

IN THE MATTER OF

SHELL OIL COMPANY, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3912. Complaint, Dec. 22, 1999--Decision, Dec. 22, 1999*

This consent order, among other things, prohibits two Texas-based corporations, that manufacture, advertise, and distribute gasoline additives, from making any representation regarding the performance, benefits, efficacy, attributes or use of fuel additive products or ingredients unless, they possess and rely upon competent and reliable scientific evidence that substantiates the representation. In addition, the consent order prohibits the respondents from misrepresenting the existence, contents, validity, results, or interpretation of any test, study, or research regarding such products.

Participants

For the Commission: *Michael Dershowitz, Sydney Knight, C. Lee Peeler, Lisa Daniel, Susan Braman and Genevieve Fu.*

For the respondents: *Barry Cutler, Baker & Hostetler, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Shell Oil Company, a corporation, and Shell Chemical Company, a corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Shell Oil Company ("Shell Oil") is a Delaware corporation. Respondent Shell Chemical Company ("Shell Chemical") is a Delaware corporation and a wholly-owned subsidiary of Shell Oil. Shell Oil and Shell Chemical have their principal offices or places of business at One Shell Plaza, 910 Louisiana Street, Houston, TX. Shell Oil controls the acts and practices of its subsidiary Shell Chemical.

2. Respondents have manufactured, tested, advertised, offered for sale, sold, and distributed motor vehicle gasoline additives, including the VEKTRON™ 3000 series of gasoline additives. This series of additives contains the active ingredient polyether pyrrolidone ("PEP"), a molecule patented for use in gasoline additives. Respondents have advertised and sold these additives to trade customers for use in their

fuel system treatment products. The trade customers who have purchased these additives include Castrol North America Automotive, Inc. ("Castrol") and Blue Coral/Slick 50, Inc. ("Blue Coral/Slick 50"). Castrol and Blue Coral/Slick 50 have marketed fuel system treatment products containing respondents' additives as their active ingredient to the public under the brand names Castrol Syntec Power System and Slick 50 Synchron Premium Octane Treatment, respectively.

3. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

4. Respondents have promoted their PEP-containing additives to trade customers through their Internet website, advertisements in trade publications, and a promotional videotape, among other means, including the attached Exhibits A through D. These materials have been provided to trade customers, including Castrol and Blue Coral/Slick 50, and contain the following statements and depictions:

A. VEKTRON™ 3000 Gasoline Additives

Tests Confirm revolutionary additive's unique performance advantages.

To demonstrate that VEKTRON™ 3000 additized gasoline returns power to engines equipped with knock sensors, we conducted field acceleration tests using a runway at the Westheimer Airport in Houston, Texas. . . . The results: all of the test cars with gasoline containing VEKTRON™ 3000 Additive performed better in every acceleration range versus those run on base fuel with EPA-grade additive After running the cars with VEKTRON™ 3000 Additive, acceleration was improved by .6 seconds and 32 feet, roughly two car lengths faster. . . . VEKTRON™ 3000 Gasoline Additive is based on a revolutionary new technology that has proven to provide superior performance: returning power to engines. . . .

[Exhibit A: Internet Advertisement]

B. VEKTRON™ 3000 Gasoline Additives

A Revolutionary New Advancement In Gasoline Additive Technology

* * * *

ACCELERATION

In vehicles fitted with electronic knock sensors, the use of VEKTRON™ 3000 Additive technology can provide power and acceleration benefits unattainable from other technologies.

A bar graph depicts acceleration results based upon results achieved (1) with a clean engine, (2) with an EPA grade additive, and (3) with respondents' PEP-containing additive.

[Exhibit B: Internet Advertisement]

C. OUR NEW VIDEO SHOWS PERFORMANCE SO HOT WE'VE RATED IT "R"

* * * *

Every additive supplier makes superiority claims. Shell Additives would like to prove theirs. Our new VEKTRON™ 3000 Gasoline Additives go beyond merely removing some of the engine deposits; they actually can help restore and maintain power and performance by chemically enhancing the combustion process.

* * * *

[Exhibit C: Trade Publication advertisement]

D. Promotional video depicts actual field acceleration tests conducted by Shell, and graphically depicts a car with respondents' PEP-containing additives going 2 car lengths faster than a car that does not contain respondents' additives. The video depicts what this test data "means to consumers": (a) that in trying to pass a truck on a two-lane roadway, a car with respondents' PEP-containing additives is able to accelerate just fast enough to pass the truck and avoid a head-on collision with an oncoming tractor trailer truck in the other lane; and (b) in merging into the flow of highway traffic at high speed, a car with respondents' PEP-containing additive is able to accelerate and merge fast enough to barely avoid an accident with an 18-wheel tractor trailer.

