

IN THE MATTER OF

CONSOL, INC.

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-3460. Complaint, Sept. 27, 1993--Decision, Sept. 27, 1993

This consent order permits, among other things, the Pennsylvania-based provider of coal export terminal services to acquire Island Creek Coal, Inc., but it requires the respondent to divest the Curtis Bay Company to a Commission-approved acquirer within 12 months, and to obtain, for the next 10 years, prior Commission-approval before acquiring any interest in any concern that provides export coal terminal services in the Port of Baltimore or within 50 miles of it.

Appearances

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

For the respondent: *Randy Smith, Crowell & Moring*, Washington, D.C. and *Debbie Feinstein, Arnold & Porter*, Washington, D.C.

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 Consol, Inc. (Consol), a joint venture corporation, wholly and equally owned by E.I. du Pont de Nemours (du Pont) and RWE Aktiengesellschaft (RWE), has agreed to acquire the stock of Island Creek Coal, Inc., including the Curtis Bay Company which owns and operates the Bayside Coal Pier, a coal export terminal located in Baltimore, Maryland, 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 Consol 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 1800 Washington Road, Pittsburgh, Pennsylvania. Consol is fifty (50) percent owned by du Pont and fifty (50) percent owned by RWE.

2. Consol 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. Consol has agreed to acquire from Occidental Petroleum Corporation (OPC) the voting securities of Island Creek Coal, Inc. (Island Creek), a wholly-owned indirect subsidiary of OPC, for approximately \$480 million, including \$25 million in cash and contingency payments valued in excess of \$454 million. Island Creek operates coal mines and an export coal terminal in Baltimore, Maryland, and is headquartered at 250 West Main Street, Lexington, Kentucky.

III. THE RELEVANT MARKET

4. The relevant line of commerce within which to analyze the effects of Consol’s proposed acquisition is coal export terminal services, which include receiving coal on rail cars, unloading those rail cars, storing coal, blending of coals, and loading coal onto deep draft seagoing vessels for shipment to foreign countries.

5. The relevant section of the country within which to analyze the effects of the proposed acquisition is Baltimore, Maryland. Coal fields located in Pennsylvania, Maryland, and northern West Virginia served by the B&O portion of the CSX railroad and/or Continental Railroad must ship their coal for export to Baltimore.

IV. MARKET STRUCTURE

6. Consol and Island Creek are the two leading providers of export coal terminal services in the relevant market.

7. The Consol coal terminal located at the port of Baltimore has an annual practical capacity of approximately 11.5 million tons. Consol shipped approximately 9.1 million tons of coal for export in 1992, generating approximately \$18 million in revenue.

8. Island Creek's Bayside coal terminal, located at the port of Baltimore, has an annual practical capacity of approximately 6.3 million tons. Bayside shipped approximately 972 thousand tons of coal for export in 1992, generating approximately \$2 million in revenue.

9. The export coal terminal services market in the relevant geographic area is already highly concentrated, whether measured by the Herfindahl-Hirschmann Index or four-firm concentration ratios. Consol is the leading provider of export coal terminal services in the relevant market with approximately 65% of export capacity. In 1992, the Consol terminal serviced 90% of the export coal tonnage at the port of Baltimore. Island Creek's Bayside export coal terminal in Baltimore has approximately 35% of export capacity. In 1992, the Bayside terminal serviced 10% of the total export coal tonnage at Baltimore.

V. ENTRY CONDITIONS

10. Entry into the Baltimore export coal terminal services industry would take well in excess of two years and is unlikely because of the need for high capital expenditures, substantial sunk

costs, depressed demand, and the time required to obtain environmental permits and to design and build an export coal terminal.

VI. EFFECTS OF THE ACQUISITION

11. 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 Island Creek's terminal as a substantial independent competitive force in the relevant market;

(b) It will eliminate actual, direct and substantial competition between Consol and Island Creek;

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

(d) It will allow Consol to unilaterally exercise market power, which will result in higher prices being paid by coal producers for coal export services;

(e) It will result in a transfer of wealth between buyers (coal producers) and sellers (export coal terminals) of coal terminal services; and

(f) It may lead to a reduction of coal production in northern Appalachia and result in a misallocation of resources.

