

Complaint

116 F.T.C.

IN THE MATTER OF

MONSANTO COMPANY

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-3458. Complaint, Sept. 1, 1993--Decision, Sept. 1, 1993*

This consent order permits, among other things, a Missouri-based manufacturer of chemicals, including lawn and garden products, to acquire the Ortho Consumer Products Div. of Chevron Corp., and requires the respondent to divest certain assets to Commission-approved acquirers within one year. It also prohibits, among other things, Monsanto, for a period of 10 years, from acquiring, without prior Commission approval, an interest in any company engaged in the manufacture or formulation for sale in the U.S. of any non-selective herbicide for residential use.

Appearances

For the Commission: *Howard Morse* and *Allee A. Ramadhan*.

For the respondent: *Kenneth A. Letzler*, *Abe Krash* and *Richard A. Kleine*, in-house counsel, St. Louis, MO.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission (Commission), having reason to believe that respondent Monsanto Company (Monsanto), a corporation, has agreed to acquire the assets of the Ortho Consumer Products Division of the Chevron Corporation (Chevron), in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding in respect thereof

would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent Monsanto is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business at 800 North Lindbergh Blvd., St. Louis, Missouri.

2. Monsanto is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

II. THE ACQUISITION

3. Pursuant to a letter agreement dated January 5, 1993, Monsanto agreed in principle to acquire from Chevron substantially all of the assets of the Ortho Consumer Products Division for a price of approximately \$416 million.

III. THE RELEVANT MARKET

4. The relevant line of commerce within which to analyze the effects of Monsanto's proposed acquisition of the Ortho Consumer Products Division of Chevron is the residential non-selective herbicide market, which consists of manufacturing or formulating, marketing and selling non-selective herbicide products for residential use in general control of brush, plants, weeds and grasses.

5. The relevant section of the country or geographic area within which to analyze the effects of the proposed acquisition is the United States.

IV. MARKET STRUCTURE

6. The United States residential non-selective herbicide market is already highly concentrated, whether measured by the Herfindahl-Hirschmann Index or by two-firm and four-firm concentration ratios.

V. ENTRY CONDITIONS

7. Entry into the United States residential non-selective herbicide market is difficult or unlikely.

VI. EFFECTS OF THE ACQUISITION

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

(a) It will eliminate actual, direct and substantial competition between Monsanto and Chevron and increase Monsanto's ability unilaterally to exercise market power in the United States residential non-selective herbicide market;

(b) It will substantially increase the already high concentration in the United States residential non-selective herbicide market;

(c) It will raise barriers and impediments to entry into the United States residential non-selective herbicide market; and

(d) It will eliminate Ortho as a substantial independent competitive force in the United States residential non-selective herbicide market.

VII. VIOLATIONS CHARGED

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

10. The proposed acquisition of the Ortho Consumer Products Division by Monsanto, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission, having initiated an investigation of respondent's proposed acquisition of the Ortho Consumer Products Division of Chevron Corp., and the respondent having been furnished thereafter with a copy of this 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 respondent with violation of the Clayton Act and the Federal Trade Commission Act; and

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

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

1. Monsanto Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 800 North Lindbergh Boulevard, St. Louis, Missouri.

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

ORDER

I.

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

A. “*Monsanto*” means Monsanto Company, its predecessors, successors and assigns, divisions, subsidiaries, affiliates, companies, groups, partnerships and joint ventures that Monsanto Company controls, directly or indirectly, and their directors, officers, employees, agents and representatives, and their respective successors and assigns.

B. “*Chevron*” means Chevron Corporation, its predecessors, successors and assigns, divisions, subsidiaries, affiliates, companies, groups, partnerships and joint ventures that Chevron Corporation controls, directly or indirectly, and their directors, officers, employees, agents and representatives, and their respective successors and assigns.

C. “*Acquisition*” means the acquisition by Monsanto from Chevron of the assets of the Ortho Consumer Products Division of Chevron, as referenced in Commission Premerger Report Number 93-0514.

D. “*Chevron Assets*” means:

1. The Kleenup Assets;
2. The Shackle C Assets; and
3. The Formula II Assets.

E. “*Kleenup Assets*” means the brand or trademark “Kleenup” obtained by Monsanto in connection with the Acquisition and used by Chevron for nonselective herbicides; provided, however, that the

Ortho brand or trademarks and trade dress are not part of the Kleenup Assets or the Chevron Assets and need not be divested pursuant to this order.