[Exhibit D: Promotional video advertisement]

5. Through the means described in paragraph four, respondents have represented, expressly or by implication, that:

A. Respondents' PEP-containing additives significantly improve engine power and acceleration in motor vehicles generally.

B. Respondents' PEP-containing additives are superior to other fuel system additives in improving engine power and acceleration in motor vehicles generally.

6. Through the means described in paragraph four, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph five, at the time the representations were made.

7. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph five, at the time the representations were made. Therefore, the representation set forth in paragraph six was, and is, false or misleading.

8. Through the means described in paragraph four, respondents have represented, expressly or by implication, that:

A. Scientific tests prove that respondents' PEP-containing additives significantly improve engine power and acceleration in motor vehicles generally.

B. Scientific tests prove that respondents' PEP-containing additives are superior to other fuel system additives in improving engine power and acceleration in motor vehicles generally.

9. In truth and in fact:

A. Scientific tests do not prove that respondents' PEP-containing additives significantly improve engine power and acceleration in motor vehicles generally.

B. Scientific tests do not prove that respondents' PEP-containing additives are superior to other fuel system additives in improving engine power and acceleration in motor vehicles generally.

Therefore, the representations set forth in paragraph eight were, and are, false or misleading.

10. Respondents have performed tests of their PEP-containing additives relating to their purported acceleration benefits, as well as tests for their trade customers, including Castrol and Blue Coral/Slick 50, of the PEP-containing formulations of those customers' fuel system treatment products sold to the public. In connection with the promotion and sale of their PEP-containing additives, respondents have reported the results of those tests to their trade customers. In so doing, respondents have represented to their trade customers, expressly or by implication, that:

A. The reported test results constitute scientific proof that respondents' PEP-containing additives, and fuel system treatment products containing respondents' PEP-containing additives, significantly improve engine power and acceleration in motor vehicles generally.

B. The reported test results constitute scientific proof that respondents' PEP-containing additives, and fuel system treatment products containing respondents' PEP-containing additives, are superior to other fuel system additives in improving engine power and acceleration in motor vehicles generally.

11. In truth and in fact:

A. The reported test results referred to in paragraph ten do not constitute scientific proof that respondents' PEP-containing additives, and fuel system treatment products containing respondents' PEP-containing additives, significantly improve engine power and acceleration in motor vehicles generally.

B. The reported test results referred to in paragraph ten do not constitute scientific proof that respondents' PEP-containing additives, and fuel system treatment products containing respondents' PEP-containing additives, are superior to other fuel system additives in improving engine power and acceleration in motor vehicles generally.

Therefore, the representations set forth in paragraph ten were, and are, false or misleading.

12. By providing their trade customers, including Castrol and Blue Coral/Slick 50, with the advertising and promotional materials referred to in paragraph four, and with the test data and reports referred to in paragraph ten, respondents have furnished the means and instrumentalities to those customers to engage in deceptive acts and practices in violation of Section 5(a) of the Federal Trade Commission Act.

13. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 (a) of the Federal Trade Commission Act.

Commissioner Swindle dissenting and Commissioner Leary not participating.

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EXHIBIT A

VEKTRONTM 3000 ADDITIVES

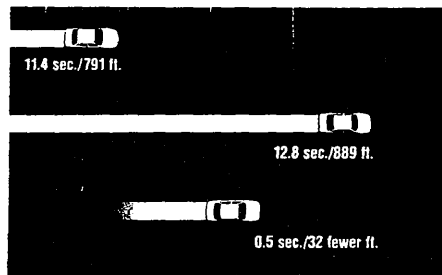
EXHIBIT A

Tests confirm revolutionary additive's unique performance advantages.

To demonstrate that VEKTRONTM 3000 additized gasoline returns power to engines equipped with knock sensors, we conducted field acceleration tests using a runway at the Westheimer Airport in Houston, Texas. The experiment physically measured time and distance of acceleration

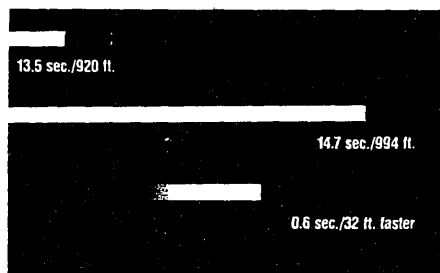
from 15 to 70 miles per hour with two sets of cars: three each of Dodge Intrepid LEs and Lexus GS300s.

The results: all of the test cars with gasoline containing VEKTRON 3000 Additive performed better in every acceleration range versus those run on base fuel with EPA-grade additive.