VII. VIOLATIONS CHARGED

12. 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.

13. The proposed acquisition of Island Creek from OPC by Consol, if consummated, would constitute violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission, having initiated an investigation of the proposed acquisition by Consol, Inc. of the stock of Island Creek Coal, Inc., 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 jurisdictional findings and enters the following order:

1. Consol 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 1800 Washington Road, Pittsburgh, PA.
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.

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

(a) “*Consol*” means Consol, Inc. (a wholly and equally owned joint venture between E.I. du Pont de Nemours and RWE Aktiengesellschaft), Consol, Inc.’s joint venture parents, its predecessors, successors and assigns, divisions, subsidiaries, affiliates, companies, groups, partnerships and joint ventures that Consol controls, directly or indirectly, and their directors, officers, employees, agents and representatives, and their respective successors and assigns.

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

(c) “*Curtis Bay*” means the Curtis Bay Company or all assets of the Curtis Bay Company, including, but not limited to, the Bayside Coal Pier and all assets used in the maintenance or operation of the Bayside Coal Pier located in the Port of Baltimore, Maryland.

(d) “*Acquisition*” means the acquisition by Consol from OPC of the stock of Island Creek Coal, Inc., a subsidiary of OPC.

(e) “*Commission*” means the Federal Trade Commission.

(f) “*Export Coal Terminal Services*” means the receiving of coal by rail, its storage, blending, and loading on vessels for shipment to a foreign country.

II.

It is ordered, That Consol shall comply with all the terms of the Hold Separate Agreement executed on June 25, 1993, and attached hereto as Appendix A and made a part of this order. The Hold Separate Agreement shall continue in effect until such time as

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

III.

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

IV.

It is further ordered, That within twelve (12) months after the date this order becomes final Consol shall divest, absolutely and in good faith, Curtis Bay. The divestiture shall be made only in a manner that receives the prior approval of the Commission and only to an acquirer that receives the prior approval of the Commission. The purpose of the divestiture is to maintain Curtis Bay as an independent competitor in the coal export terminal services business and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint. The divestiture shall also be consistent with covenants in applicable Revenue Bonds requiring that the facility be used as "docks, wharves or storage facilities" and in the Safe Harbor Leases requiring that the equipment covered by those leases not be removed from the facility and be maintained in operable condition, including the provision of any certifications or reports required by the Internal Revenue Code.

V.

It is further ordered, That:

A. If Consol has not fully complied, absolutely and in good faith, with paragraph IV of this order within the time period provided in such paragraph, Consol shall consent to the appointment by the Commission of a trustee to divest Curtis Bay. 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, Consol shall similarly consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(1) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Consol 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, Consol 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 Consol, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Consol has not opposed the selection of a proposed trustee within fifteen (15) days after notice by the Commission's staff to Consol of the identity of the proposed trustee, Consol 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 Curtis Bay, and to make any further arrangements that may be reasonably necessary to maintain the viability and competitiveness of the business.

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

(4) The trustee shall have full and complete access to the personnel, books, records, and facilities related to Curtis Bay, or to any other relevant information, as the trustee may request. Consol shall develop such financial or other information as such trustee may request and shall cooperate with any request of the trustee. Consol shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in the granting of divestiture caused by Consol 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 Consol's absolute and unconditional obligation to divest at no minimum price, and the purpose of the divestiture as stated in paragraph IV of this order, the trustee shall use his or her best efforts to negotiate the most favorable price and terms available for the divestiture. The divestiture shall be made in the manner set out in paragraph IV of this order, provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by Consol from among those approved by the Commission.

(6) The trustee shall serve, without bond or other security, at the cost and expense of Consol, on such reasonable and customary terms and conditions as the Commission or, in the case of a court-appointed trustee, the court may set. The trustee shall have authority to

employ, at the cost and expense of Consol, 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 Consol 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 Curtis Bay.

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

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

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

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

(11) The trustee shall have no obligation or authority to operate or maintain Curtis Bay.

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

VI.