F. “*Shackle C Assets*” means the irrevocable rights to acquire, through September 19, 2000, a total of 102,455 gallons of the Shackle C product described in the product specification attached hereto as Exhibit A.

G. “*Formula II Assets*” means all rights, title and interest in and to any formulation of nonselective herbicide products for residential use obtained by Monsanto in connection with the Acquisition intended for sale by Chevron as a substitute for the current glyphosate-based herbicide products sold by Chevron under the brand or trademark “Kleenup,” as set forth in Exhibit B attached hereto.

H. “*EPA*” means the United States Environmental Protection Agency.

II.

It is further ordered, That:

For purposes of protecting interim competition pending the introduction of new glyphosate-based herbicide suppliers pursuant to paragraph III of this order, including necessary governmental approvals, Monsanto shall:

A. For a period of twelve (12) months after this order becomes final, offer to sell to each current purchaser, except Chevron, of Shackle C for use in the formulation of nonselective herbicide products for residential use in the United States up to one hundred fifty percent (150%) of the volume of Shackle C that such customer purchased during the twelve (12) months preceding the date on which this order becomes final, under the terms and conditions of the customer's existing contract. If the divestitures of the Shackle C Assets or Kleenup Assets are not accomplished within twelve (12) months after the date on which this order becomes final, the require-

ments of this paragraph II.A. shall be extended until such divestitures are accomplished.

B. Offer to formulate and sell to each person that acquires the Shackle C Assets, pursuant to paragraph III.B. of this order, a portion of such Shackle C Assets in the form of glyphosate-based herbicides using any or all of the formulations sold by Chevron at the time of the Acquisition, for such acquirer's resale pending the acquirer's obtaining of the necessary federal regulatory agency approval to formulate, distribute and sell nonselective, glyphosate-based herbicides for residential use. Such offer by Monsanto to formulate the acquirer's Shackle C shall be on a cost-plus basis and other commercially reasonable terms for a fixed period of up to twelve (12) months from the date on which the acquirer is approved by the Commission. If an acquirer fails to secure the necessary federal regulatory agency approval to formulate, distribute and sell nonselective, glyphosate-based herbicides for residential use within twelve (12) months after the date on which the acquirer is approved by the Commission, the requirements of this paragraph II.B. shall be extended for such acquirer for up to an additional twelve (12) months pending such approval.

III.

It is further ordered, That within twelve (12) months after the date on which this order becomes final, Monsanto shall divest, absolutely and in good faith, the Chevron Assets in accordance with the following:

A. The divestiture of the Kleenup Assets shall be only to an acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission. The acquirer of the Kleenup Assets shall also be an acquirer of Shackle C Assets pursuant to paragraph III.B. of this order. Any divestiture agreement shall include a requirement that for a period of three (3) years after the date on which this order becomes final, such acquirer's interests in and rights to the Kleenup Assets shall not be

assignable except upon the prior approval of the Commission. The purpose of the divestiture is to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint and to enable the acquirer to formulate and sell nonselective herbicides for residential use.

(1) Monsanto shall make available to the acquirer of the Kleenup Assets access to such Monsanto personnel (including, but not limited to, former Chevron personnel employed by Monsanto), assistance and training as the acquirer reasonably needs (for a period of time not to exceed six (6) months from the date on which the acquirer is approved by the Commission), to transfer the Kleenup Assets to the acquirer.

(2) Monsanto shall provide such cooperation and assistance to the acquirer of the Kleenup Assets under this order as are reasonably necessary to enable the acquirer to formulate and sell nonselective herbicides for residential use.

B. The divestiture of the Shackle C Assets shall be to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission; *provided, however*, that Monsanto shall not be required to divest to more than three (3) acquirers. If there is more than one acquirer of the Shackle C Assets, one such acquirer must also be the acquirer of the Kleenup Assets under paragraph III.A. of this order. Any divestiture agreement shall include a requirement that for a period of three (3) years after the date on which this order becomes final, such acquirer's interests in and rights to the Shackle C Assets shall not be assignable except upon the prior approval of the Commission. The purpose of the divestiture is to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint and to enable the acquirer or acquirers to formulate and sell nonselective, glyphosate-based herbicides for residential use.