Acceleration Test: Dodge Intrepids

When tested with clean engines, the Dodge Intrepids averaged 11.4 seconds and 791 feet to reach 70 miles per hour. At the 10,000 mile mark, 12.8 seconds and 889 feet were required to reach the 70 mile-per-hour point. After VEKTRON 3000 Additive was introduced and run for 5,000 additional miles, acceleration had improved by one-half of a second, the equivalent of 32 fewer feet. This acceleration improvement translates to about two car lengths.



Acceleration Test: Lexus GS300s

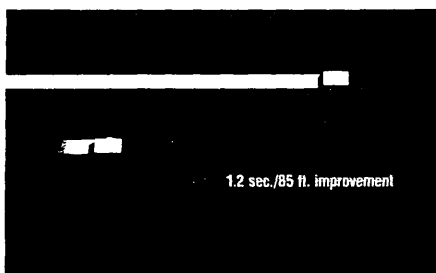
The Lexus GS300 testing also showed impressive results. The average time and distance needed to reach the 70 mile-per-hour point were 13.5 seconds and 920 feet with the clean engine, and 14.7 seconds and 994 feet at the 10,000 mile mark. That's an additional 74 feet because of accumulated engine deposits. After running the cars with VEKTRON 3000 Additive, acceleration was improved by .6 seconds and 32 feet, roughly two car lengths faster.

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Complaint

EXHIBIT A

Gasoline with VEKTRON™ 3000.



Acceleration/Load Test: Dodge Intrepid

In one final experiment, we measured the acceleration time and distance differences that a Dodge Intrepid towing a 2,000 pound U-Haul trailer might experience using the latest VEKTRON technology. Based on results from our 30 car fleet trial, we simulated the four octane number difference (which VEKTRON 3000 can easily achieve) with two different base fuels, much like the CRC testing protocol. In this case, the acceleration improvement noted was 1.2 seconds and 85 feet, or roughly 5 car lengths faster.

VEKTRON™ 3000 Gasoline Additive is based on a revolutionary new technology that has proven to provide superior performance: returning power to engines, reducing harmful NOx emissions, and improving miles per gallon.

The proof has been captured on our new video, which is yours for the asking. Take advantage of this unique marketing opportunity by calling us now at 1-800-4-VEKTRON. You'll also find us on the Internet at: www.shellus.com

Warranty All products purchased from or supplied by Shell are subject to terms and conditions set out in the contract, order acknowledgment and/or bill of lading. Shell warrants only that its product will meet those specifications designated as such herein or in other publications. All other information, including that herein, supplied by Shell is considered accurate but is furnished upon the express condition that the customer shall make

its own assessment to determine the product's suitability for a particular purpose. Shell makes no other warranty either express or implied, regarding such other information, the data upon which the same is based, or the results to be obtained from the use thereof; that any products shall be merchantable or fit for any particular purpose; or that the use of such other information or product will not infringe any patent.



Shell Additives

Never underestimate what we can do together.™

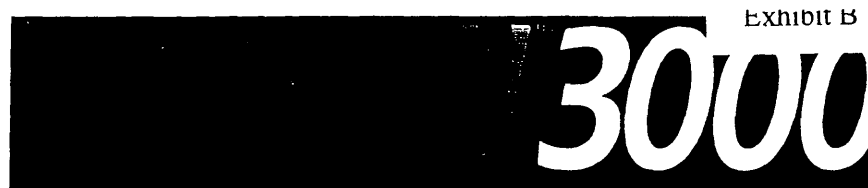
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VEKTRON™ is a trademark of Shell Chemical Company.

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EXHIBIT B

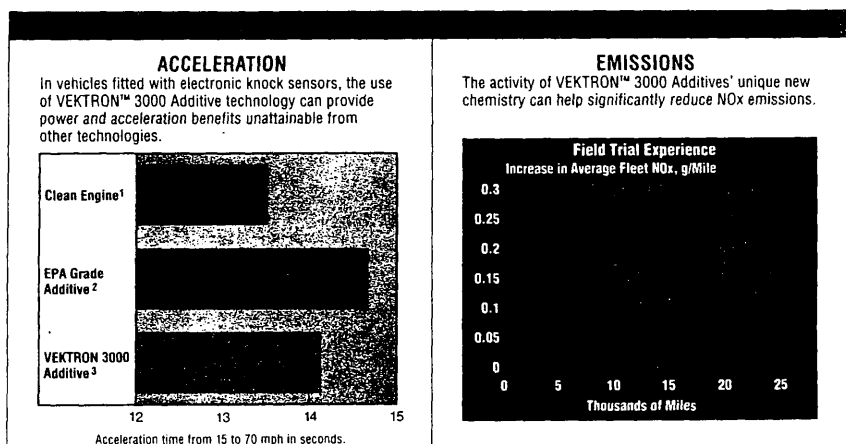
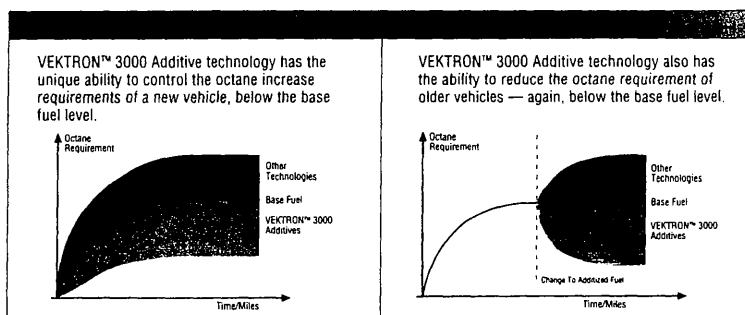