It is further ordered, That, within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until Consol has fully complied with the provisions of paragraph IV of this order, Consol 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. Consol shall include in its compliance reports, among other things that are required from time to time, a full description of all substantive contacts or negotiations for the divestiture, including the identity of all parties contacted. Consol 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, Consol shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any stock, share capital, equity or other interest in any concern, corporate or non-corporate, presently engaged in, within the past two years engaged in, or in the process of attempting to engage in providing export coal terminal services in the Port of Baltimore, Maryland or within 50 miles of the Port of Baltimore, Maryland.

B. Acquire any assets used for, or previously used for (and still suitable for use for) the providing of coal export terminal services from any concern, corporate or non-corporate, presently engaged in, within the past two years engaged in, or in the process of attempting to engage in providing export coal terminal services in the Port of Baltimore, Maryland or within 50 miles of the Port of Baltimore, except in the ordinary course of business.

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

VIII.

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

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

IX.

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

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate (the "Agreement") is by and between Consol, Inc. (Consol), a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located at 1800 Washington Road, Pittsburgh, PA., and the Federal Trade Commission (the "Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively, the "Parties").

Premises

Whereas, Consol intends to purchase 100% of the voting securities of Island Creek Coal, Inc. (Island Creek) a subsidiary of Occidental Petroleum Corporation (hereinafter the "Acquisition"); and

Whereas, Consol and Island Creek both own and operate coal export terminals in the Port of Baltimore, Maryland; and

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

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

Whereas, the Commission is concerned that if an understanding is not reached, preserving the *status quo ante* with respect to the coal export terminals owned by Island Creek and Consol during the period prior to the final acceptance of the Consent Order by the Commission (after the 60-day public notice period), divestiture resulting from any proceeding challenging the legality of the Acquisition might not be possible, or might be less than an effective remedy; and

Whereas, the Commission is concerned that if the Acquisition is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of Island Creek's Curtis Bay Company ("Curtis Bay") as described in paragraph I of the Consent Order and the Commission's right to seek to restore Curtis Bay as a viable competitor in the coal export terminal services business; and

Whereas, the purpose of this Agreement and the Consent Order is to:

- (i) Preserve Curtis Bay as a viable independent business pending its divestiture as a viable and ongoing enterprise,
- (ii) Remedy any anticompetitive effects of the Acquisition, and
- (iii) Preserve Curtis Bay as an ongoing, viable entity engaged in the coal export terminal services business in the event that divestiture is not achieved; and

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

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

Now, therefore, the Parties agree, upon understanding that the Commission has determined that it has reason to believe the acquisition may substantially lessen competition, and in consideration of the Commission's agreement that, unless the Commission determines to reject the Consent Order, it will not seek further relief from Consol with respect to effects of the Acquisition on coal export terminal services in the Port of Baltimore, Maryland, except that the Commission may exercise any and all rights to enforce this Agreement and the Consent Order to which it is annexed and made a part thereof, and, in the event the required divestiture is not accomplished, to seek divestiture of Curtis Bay pursuant to the Consent Agreement, and other relief, as follows:

1. Consol agrees to execute and be bound by the attached Consent Order.

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

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

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

c. The day after the divestiture required by the Consent Order have been completed.

3. Consol will hold Curtis Bay, as it is presently constituted, separate and apart on the following terms and conditions:

a. Curtis Bay shall be held separate and apart and shall be operated independently of Consol (meaning here and hereinafter, Consol excluding Curtis Bay and excluding all personnel connected with Curtis Bay on behalf of Island Creek as of the date this Agreement was signed) except to the extent that Consol must exercise direction and control over Curtis Bay to assure compliance with this Agreement or the Consent Order.

b. Consol shall not exercise direction or control over, or influence directly or indirectly, Curtis Bay; *provided, however*, that Consol may exercise only such direction and control over Curtis Bay as is necessary to assure compliance with this Agreement or the Consent Order.

c. Consol shall maintain the viability and marketability of Curtis Bay and shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair its marketability or viability.

d. Except for the single Consol director, officer, employee or agent serving on the "New Board" (as defined in subparagraph 3.i),

Consol shall not permit any director, officer, employee, or agent of Consol to also be a director, officer or employee of Curtis Bay.

e. Except as required by law or as reported by the auditor (provided for in subparagraph 3.f) and except to the extent that necessary information is exchanged in the course of defending investigations or litigation, obtaining legal advice, acting to assure compliance with this Agreement or the Consent Order (including accomplishing the divestiture), and except to the extent that certain designated individuals on Consol's accounting staff may provide accounting services to Curtis Bay (at no cost to Curtis Bay), Consol shall not receive or have access to, or the use of, any of Curtis Bay's "material confidential information" not in the public domain, except as such information would be available to Consol in the normal course of business if the Acquisition had not taken place. 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 Consol, and includes but is not limited to customer lists, customers, price lists, prices, individual transactions, marketing methods, patents, technologies, processes, or other trade secrets).

