereon, and the contract or transaction is specifically approved in good faith by vote of the stockholders; or (iii) the contract or transaction is fair as to the Corporation as of the time it is authorized, approved or ratified, by the Board of Directors, a committee thereof or the stockholders. Common or interested directors may be counted in determining the presence of a quorum at a meeting of the Board of Directors or of a committee which authorizes the contract or transaction.

ARTICLE IV

Officers

Section 1. General. The officers of the Corporation shall be chosen by the Board of Directors and shall be a President, a Secretary and a Treasurer. The Board of Directors, in its discretion, may choose one or more Vice Presidents, Assistant Secretaries, Assistant Treasurers and other officers. The Board of Directors, in its discretion, also may choose a Chairman of the Board of Directors and any Vice Chairman of the Board of Directors (who must be directors). Any number of offices may be held by the same person, unless otherwise prohibited by law, the Certificate of Incorporation or these By-Laws. The officers of the Corporation need not be stockholders of the Corporation nor, except in the case of the Chairman or Vice Chairman of the Board of Directors, need such officers be directors of the Corporation.

Section 2. Election. The Board of Directors at its first meeting held after each Annual Meeting shall elect the officers of the Corporation who shall hold their offices for such terms and shall exercise such powers and perform such duties as shall be determined from time to time by the Board of Directors; and all officers of the Corporation shall hold office until their successors are chosen and qualified, or until their earlier resignation or removal. Any officer elected by the Board of Directors may be removed at any time by the affirmative vote of a majority of the Board of Directors. Any vacancy occurring in any office of the Corporation shall be filled by the

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authorized officer to execute all bonds, mortgages, contracts and any other instruments of the Corporation, under the seal of the Corporation or otherwise (as shall the other officers of the Corporation when so authorized by these By-Laws, the Board of Directors or the President). Each Vice President shall perform such other duties and have such other powers as the Board of Directors from time to time may prescribe. If there be no Chairman of the Board of Directors and no Vice President, the Board of Directors shall designate the officer of the Corporation who, in the absence of the President or in the event of the inability or refusal of the President to act, shall perform the duties of the President, and when so acting, shall have all the powers of and be subject to all the restrictions upon the President.

Section 8. Secretary. The Secretary shall attend all meetings of the Board of Directors and all meetings of stockholders and record all the proceedings at the meeting in a book or books to be kept for that purpose; the Secretary shall also perform like duties for the standing committees when required. The Secretary shall give, or cause to be given, notice of all meetings of the stockholders and special meetings of the Board of Directors, and shall perform such other duties as may be prescribed by the Board of Directors or President, under whose supervision he shall be. If the Secretary shall be unable or shall refuse to cause to be given notice of all meetings of the stockholders and Special Meetings, and if there be no Assistant Secretary, then either the Board of Directors or the President may choose another officer to cause such notice to be given. The Secretary shall have custody of the seal of the Corporation and the Secretary or any Assistant Secretary, if there be one, shall have authority to affix the same to any instrument requiring it and when so affixed, it may be attested by the signature of the Secretary or by the signature of any such Assistant Secretary. The Board of Directors may give general authority to any other officer to affix the seal of the Corporation and to attest the affixing by his signature. The Secretary shall see that all books, reports, statements, certificates and other documents and records required by law to be kept or filed are properly kept or filed, as the case may be.

Section 9. Treasurer. The Treasurer shall have the custody of the corporate funds and securities and shall keep full and accurate accounts of receipts and disbursements in books belonging to the Corporation and shall deposit all moneys and other valuable effects in the name and to the credit of the Corporation in such depositories as may be designated by the Board of Directors. He shall have the power alone or with any other authorized officer to execute all bonds, mortgages, contracts and any other instruments of these Corporation, under the seal of the Corporation or otherwise (as shall the other officers of the Corporation when so authorized by these By-Laws, the Board of Directors or the President). The Treasurer shall disburse the funds of the Corporation as may be ordered by the Board of Directors, taking proper vouchers for such disbursements, and shall render to the President and the Board of Directors, at its regular meetings, or when the Board of Directors so requires, an account of all his transactions as Treasurer and of the financial condition of the Corporation. If required by the Board of Directors, the Treasurer shall give the Corporation a bond in such sum and with such surety or sureties as shall be satisfactory to the Board of Directors for the faithful performance of the duties of his office and for the restoration to the Corporation, in case of his death, resignation, retirement or removal from office, of all books, papers, vouchers, money and other property of whatever kind in his possession or under his control belonging to the Corporation.