A Revolutionary New Advancement In Gasoline Additive Technology

VEKTRON™ 3000 Gasoline Additives are based on a revolutionary new additive technology that provides superior performance and emissions benefits. This unique technology not only works to keep combustion chamber deposits at lower levels but actually chemically enhances the combustion process to restore engine

power and efficiency. VEKTRON 3000 Gasoline Additives can also help to significantly reduce NOx emissions.

Take advantage of this unique marketing opportunity by calling us now at 1-800-4-VEKTRON.



1. Result achieved when clean engine tested.
2. Result achieved at 10,000 miles using EPA Grade Additives.

Complaint

EXHIBIT B

Intake system detergency, now regulated by the federal government, is still very important in the development of gasoline additive packages. VEKTRON™ 3000 Additive Packages include the most effective intake system detergents to provide the superior intake system cleanliness that you have come to expect:

For example, packages have demonstrated:

- "1 Tank" PFI Clean-Up
- 0 mg in BMW Testing
- <10 mg in the Ford 2.3 L Test
- IVD Clean-Up Tailored to Customer Needs

These capabilities exist not only in the industry standard tests; but also in a range of engines selected to be representative of the U.S. fleet.

VEKTRON 3000 Additives can be blended into gasoline at the refinery, distribution terminal, or pipeline terminal using conventional additive injection equipment and product mixing techniques.

For specific safety and handling information, please consult the Material Safety Data Sheet available upon request.

Shell's VEKTRON 3000 Additive Packages will be tailored to meet our customers' specific requirements. However, treat rates and typical properties of representative packages will be in line with more conventional technologies.

Warranty

All products purchased from or supplied by Shell are subject to terms and conditions set out in the contract, order acknowledgment and/or bill of lading. Shell warrants only that its product will meet those specifications designated as such herein or in other publications. All other information, including that herein, supplied by Shell is considered accurate but is furnished upon the express condition that the customer shall make its

own assessment to determine the product's suitability for a particular purpose. **Shell makes no other warranty either express or implied, regarding such other information, the data upon which the same is based, or the results to be obtained from the use thereof; that any products shall be merchantable or fit for any particular purpose; or that the use of such other information or product will not infringe any patent.**

VEKTRON™ is a trademark of Shell Chemical Company.



Shell Additives

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EXHIBIT C

Exhibit C

**OUR NEW VIDEO
SHOWS PERFORMANCE SO**

HOT

WE'VE RATED IT



*** Revolutionary New Technology
is how you'll rate our VEKTRON™
3000 Gasoline Additives.**

Every additive supplier makes superiority claims. Shell Additives would like to *prove* theirs. Our new VEKTRON™ 3000 Gasoline Additives go beyond merely removing some of the engine deposits:

they actually can help restore and maintain power and performance by chemically enhancing the combustion process. And the proof has been captured on our new video, which is yours for the



asking. Just call 1-800-4-VEKTRON to get your hands on this free VEKTRON 3000 Gasoline Additives video. Oh, yeah. We'll even throw in the popcorn.



Shell Additives

Never underestimate what we can do together.

EXHIBIT D

[PROMOTIONAL VIDEO]

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorney, and counsel for Federal Trade Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true 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 respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments received, 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.a. Respondent Shell Oil Company is a Delaware corporation with its principal office or place of business at One Shell Plaza, 910 Louisiana Street, Houston, Texas.

1.b. Respondent Shell Chemical Company is a Delaware corporation with its principal office or place of business at One Shell Plaza, 910 Louisiana Street, Houston, Texas. Shell Chemical Company is a wholly-owned subsidiary of Shell Oil Company.

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

ORDER

DEFINITIONS

For purposes of this order, the following definitions shall apply:

1. "*Competent and reliable scientific evidence*" shall mean tests, analyses, research, studies, or other evidence based upon the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. "*Fuel additive product*" shall mean a product that is added to gasoline by a consumer, including but not limited to gasoline or fuel treatments, octane boosters, and octane treatments.

3. "*Fuel additive ingredient*" shall mean any active ingredient marketed for use in any fuel additive product.