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

g. Consol shall not change the composition of the management of Curtis Bay except that the non-Consol (as Consol is defined in subparagraph 3.a hereof) directors or members serving on the New Board (as defined in subparagraph 3.i hereof) shall have the power to remove employees for cause.

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

approval of a majority of the New Board (as defined in subparagraph 3.i hereof).

i. Consol shall elect a new three-person board of directors of Curtis Bay ("New Board") once it obtains title to Curtis Bay. Consol may elect the directors to the New Board provided, however, that no director of the New Board shall have had prior responsibility for, or knowledge of confidential information regarding, Consol's coal export terminal services business, and no more than one Consol director, officer, employee, or agent shall be a director of the New Board ("Consol director"). Except as permitted by this Agreement, no Consol director, so long as he or she serves as a director, shall receive, in his or her capacity as a director of the New Board, material confidential information and shall not disclose any such information received under this Agreement to Consol or use it to obtain any advantage for Consol. Such Consol director shall participate in matters which come before the New Board only for the limited purpose of considering a capital investment or other transactions exceeding \$500,000 and carrying out Consol's responsibilities under this Agreement or the Consent Order. Except as permitted by this Agreement, such Director shall not participate in any matter, or attempt to influence the votes of the other directors with respect to matters that would involve a conflict of interest if Consol and Curtis Bay were separate and independent entities. Meetings of the New Board during the term of this Agreement shall be stenographically transcribed and the transcripts retained for two (2) years after the termination of this Agreement.

j. Any Consol employee who obtains or may obtain confidential information under this Agreement shall enter a confidentiality agreement prohibiting disclosure of confidential information until the day after the divestiture required by the Consent Order have been completed.

k. All earnings and profits of Curtis Bay shall be retained separately in or on behalf of Curtis Bay. If necessary, Consol shall provide Curtis Bay with sufficient working capital to operate at the current rate of operation.

1. Should the Federal Trade Commission seek in any proceeding to compel Consol (meaning here and hereinafter Consol including Curtis Bay) to divest itself of Curtis Bay or to compel Consol to divest any assets or businesses of Curtis Bay that it may hold, or to seek any other injunctive or equitable relief, Consol 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 the Acquisition. Consol also waives all rights to contest the validity of this Agreement.

4. 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 Consol made to its principal office, Consol shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of Consol 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 Consol relating to compliance with this Agreement;

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

5. This agreement shall not be binding until approved by the Commission.

Complaint

116 F.T.C.

IN THE MATTER OF

UNITED REAL ESTATE BROKERS OF ROCKLAND, LTD.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3461. Complaint, Sept. 27, 1993--Decision, Sept. 27, 1993*

This consent order prohibits, among other things, the New York provider of real estate brokerage services from restricting exclusive-agency listings; restricting brokers from soliciting homeowners with current listings for future business; interfering with the cancellation of a listing; and excluding from membership brokers who do not operate a full-time office, or maintain an office in Rockland County, or who are not residents of New York state.

*Appearances*For the Commission: *Michael J. Bloom and Rhonda McLean.*For the respondent: *David Silverman, Granik, Silverman, Sandberg, Campbell & Nowicki, New York, N.Y.*

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 respondent United Real Estate Brokers of Rockland, Ltd., a corporation and successor by merger with its former wholly-owned subsidiary Rockland County Multiple Listing Systems, Inc., has 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 as follows:

PARAGRAPH 1. Respondent United Real Estate Brokers of Rockland, Ltd. (hereafter "Rockland MLS") is a corporation organized, existing, and doing business under and by virtue of the laws of