Section 10. Assistant Secretaries. Except as may be otherwise provided in these By-Laws, Assistant Secretaries, if there be any, shall perform such duties and have such powers as from time to time may be assigned to them by the Board of Directors, the President, any Vice President, if there be one, or the Secretary, and in the absence of the Secretary or in the event of his disability or refusal to act, shall perform the duties of the Secretary, and when so acting, shall have all the powers of and be subject to all the restrictions upon the Secretary.

Section 11. Assistant Treasurers. Assistant Treasurers, if there be any, shall perform such duties and have such powers as from time to time may be assigned to them by the Board of Directors, the President, any Vice President, if there be one, or the Treasurer, and in the absence of the Treasurer or in the event of his disability or refusal to act, shall perform the duties of the Treasurer, and when so acting, shall have all the powers of and be subject to all the restrictions upon the Treasurer. If required by the Board of Directors, an Assistant Treasurer shall give the Corporation a bond in such sum and with such surety or sureties as shall be satisfactory to the Board of Directors for the faithful performance of the duties of his office and for the restoration to the Corporation, in case of his death, resignation, retirement or removal from office, of all books, papers, vouchers, money and other property of whatever kind in his possession or under his control belonging to the Corporation.

Section 12. Other Officers. Such other officers as the Board of Directors may choose shall perform such duties and have such powers as from time to time may be assigned to them by the Board of Directors. The Board of Directors may delegate to any other officer of the Corporation the power to choose such other officers and to prescribe their respective duties and powers.

ARTICLE V

Stock

Section 1. Form of Certificates. Every holder of stock in the Corporation shall be entitled to have a certificate signed, in the name of the Corporation (i) by the Chairman of the Board of Directors, the President or a Vice President and (ii) by the Treasurer or an Assistant Treasurer, or the Secretary or an Assistant Secretary of the Corporation, certifying the number of shares owned by him in the Corporation.

Section 2. Signatures. Where a certificate is countersigned by (i) a transfer agent other than the Corporation or its employee, or (ii) a registrar other than the Corporation or its employee, any other signature on the certificate may be a facsimile. In case any officer, transfer agent or registrar who has signed or whose facsimile signature has been placed upon a certificate shall have ceased to be such officer, transfer agent or registrar before such certificate is issued, it may be issued by the Corporation with the same effect as if he were such officer, transfer agent or registrar at the date of issue.

Section 3. Lost Certificates. The Board of Directors may direct a new certificate to be issued in place of any certificate theretofore issued by the Corporation alleged to have been lost, stolen or destroyed, upon the making of an affidavit of that fact by the person claiming the certificate of stock to be lost, stolen or destroyed. When authorizing such issue of a new certificate, the Board of Directors may, in its discretion and as a condition precedent to the issuance thereof, require the owner of

such lost, stolen or destroyed certificate, or his legal representative, to advertise the same in such manner as the Board of Directors shall require and/or to give the Corporation a bond in such sum as it may direct as indemnity against any claim that may be made against the Corporation with respect to the certificate alleged to have been lost, stolen or destroyed.

Section 4. Transfers. Stock of the Corporation shall be transferable in the manner prescribed by law and in these By-Laws. Transfers of stock shall be made on the books of the Corporation only by the person named in the certificate or by his attorney lawfully constituted in writing and upon the surrender of the certificate therefor, which shall be cancelled before a new certificate shall be issued.

Section 5. Record Date. In order that the Corporation may determine the stockholders entitled to notice of or to vote at any meeting of stockholders or any adjournment thereof, or entitled to express consent to corporate action in writing without a meeting, or entitled to receive payment of any dividend or other distribution or allotment of any rights, or entitled to exercise any rights in respect of any change, conversion or exchange of stock, or for the purpose of any other lawful action, the Board of Directors may fix, in advance, a record date, which shall not be more than sixty days nor less than ten days before the date of such meeting, nor more than sixty days prior to any other action. A determination of stockholders of record entitled to notice of or to vote at a meeting of stockholders shall apply to any adjournment of the meeting; *provided, however,* that the Board of Directors may fix a new record date for the adjourned meeting.

