

IN THE MATTER OF

MARTIN MARIETTA CORPORATION

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-3500. Complaint, June 22, 1994--Decision, June 22, 1994

This consent order prohibits, among other things, the respondent's Expendable Launch Vehicle (ELV) division from disclosing to its satellite division any non-public information that its ELV division receives from a satellite manufacturer, and requires the respondent to give a copy of the consent order to U.S. satellite owners or manufacturers before obtaining any non-public information from them.

Appearances

For the Commission: *Ann B. Malester* and *Casey Triggs*.

For the respondent: *Raymond A. Jacobsen* and *Scott McGreggin*,
Howrey & Simon, Washington, D.C.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, Martin Marietta Corporation ("Martin Marietta"), a corporation subject to the jurisdiction of the Federal Trade Commission, agreed to acquire certain assets of General Dynamics Corporation, a corporation subject to the jurisdiction of the Federal Trade Commission, 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 ("FTC Act"), 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. DEFINITIONS

For the purposes of this complaint the following definitions apply:

1. “*Atlas-class Expendable Launch Vehicle*” means a vehicle that launches Satellites of 4,000 to 8,000 pounds from the Earth’s surface to geotransfer orbit and that is consumed during the process of launching a Satellite and therefore cannot be launched more than one time.

2. “*Satellite*” means an unmanned machine that is launched from the Earth’s surface for the purpose of transmitting data back to Earth and which is designed either to orbit the Earth or travel away from the Earth.

II. MARTIN MARIETTA CORPORATION

3. Respondent Martin Marietta is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Maryland, with its principal place of business located at 6801 Rockledge Drive, Bethesda, Maryland.

4. Respondent, through its Astronautics Company and Astro Space Company, is engaged in the research, development, manufacture and sale of Satellites.

5. Respondent, through its Astronautics Company and the proposed acquisition of substantially all of the assets relating to General Dynamics Corporation’s Space Systems Division, would be engaged in the research, development, manufacture and sale of Atlas-class Expendable Launch Vehicles, which deliver Satellites into orbit.

III. GENERAL DYNAMICS CORPORATION

6. General Dynamics Corporation 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 3190 Fairview Park Drive, Falls Church, Virginia.

7. General Dynamics Corporation, through its Space Systems Division, is engaged in the research, development, manufacture and sale of Atlas-class Expendable Launch Vehicles, which deliver Satellites into orbit.

IV. JURISDICTION

8. For purposes of this proceeding, respondent Martin Marietta 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 or practices are in or affecting commerce as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

V. THE ACQUISITION

9. On December 22, 1993, Martin Marietta agreed to acquire substantially all of the assets, and assume certain liabilities, relating to General Dynamics Corporation’s Space Systems Division for consideration totaling approximately \$208.5 million.

VI. TRADE AND COMMERCE

10. The relevant lines of commerce are the research, development, manufacture and sale of Satellites and the research, development, manufacture and sale of Atlas-class Expendable Launch Vehicles.

11. The relevant section of the country in which to evaluate the effects of the acquisition is the United States.

12. The relevant line of commerce consisting of the research, development, manufacture and sale of Atlas-class Expendable Launch Vehicles is highly concentrated, whether measured by Herfindahl-Hirschmann Indices (“HHI”) or two-firm and four-firm concentration ratios.

13. Entry into the research, development, manufacture and sale of Atlas-class Expendable Launch Vehicles is difficult and unlikely.

VII. EFFECTS OF THE ACQUISITION

14. The effect of the acquisition may be substantially to lessen competition and to tend to create a monopoly in the market for the research, development, manufacture and sale of Satellites in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The acquisition may increase and enhance the position and ability of Martin Marietta to gain access to competitively significant and non-public information concerning other Satellite manufacturers.

15. The effect identified in paragraph fourteen may increase the likelihood that, in the market for the research, development, manufacture and sale of Satellites:

- a. Direct actual competition between Martin Marietta and Satellite manufacturers will be reduced; and
- b. Advancements in Satellite research, innovation, and quality will be reduced.

VIII. VIOLATIONS CHARGED

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

17. The acquisition described in paragraph nine, 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 certain assets of the Space Systems Division of General Dynamics Corporation, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations 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; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of 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 a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with

the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Martin Marietta is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located at 6801 Rockledge Drive, Bethesda, Maryland.