(1) At the time of the divestiture, Monsanto shall make available to each acquirer of the Shackle C Assets access to such Monsanto

personnel (including, but not limited to, former Chevron personnel employed by Monsanto), assistance and training as each acquirer reasonably needs (for a period of time not to exceed six (6) months from the date on which the acquirer is approved by the Commission), to transfer the Shackle C Assets to the acquirer.

(2) Monsanto shall grant to each acquirer, (a) nonexclusive rights to any and all research and development, technical information, know-how, patents and all EPA and other federal and state regulatory agency filings and registrations of Chevron relating to nonselective, glyphosate-based herbicides (including, without limitation, combinations of glyphosate and one or more other active ingredients), and (b) for as long as the acquirer holds rights to Shackle C Assets obtained pursuant to paragraph III of this order, nonexclusive rights to reference any Monsanto test data for nonselective, glyphosate-based herbicides for purposes of obtaining governmental regulatory approvals, to the extent that Chevron had such rights prior to the Acquisition.

(3) Monsanto shall provide such cooperation to each acquirer of the Shackle C Assets under this order (including, but not limited to, cooperation in obtaining EPA registrations and any other governmental regulatory approvals to the extent that Chevron had such registrations and approvals prior to the Acquisition) necessary to formulate, distribute and sell nonselective, glyphosate-based herbicides for residential uses in any form (including, but not limited to, in any glyphosate concentration); *provided, however*, that Monsanto shall have no obligation to conduct additional studies to develop data solely for any such acquirer.

(4) In connection with the divestiture of Chevron Assets under this order, Monsanto shall not restrict the ability of any acquirer of the Shackle C Assets to use, or to acquire the right to use, any active ingredient other than glyphosate, nor shall Monsanto restrict the ability of any acquirer to make any lawful product comparison in the labeling, advertising or other promotion of its glyphosate-based product.

C. The divestiture of the Formula II Assets shall be only to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The divestiture shall include a requirement that for a period of three (3) years after the date on which this order becomes final such acquirer's interests in and rights to the Formula II Assets shall not be assignable except upon the prior approval of the Commission. The purpose of the divestiture is to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint and to enable the acquirer to formulate and sell nonselective herbicides for residential uses.

(1) Monsanto shall make available to the acquirer of the Formula II Assets access to such Monsanto personnel (including, but not limited to, former Chevron personnel employed by Monsanto), assistance and training as each acquirer reasonably needs (for a period not to exceed six (6) months from the date on which the acquirer is approved by the Commission), to transfer the Formula II Assets to the acquirer.

(2) Monsanto shall provide reasonable cooperation to the acquirer of the Formula II Assets under this order, including, but not limited to, cooperation in obtaining nonexclusive rights to such additional Chevron research and development, technical information, know-how, patents and EPA and other federal and state regulatory agency filings and registrations of Chevron as Chevron (a) has used in the development of Formula II products for residential use or (b) contemplates using to make or market Formula II products for such use.

IV.

It is further ordered, That, pending divestiture of the Chevron Assets, Monsanto shall take such action as is necessary to maintain the viability and marketability of the Chevron Assets (including, but not limited to, research and development, technical information, know-how, patents and EPA filings and registrations) and shall not

cause or permit any destruction, removal, wasting, deterioration or impairment of those assets, except for ordinary wear and tear in the ordinary course of business that does not affect the viability and marketability of the Chevron Assets.

V.

It is further ordered, That:

A. If Monsanto has not fully complied, absolutely and in good faith, with paragraph III of this order within the time period provided in such paragraph, Monsanto shall consent to the appointment by the Commission of a trustee to divest the remaining portion(s) of the Chevron Assets. 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, Monsanto shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other available relief, including a court-appointed trustee, for any failure by Monsanto to comply with this order.

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

(1) The Commission shall select the trustee, subject to the consent of Monsanto, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Monsanto has not opposed, in writing, the selection of any proposed trustee within fifteen (15) days after notice by the staff of the Commission to Monsanto of the identity of any proposed trustee, Monsanto shall be deemed to have consented to the selection of the proposed trustee.

(2) Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Chevron Assets, and to make any further arrangements that may be reasonably necessary to assure the viability and competitiveness of the pertinent assets.

(3) The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph V.B(8) to accomplish the divestiture. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be accomplished within a reasonable time, the divestiture period may be extended by the Commission or, in the case of a court-appointed trustee, by the court.