Section 6. Beneficial Owners. The Corporation shall be entitled to recognize the exclusive right of a person registered on its books as the owner of shares to receive dividends, and to vote as such owner, and to hold liable for calls and assessments a person registered on its books as the owner of shares, and shall not be bound to recognize any equitable or other claim to or interest in such share or shares on the part of any other person, whether or not it shall have express or other notice thereof, except as otherwise provided by law.

ARTICLE VI

Notices

Section 1. Notices. Whenever written notice is required by law, the Certificate of Incorporation or these By-Laws, to be given to any director, member of a committee or stockholder, such notice may be given by mail, addressed to such director, member of a committee or stockholder, at his address as it appears on the records of the Corporation, with postage thereon prepaid, and such notice shall be deemed to be given at the time when the same shall be deposited in the United States mail. Written notice may also be given personally or by telegram, telex or cable.

Section 2. Waivers of Notice. Whenever any notice is required by law, the Certificate of Incorporation or these By-Laws, to be given to any director, member of a committee or stockholder, a waiver thereof in writing, signed, by the person or persons entitled to said notice, whether before or after the time stated therein, shall be deemed equivalent thereto.

ARTICLE VII

General Provisions

Section 1. Dividends. Dividends upon the capital stock of the Corporation, subject to the provisions of the Certificate of Incorporation, if any, may be declared by the Board of Directors at any regular or special meeting, and may be paid in cash, in property, or in shares of the capital stock. Before payment of any dividend, there may be set aside out of any funds of the Corporation available for dividends such sum or sums as the Board of Directors from time to time, in its absolute discretion, deems proper as a reserve or reserves to meet contingencies, or for equalizing dividends, or for repairing or maintaining any property of the corporation, or for any proper purpose, and the Board of Directors may modify or abolish any such reserve.

Section 2. Disbursements. All checks or demands for money and notes of the Corporation shall be signed by such officer or officers or such other person or persons as the Board of Directors may from time to time designate.

Section 3. Fiscal Year. The fiscal year of the Corporation shall be fixed by resolution of the Board of Directors.

Section 4. Corporate Seal. The corporate seal shall have inscribed thereon the name of the Corporation, the year of its organization and the words "Corporate Seal, Delaware". The seal may be used by causing it or a facsimile thereof to be impressed or affixed or reproduced or otherwise.

Section 5. Amendments. These By-Laws may be amended or repealed, or new By-Laws may be adopted, by the Board of Directors at any meeting thereof (or by action by written consent as provided under Section 141(f) of the Delaware General Corporation Law); *provided* that By-Laws adopted by the Board may be amended or repealed by the stockholders.

ARTICLE VIII

Indemnification

Section 1. Power to Indemnify in Actions, Suits or Proceedings Other Than Those by or in the Right of the Corporation. Subject to Section 3 of this Article VIII, the Corporation shall indemnify any person who is or was a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the Corporation) by reason of the fact that he is or was a director, officer, employee or agent of the Corporation, or is or was serving at the request of the Corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust, employee benefit plan or other enterprise, against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit or proceeding if he acted in good faith and in a manner he reasonably believed to be in, or not opposed to the best interests of the Corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of *nolo contendere* or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which

he reasonably believed to be in or not opposed to the best interests of the Corporation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that his conduct was unlawful.

Section 2. Power to Indemnify in Actions. Suits or Proceedings by or in the Right of the Corporation. Subject to Section 3 of this Article VIII, the Corporation shall indemnify any person who is or was a party or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the Corporation to procure a judgment in its favor by reason of the fact that he is or was a director, officer, employee or agent of the Corporation, or is or was a director or officer of the Corporation serving at the request of the Corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust, employee benefit plan or other enterprise against expenses (including attorneys' fees) actually and reasonably incurred by him in connection with the defense or settlement of such action or suit if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the Corporation; except that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable to the Corporation unless and only to the extent that the Court of Chancery or the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability, in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which the Court of Chancery or such other court shall deem proper.

Section 3. Authorization of Indemnification. Any indemnification under this Article VIII (unless ordered by a court) shall be made by the Corporation only as authorized in the specific case upon a determination that indemnification of the director, officer, employee or agent is proper in the circumstances because he has met the applicable standard of conduct set forth in Section 1 or Section 2 of this Article VIII, as the case may be. Such determination shall be made (i) by the Board of Directors by a majority vote of a quorum consisting of directors who were not parties to such action, suit or proceeding, or (ii) if such a quorum is not obtainable, or, even if obtainable a quorum of disinterested directors so directs, by independent legal counsel in a written opinion, or (iii) by the stockholders. To the extent, however, that a director, officer, employee or agent of the Corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding described above, or in defense of any claim, issue or matter therein, he shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by him in connection therewith, without the necessity of authorization in the specific case.