4. "*PEP molecule*" shall mean polyether pyrrolidone, a patented fuel additive ingredient.

5. Unless otherwise specified, "*respondents*" shall mean Shell Oil Company, a corporation, and Shell Chemical Company, a corporation, their successors and assigns, and their officers, agents, representatives, and employees.

6. "*Commerce*" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

It is ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, advertising, labeling, promotion, offering for sale, sale, or distribution of any fuel additive product or fuel additive ingredient in or affecting commerce, shall not make any representation, in any manner, expressly or by implication:

A. That such product or ingredient will significantly improve engine power and acceleration in motor vehicles generally;

B. That such product or ingredient is superior to any other fuel additive product in improving engine power and acceleration in motor vehicles generally; or

C. Regarding the performance, benefits, efficacy, attributes or use of such product or ingredient,

unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

II.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, promotion, offering for sale, sale, or distribution of any fuel additive product or fuel additive ingredient in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

III.

It is further ordered, That respondents, and their successors and assigns shall, within thirty (30) days after the date of service of this order, send by first class mail, return receipt requested, a copy of this order along with the Commission's complaint in this matter to each trade customer that purchased a product that contained the "PEP" molecule.

IV.

It is further ordered, That respondents, and their successors and assigns shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

V.

It is further ordered, That respondents, their successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors, managers, employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VI.

It is further ordered, That respondents, and their successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

VII.

It is further ordered, That respondents and their successors and assigns shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

VIII.

This order will terminate on December 22, 2019, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part of this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondents did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

Commissioner Swindle dissenting and Commissioner Leary not participating.

PUBLIC STATEMENT OF CHAIRMAN PITOFSKY,
COMMISSIONER ANTHONY AND COMMISSIONER THOMPSON

We conclude that there is ample evidence to find reason to believe that the consent agreement with Shell Oil Company ("Shell") should be accepted. The facts show that Shell provided promotional materials to its customers that contained unsubstantiated claims that ultimately appeared in its customers' ads. There is also evidence that Shell actively encouraged its customers to repeat the claims contained in its promotional materials and actively supported customers' efforts to do so. In fact, the similarities between promotional materials used by Shell and its customers are quite striking. Finally, we do not find that Shell used a disclaimer -- either clearly or conspicuously. Accordingly, we conclude that Shell was properly alleged to have

violated Section 5 because it "put into the hands of others the means by which they may mislead the public." *Waltham Watch Co v. FTC*, 318 F.2d 28, 32 (7th Cir. 1963).

It is true, as the Complaint alleges, that Shell provided its product to sophisticated trade customers, who then incorporated Shell's product into a subsequent product. But we do not believe that this sequence of events allows Shell to escape liability. We believe that all would agree that the interposition of a "sophisticated" party between the originator of deceptive claims and the consumer is not necessarily a defense to "means and instrumentalities" liability. Indeed, the means and instrumentalities doctrine is *intended* to apply in cases like this one where the originator of the unlawful material is not in privity with consumers, and does not control the actions of those (sophisticated or not) who will make the final decisions as to the message conveyed to consumers. It is well settled law that the originator is liable if it passes on a false or misleading representation with knowledge or reason to expect that consumers may possibly be deceived as a result. See *Regina Corp. v. FTC*, 322 F.2d 765, 768 (3rd Cir. 1963). Based on the facts, we have reason to believe that standard is met in this case and, accordingly, have voted to finalize the consent agreement.

DISSENTING STATEMENT OF COMMISSIONER ORSON SWINDLE

The Commission has issued a final order against Shell Oil Company ("Shell") to settle complaint allegations that Shell provided its customers, who purchased from Shell an ingredient used in their fuel treatment additive products, with the "means and instrumentalities" with which two of these customers deceived consumers. I agree with my colleagues that there is reason to believe that two of Shell's customers made deceptive acceleration claims to consumers about their fuel treatment additive products. However, I do not think that Shell made deceptive acceleration claims to consumers through the promotional materials and test results that Shell provided to these two customers. I therefore do not have reason to believe that Shell is liable under a means and instrumentalities theory.

Shell manufactures a chemical substance marketed to fuel treatment additive companies under the trade name "VEKTRON." Shell supplies VEKTRON to Castrol (the marketer of Castrol Syntec), Blue Coral/Slick 50 (the marketer of Slick 50), and to other companies which market fuel treatment additive products to consumers. Each

fuel treatment additive company determines the particular amount of VEKTRON to include in its own product. The specific concentration of VEKTRON that has been included differs among each of these fuel treatment additive products. Each fuel treatment additive company also determines the other chemical substances (such as detergents and solvents) to include in its product.