(4) The trustee shall have full and complete access to the personnel, books, records, and facilities related to the Chevron Assets, or any other relevant information, as the trustee may reasonably request. Monsanto shall develop such financial or other information as such trustee may reasonably request and shall cooperate with any reasonable request of the trustee. Monsanto shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Monsanto shall extend the time for divestiture under paragraph V.B(3) in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

(5) Subject to Monsanto's absolute and unconditional obligation to divest at no minimum price, the trustee shall use his or her best efforts to negotiate the most favorable price and terms available with each acquirer for the divestiture. The divestiture shall be made in the manner and to the number of acquirers set out in paragraph III of this order.

(6) The trustee shall serve, without bond or other security, at the cost and expense of Monsanto, 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 Monsanto, 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 from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Monsanto and the trustee's power shall be terminated. The trustee's compensation shall be based in significant part on a commission arrangement contingent on the trustee's divesting the Chevron Assets.

(7) Monsanto shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trusteeship, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

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

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

(10) The Commission or, in the case of a court-appointed trustee, the court may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this order.

(11) The trustee shall have no obligation or authority to operate or maintain the Chevron Assets.

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

VI.

It is further ordered, That, within sixty (60) days after the date on which this order becomes final and every sixty (60) days thereafter until Monsanto has fully complied with the provisions of paragraphs II, III, IV, and V of this order, Monsanto shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, or has complied with those provisions. Monsanto shall include in its compliance reports, among other things that are required from time to time, a full description of all substantive contacts or negotiations for the divestiture of the Chevron Assets, including the identities of all parties contacted. Monsanto also shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

VII.

It is further ordered, That, for a period of ten (10) years from the date on which this order becomes final, Monsanto shall not, without the prior approval of the Commission, directly or indirectly:

A. Acquire any stock, share capital, equity or other interest in any concern, corporate or non-corporate, engaged in the manufacture or formulation (either directly or by contract) for sale in the United States of any nonselective herbicide for residential use.

B. Acquire the brand or trademark of any nonselective herbicide for residential use used in the United States.

C. Acquire from any other person the exclusive rights to manufacture, distribute or sell for residential use in or to the United States a pesticidal active ingredient (within the meaning of 7 U.S.C. 136(u)) that contributes significantly to the actual or perceived efficacy of any nonselective herbicide.

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

VIII.

It is further ordered, That, for the purposes of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to Monsanto, Monsanto shall permit any duly authorized representatives of the Commission:

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

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

IX.

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

EXHIBIT A

MONSANTO AGRICULTURAL
COMPANYEXHIBIT A
C-3458
B144600

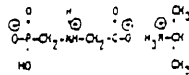
PRODUCT SPECIFICATION

PRODUCT Shackles C Issue No. 5

N No. 2139 Date Effective: 8/1/88

GENERAL DESCRIPTION

A light amber to light brown liquid containing 41.0% by weight and 4 lbs./gallon of active, N-phosphonomethyl glycine, Isopropylamine Salt (CP 70139)



CHARACTERISTICS	LIMITS	TYPICAL	METHOD NO.
(R) Appearance	Clear solution, light amber to light brown color.		Visual
(R) Assay, IPA salt glyphosate, wt. %	41.00 - 43.0	41.4	AQC-294-87
(R) Sp. Gr. @ 20/15.6°C	Determine	1.1720	AQC-292-86
(R) IPA Salt of glyphosate - Lbs./gallon - Lbs./liter	4.00 min. 480 min.	4.05 485	Calculated (1) Calculated (2)
(R) Surfactant (MON 0818), wt. %	14.0 - 17.0	15.4	AQC-140-82 (3)
(OR) Water Content, wt. %	38.5 - 45.0	43.2	Determined by difference
(R) pH	4.4 - 4.9	4.5	AQC-139-81
(R) Insolubles in water, ppm	100 max.	30	AQC-121-74
(R) Cloud Point, °C	60 min.	75	AQC-120-81
(R) Carbon, ppm	5 max.	< 5	AQC-2956-83
(R) Dilution Test	Not turbid after 1 hour.		AQC-316-82
(R) Gardner Color	4 - 7	5	AQC-226-81

Approved by: _____

Decision and Order

116 F.T.C.

EXHIBIT A

FINISHED PRODUCT SPECIFICATION
SHACKLE C

PAGE 2 OF 3

CHARACTERISTICS	LIMITS	TYPICAL	METHOD NO.
(R) NNG Content, ppb	600 max.		AQC-684-86