Section 4. Good Faith Defined. For purposes of any determination under Section 3 of this Article VIII, a person shall be deemed to have acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the Corporation, or, with respect to any criminal action or proceeding, to have had no reasonable cause to believe his conduct was unlawful, if his action is based on the records or books of account of the Corporation or another enterprise, or on information supplied to him by the officers of the Corporation or another enterprise in the course of their duties, or on the advice of legal counsel for the Corporation or another enterprise or on information or records given or reports made to the Corporation or another enterprise by an independent certified public accountant or by an appraiser or other expert selected with reasonable care by the Corporation or another enterprise. The term "another enterprise" as used in this Section 4 shall

mean any other corporation or any partnership, joint venture, trust, employee benefit plan or other enterprise of which such person is or was serving at the request of the Corporation as a director, officer, employee or agent. The provisions of this Section 4 shall not be deemed to be exclusive or to limit in any way the circumstances in which a person may be deemed to have met the applicable standard of conduct set forth in Sections 1 or 2 of this Article VIII, as the case may be.

Section 5. Indemnification by a Court. Notwithstanding any contrary determination in the specific case under Section 3 of this Article VIII, and notwithstanding the absence of any determination thereunder, any director, officer, employee or agent may apply to any court of competent jurisdiction in the State of Delaware for indemnification to the extent otherwise permissible under Sections 1 and 2 of this Article VIII. The basis of such indemnification by a court shall be a determination by such court that indemnification of the director, officer, employee or agent is proper in the circumstances because he has met the applicable standards of conduct set forth in Sections 1 or 2 of this Article VIII, as the case may be. Neither a contrary determination in the specific case under Section 3 of this Article VIII nor the absence of any determination thereunder shall be a defense to such application or create a presumption that the director, officer, employee or agent seeking indemnification has not met any applicable standard of conduct. Notice of any application for indemnification pursuant to this Section 5 shall be given to the Corporation promptly upon the filing of such application. If successful, in whole or in part, the director, officer, employee or agent seeking indemnification shall also be entitled to be paid the expense of prosecuting such application.

Section 6. Expenses Payable in Advance. Expenses incurred by a director or officer in defending or investigating a threatened or pending action, suit or proceeding may be paid by the Corporation in advance of the final disposition of such action, suit or proceeding upon receipt of an undertaking by or on behalf of such director, officer, employee or agent to repay such amount if it shall ultimately be determined that he is not entitled to be indemnified by the Corporation as authorized in this Article VIII.

Section 7. Nonexclusivity of Indemnification and Advancement of Expenses. The indemnification and advancement of expenses provided by or granted pursuant to this Article VIII shall not be deemed exclusive of any other rights to which those seeking indemnification or advancement of expenses may be entitled under any By-Law, agreement, contract, vote of stockholders or disinterested directors or pursuant to the direction (howsoever embodied) of any court of competent jurisdiction or otherwise, both as to action in his official capacity and as to action in another capacity while holding such office, it being the policy of the Corporation that indemnification of the persons specified in Sections 1 and 2 of this Article VIII shall be made to the fullest extent permitted by law. The provisions of this Article VIII shall not be deemed to preclude the indemnification of any person who is not specified in Sections 1 or 2 of this Article VIII but whom the Corporation has the power or obligation to indemnify under the provisions of the General Corporation Law of the State of Delaware, or otherwise.

Section 8. Insurance. The Corporation may purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the Corporation, or is or was a director or officer of the Corporation serving at the request of the Corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust, employee benefit plan or other enterprise against any

liability asserted against him and incurred by him in any such capacity, or arising out of his status as such, whether or not the Corporation would have the power or the obligation to indemnify him against such liability under the provisions of this Article VIII.

Section 9. Certain Definitions. For purposes of this Article VIII, references to “the Corporation” shall include, in addition to the resulting corporation, any constituent corporation (including any constituent of a constituent) absorbed in a consolidation or merger which, if its separate existence had continued, would have had power and authority to indemnify its directors, officers, employees or agents, so that any person who is or was a director, officer, employee or agent of such constituent corporation, or is or was a director or officer of such constituent corporation serving at the request of such constituent corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust, employee benefit plan or other enterprise, shall stand in the same position under the provisions of this Article VIII with respect to the resulting or surviving corporation as he would have with respect to such constituent corporation if its separate existence had continued. For purposes of this Article VIII, references to “fines” shall include any excise taxes assessed on a person with respect to an employee benefit plan; and references to “serving at the request of the Corporation” shall include any service as a director, officer, employee or agent of the Corporation which imposes duties on, or involves services by, such director, officer, employee or agent with respect to an employee benefit plan, its participants or beneficiaries; and a person who acted in good faith and in a manner he reasonably believed to be in the interest of the participants and beneficiaries of an employee benefit plan shall be deemed to have acted in a manner “not opposed to the best interests of the Corporation” as referred to in this Article VIII.

Section 10. Survival of Indemnification and Advancement of Expenses. The indemnification and advancement of expenses provided by, or granted pursuant to, this Article VIII shall, unless otherwise provided when authorized or ratified, continue as to a person who has ceased to be a director, officer, employee or agent and shall inure to the benefit of the heirs, executors and administrators of such a person.

Section 11. Limitation on Indemnification. Notwithstanding anything contained in this Article VIII to the contrary, except for proceedings to enforce rights to indemnification (which shall be governed by Section 5 hereof), the Corporation shall not be obligated to indemnify any director, officer, employee or agent in connection with a proceeding (or part thereof) initiated by such person unless such proceeding (or part thereof) was authorized or consented to by the Board of Directors.

Section 12. Indemnification of Employees and Agents. The Corporation may, to the extent authorized from time to time by the Board of Directors, provide rights to indemnification and to the advancement of expenses to employees and agents of the Corporation similar to those conferred in this Article VIII to directors and officers of the Corporation.

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Decision and Order

EXHIBIT C

RWE-DEA AKTIENGESELLSCHAFT
FÜR MINERALOEL UND CHEMIE

, 1991

[NEWCO]

In care of The Corporation Trust Company
1209 Orange Street
Wilmington, Delaware 19801

Dear Sirs:

The undersigned, RWE-DEA Aktiengesellschaft für Mineraloel und Chemie, hereby offers to subscribe and pay for 1,000 shares of Common Stock, par value \$.01 per share, of [NEWCO], a Delaware corporation, at a price of \$1,600 per share.

Very truly yours,

RWE-DEA AKTIENGESELLSCHAFT
FÜR MINERALOEL UND CHEMIE,
by

Name:

Title:

Name:

Title:

Accepted:

[NEWCO]

by

Name:

Title:

IN THE MATTER OF

T&N PLC

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

Docket C-3312. Consent Order, Nov. 8, 1990—Modifying Order, Nov. 13, 1991

This order reopens the proceeding and modifies the Commission's 1990 order [113 FTC 1016], regarding the divestiture of certain thinwall engine bearing assets. The Commission has determined that the potential harm to respondent's ability to compete outweighs any further need to require a divestiture of the remaining VanAm inventory.

ORDER REOPENING PROCEEDING
AND MODIFYING ORDER

On September 24, 1991, respondent T&N plc ("T&N") filed a "Request for Confirmation that T&N has Discharged its Obligation to Divest the Thinwall Engine Bearing Assets or, in the Alternative, to Reopen the Proceeding and Modify the Consent Order" ("Request") pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51. T&N seeks acknowledgement that it has fully complied with its obligations under paragraph III of the consent order in Docket No. C-3312 ("order") to divest the thinwall engine bearing assets or, in the alternative, a modification of paragraph I.10(a) of the order to relieve it of any further divestiture obligations under paragraph III.

Paragraph III of the order requires T&N to divest the "thinwall engine bearing assets" by November 21, 1991. Paragraph I.10(a) defines the term "thinwall engine bearing assets" to include, among other things:

All assets relating to the sale, marketing and distribution of bearings for U.S. gasoline engine applications manufactured by Vandervell directed to the U.S. aftermarket that are based at VanAm's facility in Tucker, Georgia, including, but not limited to, all customer lists, inventory (to be repackaged in plain boxes), and assignment of the building lease and all agreements with sales agencies and fee warehouses, excluding any trademarks or trade names[.]

To date T&N has received Commission approval for a divestiture to