Shell provided fuel treatment additive companies with advertising and promotional materials to persuade them to purchase VEKTRON. Shell's advertising and promotional materials claim that VEKTRON significantly increases acceleration when used in motor vehicle engines. Specifically, these materials report that when gasoline bulk treated with VEKTRON was used in an engine continuously for 5,000 miles ("the bulk treatment test"), a 32-foot improvement (two car lengths) was recorded in accelerating from 15 mph to 70 mph. Both in its promotional materials and through other methods, Shell made the disclaimer that the information it provided concerning the VEKTRON ingredient, including the bulk treatment test result, was "furnished upon the express condition that [the customer] shall make its own assessment to determine the product's suitability for a particular purpose."

It makes sense that Shell would make this disclaimer. VEKTRON is but one ingredient (albeit an active ingredient) in fuel treatment additive products. In addition, the amount of VEKTRON varies with each fuel treatment additive product. Many fuel treatment additive products further are claimed to work when added to a single tank of gasoline (roughly 300 miles of use) rather than when included in bulk treated gasoline used over thousands of miles. Because the acceleration results that were obtained in the bulk treatment test of the VEKTRON ingredient thus clearly would not necessarily apply to fuel treatment additive final products, it makes sense that Shell would have informed its customers that they must make their own assessment of the acceleration benefits attributable to their own products.

Castrol and Blue Coral/Slick 50 purchased VEKTRON from Shell for use in their fuel treatment additive products and both paid Shell to conduct product-specific acceleration tests. In my view, clearly none of the tests of either of these products reported a significant increase in acceleration. Nevertheless, the two fuel treatment additive companies allegedly made the deceptive claim to

consumers that their respective fuel treatment additive products would *significantly improve* acceleration in motor vehicles generally.¹ The Commission has accepted a consent agreement with Shell that would hold Shell responsible for the allegedly deceptive claims made to consumers by the two fuel treatment additive companies. The basic complaint allegation is that Shell provided these companies with the "means and instrumentalities" (in the form of advertising and promotional materials concerning the VEKTRON ingredient and test reports concerning their specific products) with which these companies deceived consumers.

Means and instrumentalities is a form of primary liability, and a respondent is primarily liable only for *its own* misrepresentations to consumers. See, e.g., *In re JWP Inc. Securities Lit.*, 928 F. Supp. 1239, 1256 (S.D.N.Y. 1996) (defendant "may not be held primarily liable unless it has actually *made* a misrepresentation") (emphasis in original); *In re Kendall Square Research Corp. Sec. Lit.*, 868 F. Supp. 26, 28 (D. Mass. 1994) (primary violators are "those who *make* a material misstatement") (emphasis in original); *Vosgerichian v. Commodore Int'l.*, 862 F. Supp. 1371, 1378 (E.D. Pa. 1994) (no primary liability because the alleged misrepresentations were made by a party other than the defendant).² In contrast, a respondent who has provided assistance to another party that has made misrepresentations is at most secondarily liable - - in particular, for aiding and abetting another's misrepresentations. *Wright v. Ernst & Young LLP*, 152 F.3d 169, 175 (2d Cir. 1998), *cert. denied*, 119 S.Ct. 870 (1999); *Shapiro v. Cantor*, 123 F.3d 717, 720 (2d Cir. 1997); *Anixter v. Home-Stake Production Co.*, 77 F.3d 1215, 1225 (10th Cir. 1996) ("[t]he critical element separating primary from aiding and abetting violations is the existence of a representation * * * made by the defendant"). Regardless of the nature and extent of the assistance that a respondent may have provided to a party who made deceptive claims to consumers, the respondent cannot be held primarily liable

¹ The Commission has issued a final order against Castrol to settle the allegations that it made deceptive acceleration claims concerning Castrol Syntec, and I have voted in favor of issuing that final order. *Castrol North America, Inc.*, C- _____.

² The cases cited in the text involved allegation of securities fraud in violation of SEC Rule 10b-5. The cases are instructive because of the similarities between securities fraud and deception under Section 5 of the FTC Act. Moreover, there have been a significant number of Rule 10b-5 cases distinguishing between the concepts of primary liability and aiding and abetting liability in the aftermath of *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994).

unless it has *itself* made misrepresentations to consumers. *Wright*, 152 F.3d at 175; *Shapiro*, 123 F.3d at 720.

Primary liability, however, does not require that the respondent have made its misrepresentation *directly* to consumers. Instead, for a "misrepresentation to be actionable as a primary violation, there must be a showing that [the defendant] knew or should have known that *his* representation would be communicated [to purchasers]." *Anixter*, 77 F.3d at 1226 (emphasis added) (citations omitted); *see also Wright*, 152 F.3d at 175 (same); *Shapiro*, 123 F.3d at 720 (same). Clearly, the reason that primary liability is imposed even in the absence of a direct communication is that, otherwise, respondents could evade liability simply through the use of intermediaries (such as agents or downstream actors in a vertical chain of distribution) to convey misrepresentations to consumers.