NOTES:

- (1) IPA Salt of Glyphosate, Lb/Gal = $\frac{\% \text{ IPA Salt} \times \text{Sp. Gr.} \times 8.33722}{100}$
- (2) Ipa Salt of Glyphosate, Gm/Liter = $\frac{\% \text{ IPA Salt} \times \text{Sp. Gr.} \times 9.990}{100}$
- (3) The surfactant method determines surfactant amount in units of "lb/gallon", however the specification is expressed as "wt. %". To convert from "lb./gallon" to "wt. %" units, use the following:
- $$(\text{Surfactant, wt. \%}) = \frac{(\text{Surfactant, Lb/Gallon}) \times 100}{(\text{Specific Gravity}) \times 8.33722}$$

For a typical specific gravity of 1.1720, the 14.0 - 17.0 wt. % specification limit is equivalent to 1.37 - 1.66 lb/gallon. Since specific gravity will vary, wt. % must be calculated and compared to specification for each lot.

TYPICAL FORMULATION

Ingredient	% By Weight
Glyphosate (98%)	31.32 (30.70)
Isopropylamine	10.70
Surfactant (MON 0818)	15.40
Water	42.58

Manufacturing should target for a surfactant content of 15.40%. The specification range of 14.0 - 17.0% is to allow for normal process variation around a target value of 15.4%.

PLANT QUALITY CONTROL SYNOPSIS:

A. Circulating Plant - Sampling

Shackle C is stored in storage tanks in Formulation. When a tank is full, it is circulated for six hours and a sample is removed for complete analysis. the circulation is continued for two hours and another sample is taken. When a tank is on specification, which is determined by the analysis of the two samples, the material is transferred to Glyphosate Packaging via pipeline.

EXHIBIT A

0047 028

FINISHED PRODUCT SPECIFICATION
SHACKLE C

PAGE 3 OF 3

PLANT QUALITY CONTROL SYNOPSIS: (Continued)

Packaging has two lot tanks which receive product from Formulation. When a transfer is made to one of these tanks, the material is circulated for a minimum of four hours and sampled. This sample is analyzed for assay and specific gravity. The assay must be 41.00% active before Packaging can start. The specific gravity measurement is used to calculate the minimum average gross fill weight for the lot. This tank then constitutes a lot and is ready for packaging.

Plant personnel withdraw a 4 oz. sample from a filling head at two hour intervals while a given lot is packaged. Each two hour sample should be labeled with the date, time, lot number and sampler's name. A sampling log is kept, which must be filled in for each sample taken to show chain of custody.

B. Fayetteville Plant - Sampling

Shackle C is stored in a storage tank at the formulation plant. When the tank is full, it is circulated and sampled for complete analysis. When on specification, the storage tank is transferred to the lot tank.

The lot tank is circulated for 7 hours and sampled. the circulation is continued for another hour and another sample is taken. When the tank is on specification, which is determined by the analysis of the two samples, the material is drummed.

Plant personnel withdraw a 15-20 ml. aliquot from every 10th filled drum while a given lot is packaged. A sampling record is maintained indicating date, time, lot number and sampler's name for the composite sample.

C. Composite Sample Analysis

When the entire lot is packaged, the laboratory will composite the lot sampling and run a complete lot analysis. If the lot passes all specifications, including weight control limits, it is released for shipment.

D. Retains

The laboratory will retain a four ounce sample of each lot composite for a minimum of five years. Analytical records will be maintained for a five year period.

EXHIBIT B

The Formula II assets identified in Paragraph I.G. of this order shall include all rights obtained by Monsanto in connection with the Acquisition relating specifically to the formulation of a nonselective lawn and garden herbicide product developed or currently under development by Chevron as replacement or substitute for Chevron's Kleenup products and including as active ingredients a combination of 24D, MCPP, fusilade and diquat. The Formula II assets include, without limitation, the following:

(1) All Environmental Protection Agency and other federal and state regulatory agency registrations and applications for Formula II products, including the precise recipe or mixture of the four active ingredients and toxicology, stability, effectiveness, and such other studies as were conducted to support the EPA or other regulatory applications.