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. “*Martin Marietta*” or “*respondent*” means Martin Marietta Corporation, its predecessors, subsidiaries, divisions, groups and affiliates controlled by Martin Marietta, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

B. “*Astronautics*” means Martin Marietta’s Astronautics Company, an entity with its principal place of business at P.O. Box 179, Denver, Colorado, which is engaged in, among other things, the research, development, manufacture and sale of Expendable Launch Vehicles and Satellites, as well as its officers, employees, agents, divisions, subsidiaries, successors, and assigns, and the officers, employees or agents of Astronautics’s divisions, subsidiaries, successors and assigns.

C. “*Astro Space*” means Martin Marietta’s Astro Space Company, an entity with its principal place of business at P.O. Box 800, Princeton, New Jersey, which is principally engaged in the research, development, manufacture and sale of Satellites, its officers, employees, agents, divisions, subsidiaries, successors and assigns, and the officers, employees or agents of Astro Space’s divisions, subsidiaries, successors and assigns.

D. “*General Dynamics*” means General Dynamics Corporation, a corporation organized, existing and doing business under the laws of Delaware with its principal place of business at 3190 Fairview Park Drive, Falls Church, Virginia.

E. “*Person*” means any natural person, corporate entity, partnership, association, joint venture, government entity, trust or other business or legal entity.

F. “*Commission*” means the Federal Trade Commission.

G. “*Expendable Launch Vehicle*” means a vehicle that launches satellites from the Earth’s surface that is consumed during the process of launching a Satellite and therefore cannot be launched more than one time.

H. “*Satellite*” means an unmanned machine that is launched from the Earth’s surface for the purpose of transmitting data back to Earth and which is designed either to orbit the Earth or travel away from the Earth.

I. “*Acquisition*” means the acquisition by Martin Marietta of substantially all of the assets relating to General Dynamics Corporation’s Space Systems Division.

J. “*Non-Public Information*” means any information not in the public domain furnished by a Satellite owner or manufacturer to Astronautics or General Dynamics in their capacity as providers of Expendable Launch Vehicles and (a) if written information, designated in writing by the Satellite owner or manufacturer as proprietary information by an appropriate legend, marking, stamp, or positive written identification on the face thereof, or (b) if oral, visual or other information, identified as proprietary information in writing by the Satellite owner or manufacturer prior to the disclosure or within thirty (30) days after such disclosure. Non-Public Information shall not include (i) information already known to Martin Marietta, (ii) information which subsequently falls within the public domain through no violation of this order by Martin Marietta, (iii) information which subsequently becomes known to Martin Marietta from a third party not in breach of a confidential disclosure agreement with such Satellite owner or manufacturer, or (iv) information after six (6) years from the date of disclosure of such Non-Public information to Martin Marietta or such other period as agreed to in writing by Martin Marietta and the Satellite owner or manufacturer.

II.

It is further ordered, That:

A. Martin Marietta shall not, absent the prior written consent of the proprietor of Non-Public Information, provide, disclose, or otherwise make available to Astro Space any Non-Public Information; and

B. Martin Marietta shall use any Non-Public Information obtained by Astronautics only in Astronautics' capacity as a provider of Expendable Launch Vehicles, absent the prior written consent of the proprietor of Non-Public Information.

III.

It is further ordered, That Martin Marietta shall deliver a copy of this order to any United States Satellite owner or manufacturer prior to first obtaining any information relating to the owner's or manufacturer's Satellites outside the public domain either from the Satellite owner or manufacturer or through the acquisition.

IV.

It is further ordered, That one (1) year from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at such other times as the Commission may require, respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with this order. To the extent not prohibited by United States Government national security requirements, respondent shall include in its reports information sufficient to identify all United States Satellite owners or manufacturers with whom respondent has entered an agreement for the research, development, manufacture or sale of Expendable Launch Vehicles.

V.

It is further ordered, That respondent shall notify the Commission at least thirty days prior to any proposed change in respondent, such

as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in respondent, that may affect compliance obligations arising out of this order.

VI.

It is further ordered, That, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege and applicable United States Government security requirements, upon written request, and on reasonable notice, respondent shall permit any duly authorized representative of the Commission:

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

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

DISSENTING STATEMENT OF COMMISSIONER DEBORAH K. OWEN

Respondent Martin Marietta Corporation manufactures satellites, which are launched into orbit by expendable launch vehicles, some of which it also manufactures. It proposed to acquire the Space Systems Division of General Dynamics Corporation, which manufactures Atlas-class expendable launch vehicles. The theory of the complaint is that if this acquisition were consummated, Martin Marietta's launch vehicle division would gain access to trade secrets concerning the products of other satellite manufacturers, and would transfer such information to Martin Marietta's satellite division, which will use such information to injure its competitors. The Commission's order enjoins Martin Marietta from misusing its rival's confidential information in this manner.

Vertical integration, and combinations designed to achieve the efficiencies of such integration, are common phenomena, particularly

in the aerospace industry. Accordingly, it would seem that there are already ample opportunities for the sort of abusive information-sharing which concerns the Commission. However, equally common are contractual obligations between vertically integrated companies, and firms that do business with one of their divisions, to prevent the sharing of those firms' confidential business information with other parts of the conglomerate with which they compete. The question then is whether such contracts are sufficient to avoid any competitive problem, or whether government-imposed requirements are necessary; if there exist a significant number of substantiated incidents of such activity, then private agreements would not seem adequate. However, the opposite appears to be the case.

While various Commission personnel have, in recent years, exhorted the business community to be sensitive to antitrust concerns stemming from the sharing of business information, Commission enforcement actions in this area have been rare, and no case has involved the strategic misuse of proprietary information so as to injure a competitor. Furthermore, Martin Marietta currently manufactures both satellites and launch vehicles, and is already privy to competitively significant information from other satellite manufacturers, yet I am unaware of any instance where it has been alleged that proprietary information has been used for exclusionary purposes by Martin Marietta, or indeed by any other aerospace manufacturer. As a result, it seems fair to conclude that contractual obligations prohibiting such behavior, coupled with the threat of business tort and treble-damage antitrust suits, are sufficient deterrents. Moreover, as the amount of available business in the aerospace industry continues to dwindle, it is hard to imagine that developing a reputation for abusing confidential information would enhance any company's profitability.

The Commission's consent is somewhat puzzling in its coverage. If the theory of the complaint is correct -- that Martin Marietta's dominant power in the launch vehicle market would facilitate anticompetitive information-sharing in the satellite market -- why would the company stop there? The theory would seem to support as well allegations of other exclusionary and tying practices, yet these are not included. The Commission, correctly I believe, concluded that there was no evidence to support such charges; I therefore find

it strange that it chose to go forward on the equally speculative information-sharing allegations.

In short, I do not believe that the evidence supports the theory behind the Commission's complaint, nor that a Commission order would be superior to privately negotiated confidentiality agreements for protecting the trade secrets of satellite manufacturers. I dissent.

IN THE MATTER OF

VEIN CLINICS OF AMERICA, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3501. Complaint, June 24, 1994--Decision, June 24, 1994*

This consent order prohibits, among other things, an Illinois-based corporation and its officer from misrepresenting the rate of likely recurrence for any venous disease following treatment, or misrepresenting the newness, past availability, safety, risks or potential side-effects of any cosmetic or plastic surgery procedure. In addition, the consent order requires the respondents to have scientific evidence to substantiate any representations it makes about any cosmetic or plastic surgery procedure it markets or sells in the future.

Appearances

For the Commission: *Richard F. Kelly, Sondra Mills and Melissa Feinberg.*

For the respondents: *Robert E. Kehoe and Daniel S. Kaplan, Wildman, Harrold, Allen & Dixon, Chicago, IL.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Vein Clinics of America, Inc., a corporation, and D. Brian McDonagh, M.D., individually and as an officer of said corporation (hereinafter "respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Vein Clinics of America ("VCA") is a Delaware corporation, with its corporate headquarters at 1101 Perimeter Drive, Suite 615, Schaumburg, Illinois. Respondent has offices in fifteen cities located in the states of California, Georgia, Illinois, Maryland, Kansas, and Michigan.

Respondent D. Brian McDonagh, M.D., is the Chairman of the Board and National Medical Director of Vein Clinics of America. His address is 1535 Lake Cook Road, Northbrook, IL.