Means and instrumentalities is a specific type of primary liability under which a respondent is held responsible for misrepresentations made *indirectly* to consumers. Liability under this theory is usually imposed against those who have provided an intermediary with an item (typically, a tangible item) that misleads consumers when that item is physically passed on to consumers. *See, e.g., FTC v. Winsted Hosiery Co.*, 258 U.S. 483 (1922) (deceptive labels on knit goods sold to consumers); *Waltham Watch Co. v. FTC*, 318 F.2d 28, 32 (7th Cir. 1963) (deceptive trade name on face or dial of clocks sold to consumers); *Globe Cardboard Novelty Co. v. FTC*, 192 F.2d 444, 446 (3d Cir. 1951) (push cards and punch boards distributed to consumers); *Jaffe v. FTC*, 139 F.2d 112 (7th Cir. 1943) (same); *International Art Co. v. FTC*, 109 F.2d 393 (7th Cir. 1940) (same); *FTC v. Magui Publishers, Inc.*, 1991-1 Trade Cas. (CCH) ¶ 69,425 (C.D. Cal. 1991) (deceptive certificates, promotional brochures, and signed prints provided to retailers who passed these items on to consumers), *aff'd*, 9 F.3d 1551 (9th Cir. 1993).

Means and instrumentalities liability also has been imposed where the intermediary has not passed on a tangible item to consumers, but instead has simply repeated to consumers the specific misrepresentations claims that were contained in the tangible item. For example, liability has been imposed under a means and instrumentalities theory where an intermediary made misrepresentations that were contained in the respondent's telemarketing scripts. *See, e.g., Regina Corp. v. FTC*, 322 F.2d 765, 768 (3d Cir. 1963) (deceptive prices from price

lists repeated in advertisements to consumers); *National Housewares, Inc.*, 90 FTC 512, 590 (1977) (telemarketing scripts and sample letters). All of these cases reflect the fundamental notion that means and instrumentalities is a form of primary liability in which the respondent was using another party as the conduit for disseminating the respondent's misrepresentations to consumers.

Shell's liability under a means and instrumentalities theory thus turns on the role that Shell played with regard to the deceptive acceleration claims that were contained in the advertising and packaging that its customers created and disseminated to consumers. If Shell was making deceptive acceleration claims to consumers through its customers, then there is reason to believe that Shell violated Section 5 of the FTC Act under a means and instrumentalities theory. But if Shell was providing assistance to its customers, who were making *their own* deceptive acceleration claims to consumers, then at most Shell could be some sort of aider and abettor.³ It is often difficult to distinguish between these two theories of liability in particular factual contexts. However, it is critical to do so because the Commission certainly has the authority to bring Section 5 cases under a means and instrumentalities theory but may well be precluded from bringing Section 5 cases under an aiding and abetting theory in the aftermath of *Central Bank of Denver*.

I think that the better view here is that Shell was not making deceptive acceleration claims to consumers through the advertising that Castrol created and disseminated for its fuel treatment additive product. The advertising and promotional materials that Shell disseminated to its customers concerning the VEKTRON ingredient made the claim that the ingredient had improved acceleration in the bulk treatment test (specifically, a 32-foot improvement in going from 15 mph to 70 mph), and depicted the benefits of improved acceleration in common driving situations, such as a vehicle passing another vehicle on a two-lane road or a vehicle merging into freeway traffic. The advertising that Castrol created and disseminated to consumers concerning their fuel treatment additive products contained similar acceleration claims and depictions of the benefits of improved acceleration in common driving situations. Notwithstanding the

³ The elements of aiding and abetting are: (1) the existence of an independent primary wrong; (2) actual knowledge by the alleged aider and abettor of the wrong and his role in furthering the wrong, and (3) substantial assistance in the commission of the wrong. *Magui Publishers, Inc.*, 1991-1 Trade Cas. (CCH) ¶ 69,425 at 65,727.

similarities between Shell's advertising and promotional materials concerning VEKTRON and the advertising that Castrol created and disseminated to consumers,⁴ I do not think that Shell was making deceptive acceleration claims to consumers through Castrol's advertisements.⁵

Both in its promotional materials and through other methods, Shell informed its customers that they could not rely on the results of Shell's bulk treatment test of the VEKTRON ingredient and other information in Shell's promotional materials in making claims for their fuel treatment additive products. Because Castrol paid Shell to conduct product-specific single tank treatment tests, it certainly understood that such tests were necessary. None of the test results for Castrol Syntec, however, supported the claim that a significant increase in acceleration occurs when it was used in a single tank treatment.⁶

Castrol is a relatively large and sophisticated company with substantial experience in the fuel treatment additive business, which is characterized by vigorous competition through advertising claims. As such, Castrol employs or retains those with a technical background in fields relating to fuel treatment additives and those with advertising expertise. After Castrol received from Shell the acceleration test results of its product, it determined the acceleration claims that it wanted to make and it disseminated advertising with these claims to consumers. There is no allegation that Shell reviewed or approved any of the advertising or the advertising claims that Castrol created and disseminated. There also is no allegation that Shell reimbursed or otherwise compensated Castrol for any costs associated with its advertising. Given the respective roles played by Shell and Castrol with regard to the advertising for Castrol Syntec,

⁴ Although both Shell and Castrol used very similar depictions of the benefits from improved acceleration in common driving situations, this does not demonstrate that Shell was making the claims to consumers because the depictions are an obvious means for any advertiser to demonstrate the practical benefits of increased acceleration, much in the same way that an obvious means for any advertiser to depict weight loss from the use of any diet program is through "before-and-after" pictures of program participants.

⁵ Shell's promotional materials and test results concerning VEKTRON were not passed on to consumers. These materials would have been meaningless to consumers because VEKTRON was never sold to them.

⁶ While there may be some dispute as to whether the appropriate methodology was used to conduct these tests, in my view, the results reported on their face do not support the claims of a *significant* increase in acceleration that were made in Castrol's advertisements.

Shell clearly was not making deceptive acceleration claims to consumers through this advertising.⁷

A much closer question is presented by the claims on product packaging. Both Castrol and Blue Coral/Slick 50 made the specific claim on their packaging that use of their fuel treatment additive products would cause a 32-foot improvement (two car lengths) in accelerating from 15 mph to 70 mph. Given that the bulk treatment test of the VEKTRON ingredient yielded exactly this improvement in acceleration, the claim of a 32-foot improvement in acceleration found on the product packaging almost certainly had its genesis in the VEKTRON bulk treatment test. Nevertheless, through its promotional materials and through other methods, Shell instructed its customers that they could not use this information to make claims for their fuel treatment additive products.⁸ Both this instruction and other actions by Shell indicate to me that Shell was trying to some extent to prevent its customers from making a 32-foot-improvement-in-acceleration claim, and, therefore, the better view is that Shell was not making this deceptive claim through packaging created and disseminated by its customers.

I do not have reason to believe that Shell can be held liable under a means and instrumentalities theory (or any other form of primary liability) for the deceptive claims that Shell's customers - - rather than Shell - - made to consumers. Holding Shell liable under a means and instrumentalities theory in this factual context raises concerns as to how far the Commission intends to expand the theory in future cases involving input suppliers and testing laboratories. I hope that no such expansion occurs.

I dissent.

⁷ I agree with the majority's statement that the interposition of a sophisticated intermediary is not necessarily a defense to liability under a means and instrumentalities theory. The sophistication of the alleged intermediary, however, may well be relevant in determining whether the alleged intermediary was making its own claims to consumers or it was simply passing along the claims of another to consumers. Here, based on Castrol's role in connection with the deceptive claims made in advertising that it created and disseminated to induce sales of its own product, I do not think that Castrol - - a company with sophistication in the fuel treatment additive business - - was simply passing on Shell's claims to consumers.

⁸ Like Castrol, Blue Coral/Slick 50 clearly understood that product-specific tests were necessary because it paid Shell to conduct such a test. Moreover, given its experience in the fuel treatment additive business and the expertise of its employees or agents, in my view it was clear to Blue Coral/Slick 50 that the limited test result reported would not support the acceleration claim that it decided to place on its packaging.

IN THE MATTER OF

THE ASSOCIATED OCTEL COMPANY LIMITED

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-3913. Complaint, Dec. 22, 1999--Decision, Dec. 22, 1999*

This consent order, among other things, requires The Associated Octel Company Limited, the leading manufacturer of lead antiknocks worldwide, to provide Allchem Industries, Inc., with quantities of lead antiknock compounds pursuant to the terms and conditions of their supply agreement and subject to the termination provision.

Participants

For the Commission: *Geoffrey Green, Veronica Kayne and Richard Parker.*

For the respondent: *Mark Kovner, Kirkland & Ellis, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent The Associated Octel Company Limited ("Octel"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire all of the voting securities of Oboadler Company Limited, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, 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:

I. RESPONDENT

1. Respondent The Associated Octel Company Limited ("Octel") is a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom, with its office and principal place of business located at Berkeley Square House, Berkeley Square, London, W1X 6DT, England, United Kingdom.

2. Octel is engaged in, among other things, the manufacture and sale of lead antiknock compounds. Octel is the leading manufacturer of lead antiknocks worldwide, accounting for approximately 80