(2) All rights, title and interest in and to the contracts, if any, entered in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, brokers and distributors, agents, inventors, product testing and laboratory research institutions, providers of electronic data exchange services, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees relating exclusively to Formula II products.

CONCURRING STATEMENT OF COMMISSIONER DENNIS A. YAO

I concur with the Commission's vote to condition Monsanto's acquisition of Ortho's assets on the divestiture of the Kleenup brand name, related formulas, and the inventory of and certain purchase rights for Monsanto's patented product, glyphosate, currently held by Ortho. I write to address some of the economic issues raised by a proposed acquisition that would merge two competing products and would include a reacquisition of patented product by the patent holder.

Since Ortho's glyphosate inventory was acquired from Monsanto, the patent holder, one might argue that Monsanto's reacquisition of its own patented product would not entail any enlargement of patent power. This view, however, would over-simplify the economic analysis that is appropriate in a case like this. A critical fact here is that the proposed acquisition involves not only a reacquisition of patent rights or patented product alone, but also an acquisition of other assets whose value is significantly intertwined with that of the patented product. Regardless of how one would assess a reacquisition of patent rights or patented product alone, an acquisition of such a combination of assets by the patent holder potentially raises antitrust concerns.

The importance of assets that are related to the patent or patented product is underscored by the fact that a significant commercial value is generally achieved only when a patented idea is combined with complementary assets -- for example, productive capital, technology, a brand name, or a marketing and distribution network. Complementary assets can be characterized as either general or specific. A specific asset is one whose value is diminished when it is redeployed to its next-best use.¹ Once complementary assets add to the value of a patented idea, it is often difficult to disentangle what components of value derive from the patented idea itself or from other assets. This is particularly true for specific assets because, by definition, the value of optimally combined specific assets is more than the sum of its parts.

¹ Possible examples of specific assets are specialized plant and equipment, a unique production technology, a product's particular brand name image, or a specialized distribution network.

Specific complementary assets are potentially a source of product differentiation, which often makes it difficult for a patent holder to gain monopoly profit merely by controlling the price and quantity of the patented input. Moreover, the next-best use of these assets could be in combination with other inputs to form a new rival product that competes with products based on the patented idea. For these reasons, the acquisition or merger of such assets may have an anticompetitive effect. Indeed, it may be argued that the more specific the assets, the greater the potential for anticompetitive effect.

In this case, it appears that the two glyphosate-based products, Monsanto's Roundup and Ortho's Kleenup, are differentiated products, using different formulas and reflecting different brand name images. Therefore, Monsanto's proposed acquisition of Ortho involves a patented product and several specific complementary assets potentially relevant to the residential nonselective herbicide market: Ortho's inventory of and purchase rights for glyphosate products, the Ortho brand name and specialized distribution network, and the Kleenup brand name and formula. The Kleenup brand name is linked directly to the market for residential nonselective herbicides and to the functional properties of glyphosate as well.

Thus, this transaction involves more than simply a reacquisition of patented products. Among other things, the proposed acquisition would eliminate brand name competition between Monsanto's Roundup and Ortho's Kleenup, raising the concentration of assets in the market for residential nonselective herbicides and likely increasing Monsanto's ability unilaterally to exercise market power in the relevant market.

Divestiture of the Kleenup brand name and related formulas mitigates the likely anticompetitive effects of the merger, particularly when combined with divestiture of the Ortho glyphosate inventory and purchase rights, which increases the value of the divested Kleenup brand name by permitting Kleenup to remain a glyphosate product. For this and other reasons, I concur.

IN THE MATTER OF

MICHAEL S. LEVEY, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3459. Complaint, Sept. 23, 1993--Decision, Sept. 23, 1993*

This consent order prohibits, among other things, the California-based producers of infomercials from misrepresenting infomercials as independent programming rather than paid advertising and from selling any baldness or impotence product not approved by the Food and Drug Administration; and requires the respondents to have competent and reliable scientific evidence to support any representations about the efficacy or safety of any food, drug or device they sell. In addition, the respondents are required to pay \$275,000 in consumer redress.

Appearances

For the Commission: *Kathryn C. Nielsen* and *Patricia Hensley*.

For the respondents: *Harvey Saferstein* and *Alexander Wiles*,
Irell & Manella, Topanga, CA.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Positive Response Marketing, Inc., a corporation, also trading and doing business as Positive Response Television and Positive Response Advertising, and Michael S. Levey, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows: