

Complaint

IN THE MATTER OF

VALERO ENERGY CORPORATION, ET AL.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-4031; File No. 0110141**Complaint, December 18, 2001--Decision, February 19, 2002*

This consent order addresses the merger of Respondent Valero Energy Corporation – a company engaged in national refining, transportation, and marketing of petroleum products and related petrochemical products, headquartered in San Antonio, Texas – with Respondent Ultramar Diamond Shamrock Corporation, a company engaged in the refining, marketing and transportation of petroleum products and petrochemicals and also headquartered in San Antonio. The order, among other things, requires the respondents to divest the Ultramar Golden Eagle refinery located in Avon, California – which can refine California Air Resources Board gasoline – bulk gasoline supply contracts, and 70 Ultramar-owned and operated Northern California retail service stations to an acquirer approved by the Commission. An accompanying Order to Hold Separate requires the respondents to hold separate and maintain certain assets pending their divestiture.

Participants

For the Commission: *Peter Richman, Frank Lipson, Art Nolan, Marc W. Schneider, Connie Salemi, Shai Littlejohn, Matthew Stratton, Jordan Coyle, Robert Walters, Valicia Spriggs, Catharine M. Moscatelli, Naomi Licker, Elizabeth A. Piotrowski, Phillip L. Broyles, Daniel P. Ducore, Susan Creighton, David W. Meyer, Louis Silvia and Mary T. Coleman.*

For the Respondents: *David Neill, Wachtell, Lipton, Rosen & Katz, and Phillip Proger and Peter J. Love, Jones, Day, Reavis & Pogue.*

Complaint

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission (“FTC” or “Commission”), having reason to believe that Respondent Valero Energy Corporation (“Valero”) and Respondent Ultramar Diamond Shamrock Corporation (“Ultramar”) have entered into an agreement and plan of merger whereby Valero proposes to acquire all of the outstanding common stock of Ultramar, that such agreement and plan of merger violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, 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. RESPONDENTS

Valero Energy Corporation

1. Respondent Valero is a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at One Valero Place, San Antonio, TX 78212.
2. Respondent Valero is, and at all times relevant herein has been, a diversified energy company engaged, either directly or through affiliates, in the refining of crude oil into refined petroleum products, including gasoline, aviation fuel, and other light petroleum products; the transportation, terminaling, and marketing of gasoline, diesel fuel, and aviation fuel; and other related businesses.
3. Respondent Valero 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 affecting commerce as

Complaint

“commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

Ultramar Diamond Shamrock Corporation

4. Respondent Ultramar is a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 6000 N. Loop 1604 West, San Antonio, TX 78249.
5. Respondent Ultramar is, and at all times relevant herein has been, a diversified energy company engaged, either directly or through affiliates, in the refining of crude oil into refined petroleum products, including gasoline, aviation fuel, and other light petroleum products; the transportation, terminaling, and marketing of gasoline, diesel fuel, and aviation fuel; and other related businesses.
6. Respondent Ultramar 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 affecting commerce as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

II. THE PROPOSED MERGER

7. Pursuant to an agreement and plan of merger dated May 6, 2001, Valero intends to acquire all of the outstanding voting securities of Ultramar in exchange for cash, stock of Valero, or a combination of cash and stock of Valero. The value of the transaction at the time of the agreement was approximately \$6 billion. The surviving entity is to be called Valero Energy Corporation.

Complaint

III. TRADE AND COMMERCE

A. Relevant Product Markets

8. Relevant lines of commerce in which to analyze the effects of the proposed merger are:
 - a. the refining and bulk supply of gasoline that meets the current specifications of the California Air Resources Board (“CARB 2” gasoline); and
 - b. the refining and bulk supply of gasoline that meets the proposed specifications of the California Air Resources Board to become effective January 1, 2003 (“CARB 3” gasoline).
9. Motor gasoline is a fuel used in automobiles and other vehicles. It is produced from crude oil at refineries in the United States and throughout the world. Gasoline is produced in various grades and types, including conventional unleaded gasoline, reformulated gasoline, CARB 2 and CARB 3 gasoline, and others. There is no substitute for gasoline as a fuel for automobiles and other vehicles that are designed to use gasoline.
10. CARB 2 gasoline is a motor fuel used in automobiles that meets the current Phase 2 specifications of the California Air Resources Board. CARB 2 gasoline is cleaner burning and causes less air pollution than conventional unleaded gasoline. Since 1996, the use of any gasoline other than CARB 2 gasoline has been prohibited in California. CARB 2 gasoline is manufactured primarily at refineries on the West Coast of the United States. There are no substitutes for CARB 2 gasoline as fuel for automobiles and other vehicles that use gasoline in California.
11. CARB 3 gasoline is a motor fuel to be used in automobiles that meets the proposed Phase 3 specifications of the

Complaint

California Air Resources Board. CARB 3 gasoline is cleaner burning and causes less air pollution than CARB 2 gasoline. After December 31, 2002, the use of any gasoline other than CARB 3 gasoline will be prohibited in California. CARB 3 gasoline will be manufactured primarily at refineries on the West Coast of the United States. There will be no substitutes for CARB 3 gasoline as fuel for automobiles and other vehicles that use gasoline in California.

B. Relevant Geographic Markets

12. Relevant sections of the country in which to analyze the proposed merger are the following:
 - a. Northern California, consisting of California counties north of, but not including, San Luis Obispo, Kern and San Bernardino counties, where the merger would reduce competition in the refining and bulk supply of CARB 2 and CARB 3 gasoline, as alleged below; and
 - b. the State of California, where the merger would reduce competition in the refining and bulk supply of CARB 2 and CARB 3 gasoline, as alleged below.

Market Structure

13. The market for the refining and bulk supply of CARB 2 gasoline for Northern California would be highly concentrated following the proposed merger. Refineries supplying Northern California are primarily located in the Bakersfield and San Francisco Bay Area, California, and Anacortes, Washington. The proposed merger would increase concentration in this market by more than 750 points to an HHI level above 2,700.
14. The market for the refining and bulk supply of CARB 2 gasoline for the State of California would be at the upper

Complaint

end of the moderately concentrated range following the proposed merger. Refineries supplying California are primarily located in California and Anacortes, Washington. The proposed merger would increase concentration in this market by more than 325 points to an HHI level above 1,750.

15. The market for the refining and bulk supply of CARB 3 gasoline for Northern California would be highly concentrated following the proposed merger. Refineries supplying Northern California are primarily located in the Bakersfield and San Francisco Bay Area, California, and Anacortes, Washington. The proposed merger would increase concentration in this market by more than 1,050 points to an HHI level above 3,050.
16. The market for the refining and bulk supply of CARB 3 gasoline for the State of California would be highly concentrated following the proposed merger. Refineries supplying California are primarily located in California and Anacortes, Washington. The proposed merger would increase concentration in this market by more than 390 points to an HHI level above 1,850.

Entry Conditions

17. Entry into the relevant lines of commerce in the relevant sections of the country is difficult and would not be timely, likely or sufficient to prevent anticompetitive effects resulting from the proposed merger.

IV. VIOLATIONS CHARGED

First Violation Charged

18. Valero and Ultramar are or will be competitors in the refining and bulk supply of CARB 2 and CARB 3 gasoline for sale in Northern California.

Complaint

19. The effect of the proposed merger, if consummated, may be substantially to lessen competition in the refining and bulk supply of CARB 2 and CARB 3 gasoline for sale in Northern California, 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, in the following ways, among others:
- a. by eliminating direct competition between Valero and Ultramar in the refining and bulk supply of CARB 2 and CARB 3 gasoline;
 - b. by increasing the likelihood that the combination of Valero and Ultramar will unilaterally exercise market power; and
 - c. by increasing the likelihood of, or facilitating, collusion or coordinated interaction between the combination of Valero and Ultramar and their competitors in Northern California;
- each of which increases the likelihood that the price of CARB 2 and CARB 3 gasoline will increase in the relevant section of the country.

Second Violation Charged

20. Valero and Ultramar are or will be competitors in the refining and bulk supply of CARB 2 and CARB 3 gasoline for sale in the State of California.
21. The effect of the proposed merger, if consummated, may be substantially to lessen competition in the refining and bulk supply of CARB 2 and CARB 3 gasoline for sale in the State of California, 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, in the following ways, among others:

Complaint

- a. by eliminating direct competition between Valero and Ultramar in the refining and bulk supply of CARB 2 and CARB 3 gasoline; and
- b. by increasing the likelihood of, or facilitating, collusion or coordinated interaction between the combination of Valero and Ultramar and their competitors in California;

each of which increases the likelihood that the price of CARB 2 and CARB 3 gasoline will increase in the relevant section of the country.

Statutes Violated

- 22. The proposed merger between Valero and Ultramar violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and would, if consummated, 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.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eighteenth day of December, 2001, issues its complaint against said Respondents.

By the Commission, Chairman Muris not participating.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed merger involving Respondents Valero Energy Corporation (“Valero”) and Ultramar Diamond Shamrock Corporation (“Ultramar”), and Respondents having been furnished thereafter with a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and that, if issued by the Commission, would charge Respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent 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 Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and its Order to Hold Separate and Maintain Assets and accepted the executed Consent Agreement and placed such Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comment filed thereafter by an interested person pursuant to Section 2.34 of its Rules, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby

Decision and Order

makes the following jurisdictional findings and issues the following Order:

1. Respondent Valero Energy Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at One Valero Place, San Antonio, Texas 78212.
2. Respondent Ultramar Diamond Shamrock Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 6000 N. Loop 1604 West, San Antonio, Texas 78249.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. “Valero” means Valero Energy Corporation, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Valero, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Ultramar” or “UDS” means Ultramar Diamond Shamrock Corporation, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its

Decision and Order

joint ventures, subsidiaries, divisions, groups and affiliates controlled by Ultramar, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

- C. "California CARB Refining and Marketing Assets" means the following assets: (1) Ultramar's Golden Eagle refinery located at Avon, California and all of Ultramar's interest in all tangible assets used in the operation of the refinery, including but not limited to docks, associated tanks, and pipelines; all licenses, agreements, contracts, and permits used in the operation of the refinery; the non-exclusive right to use all patents, know-how, and other intellectual property used by Ultramar in the operation of the refinery; all agreements, contracts, and understandings listed in Schedule A, attached as a confidential attachment; at the acquirer's option, all contracts, agreements or understandings (other than those listed in Schedule A) relating to the transportation, terminaling, storage or sale of the refinery's petroleum product output; at the acquirer's option, all agreements (other than those listed in Schedule A) under which Ultramar receives crude oil or other inputs at or for the refinery; and, at the acquirer's option, all exchange agreements involving the refinery; all plans (including proposed and tentative plans, whether or not adopted), specifications, drawings, and other assets (including the non-exclusive right to use patents, know-how, and other intellectual property relating to such plans) related to the operation of, and improvements, modifications, or upgrades to, the Golden Eagle refinery; (2) Ultramar's refinery located at Wilmington, California, and all of Ultramar's interest in all tangible assets used in the operation of the refinery; all licenses, agreements, contracts, and permits used in the operation of the refinery, including but not limited to docks, associated tanks, and pipelines; the non-exclusive right to use all patents, know-how, and other

Decision and Order

intellectual property used by Ultramar in the operation of the refinery; at the acquirer's option, all contracts, agreements or understandings relating to the transportation, terminaling, storage or sale of the refinery's petroleum product output; at the acquirer's option, all agreements under which Ultramar receives crude oil or other inputs at or for the refinery; and, at the acquirer's option, all exchange agreements involving the refinery; all plans (including proposed and tentative plans, whether or not adopted), specifications, drawings, and other assets (including the non-exclusive right to use patents, know-how, and other intellectual property relating to such plans) related to the operation of, and improvements, modifications, or upgrades to, the Wilmington refinery; and (3) Ultramar's California Retail Assets.

- D. "CARB Gasoline" means motor fuel used in automobiles that meets the specifications of the California Air Resources Board.
- E. "Commission" means the Federal Trade Commission.
- F. "Effective Date of Divestiture" means the date on which the applicable divestiture is consummated.
- G. "Golden Eagle CARB Refining and Marketing Assets" means: (1) Ultramar's Golden Eagle refinery located at Avon, California and all of Ultramar's interest in all tangible assets used in the operation of the refinery, including but not limited to docks, associated tanks, and pipelines; all licenses, agreements, contracts, and permits used in the operation of the refinery; the non-exclusive right to use all patents, know-how, and other intellectual property used by Ultramar in the operation of the refinery; all agreements, contracts and understandings listed in Schedule A; at the acquirer's option, all contracts, agreements or

Decision and Order

understandings (other than those listed in Schedule A) relating to the transportation, terminaling, storage or sale of the refinery's petroleum product output to the extent they relate to the refinery's petroleum product output; at the acquirer's option, all agreements (other than those listed in Schedule A) under which Ultramar receives crude oil or other inputs at or for the refinery; and all exchange agreements involving the refinery (but only to the extent the exchange agreements involve output of the refinery); all plans (including proposed and tentative plans, whether or not adopted), specifications, drawings, and other assets (including the non-exclusive right to use patents, know-how, and other intellectual property relating to such plans) related to the operation of, and improvements, modifications, or upgrades to, the Golden Eagle refinery; and (2) Ultramar's Divestiture Retail Assets.

- H. "Merger" means the proposed merger involving Valero and Ultramar.
- I. "New Valero" means Valero Energy Corporation, or any other entity resulting from the merger involving Valero and Ultramar, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by New Valero.
- J. "Respondents" means Valero and Ultramar, individually and collectively, and New Valero.
- K. "Retail Assets" means, for each Retail Site, all fee or leasehold interests of Respondents in the Retail Site, and all of Respondents' interest in all assets, tangible or intangible, that are used at that Retail Site, including, but not limited to, all permits, licenses, consents, contracts, and agreements used in the operation of the Retail Site, and the non-

Decision and Order

exclusive right to use all patents, know-how, and other intellectual property used by Respondents in the operation of the Retail Sites. “Retail Assets” also includes all of Respondents’ interest in all assets relating to all ancillary businesses (including, but not limited to, automobile mechanical service, convenience store, restaurant or car wash) located at each Retail Site, including all permits, licenses, consents, contracts, and agreements used in the operation of the ancillary businesses, and the non-exclusive right to use all know-how, patents, and other intellectual property used in the operation of the ancillary businesses. “Retail Assets” does not include Respondents’ proprietary trademarks, trade names, logos, trade dress, and system-wide software and databases.

- L. “Retail Site” means a business establishment from which gasoline is sold to the general public.
- M. “Ultramar’s California Retail Assets” means all of Ultramar’s Retail Assets relating to all Retail Sites in California that Ultramar operates.
- N. “Ultramar’s Divestiture Retail Assets” means all of Ultramar’s Retail Assets relating to the Retail Sites that are listed in Schedule B.

II.

IT IS FURTHER ORDERED that:

- A. Respondents shall divest the Golden Eagle CARB Refining and Marketing Assets to a single acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission, absolutely and in good faith and at no minimum price, within twelve

Decision and Order

(12) months from the date Respondents execute the Consent Agreement.

- B. Respondents shall offer the acquirer of the Golden Eagle CARB Refining and Marketing Assets an indemnity, subject to the prior approval of the Commission and to be effective upon the Effective Date of Divestiture of the Golden Eagle CARB Refining and Marketing Assets, which indemnity shall allocate among Respondents and the acquirer, on such terms as the Respondents and the acquirer agree, responsibility with respect to potential claims and liabilities arising out of failure to comply with local, state, and federal environmental obligations in connection with the Golden Eagle refinery and the Retail Sites that are divested or assigned pursuant to this Paragraph.
- C. In the event that Respondents are unable to satisfy all conditions necessary to divest any intangible asset, Respondents shall: (1) with respect to permits, licenses or other rights granted by governmental authorities (other than patents), provide such assistance as the acquirer may reasonably request in the acquirer's efforts to obtain comparable permits, licenses or rights, and (2) with respect to other intangible assets (including patents), substitute equivalent assets, subject to Commission approval. A substituted asset will not be deemed to be equivalent unless it enables the refinery to perform the same function at the same or lower cost.
- D. With respect to assets that are to be divested or agreements entered into pursuant to this paragraph at the acquirer's option, Respondents need not divest such assets or enter into such agreements only if the acquirer chooses not to acquire such assets or enter into such agreements and the Commission approves the divestiture without such assets or agreements.

Decision and Order

- E. The purpose of the divestiture of the Golden Eagle CARB Refining and Marketing Assets, and of the other provisions of this Paragraph, is to ensure the continued use of the Golden Eagle CARB Refining and Marketing Assets as viable, on-going businesses, in the same businesses in which they were engaged at the time of the announcement of the Merger, including the refining and bulk supply of CARB Gasoline and other petroleum products, by a firm that has a sufficient ability and an equivalent incentive to invest and compete in the assets and businesses as Ultramar had before the Merger, and to remedy the lessening of competition in the refining and bulk supply of CARB Gasoline and other petroleum products resulting from the proposed Merger as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

- A. If Respondents have not, within the time periods required, complied with the requirements of Paragraph II, absolutely and in good faith, the Commission may appoint a trustee to effectuate the divestiture required by Paragraph II; provided, however, that the trustee may, subject to the approval of the Commission, substitute the California CARB Refining and Marketing Assets for the Golden Eagle CARB Refining and Marketing Assets.
- B. In the event that the Commission or the United States Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the

Decision and Order

Commission or the United States Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.

- C. If a trustee is appointed by the Commission or a court pursuant to Paragraph III.A. of this Order, Respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:
1. The Commission shall select the trustee or trustees, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed trustee, Respondents shall be deemed to have consented to the selection of the proposed trustee.
 2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the assets to be divested, assign the agreements required to be assigned, and enter into the required agreements, thereby binding Respondents, all on such terms and conditions as are necessary to comply with the requirements of the applicable paragraph, to comply with all applicable laws, and to effectuate the remedial purposes of this Order. Subject to the prior approval of the Commission, the trustee shall have the sole authority to divest the assets described in Paragraph

Decision and Order

III.A in smaller packages as the trustee deems necessary to effectuate divestiture of the assets and to effectuate the remedial purposes of this Order.

3. Within ten (10) days after appointment of the trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestitures required by this Order.
4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph III.C.3. to accomplish the divestiture to an acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved 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.
5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the assets to be divested or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as

Decision and Order

determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously at no minimum price. The divestiture shall be made in the manner and to the acquirer or acquirers as approved by the Commission, as applicable; provided, however, if the trustee receives bona fide offers from more than one acquiring entity for any package of assets, 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 Respondents from among those approved by the Commission, provided further, however, that Respondents shall select such entity within five (5) days of receiving notification of the Commission's approval.
7. The trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are 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 the

Decision and Order

Respondents, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the assets to be divested.

8. Respondents 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 trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.
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 III.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 divestitures required by this Order.
11. The trustee shall have no obligation or authority to operate or maintain the assets to be divested.
12. The trustee shall report in writing to Respondents and the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestitures.

Decision and Order

IV.

IT IS FURTHER ORDERED that within sixty (60) days after the date this Order becomes final and every sixty (60) days thereafter until Respondents have fully complied with the provisions of Paragraphs II and III of this Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with these Paragraphs. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with these Paragraphs, including a description of all substantive contacts or negotiations for the divestitures and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

V.

IT IS FURTHER ORDERED that:

- A. Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondents such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of the order.
- B. Upon consummation of the Merger, Respondents shall cause New Valero to be bound by the terms of this Order.

Decision and 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 upon written request with reasonable notice to Respondents, Respondents shall permit any duly authorized representative of the Commission:

- A. Access, during office hours of Respondent and in the presence of counsel, to all facilities, and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of each Respondent relating to any matters contained in this Order; and
- B. Upon five days' notice to each Respondent and without restraint or interference from it, to interview officers, directors, or employees of Respondent, who may have counsel present, regarding any such matters.

VII.

IT IS FURTHER ORDERED that if (1) within the time period required for divestiture pursuant to Paragraph II of this Order, Respondents have submitted a complete application in support of the divestiture or other relief (including the acquirer, manner of divestiture and all other matters subject to Commission approval) as required by such paragraphs; and (2) the Commission has approved the divestiture or other relief and has not withdrawn its acceptance; but (3) Respondents have certified to the Commission prior to the expiration of the applicable time period that (a) notwithstanding timely and complete application for approval by Respondents to the State or District under an applicable consent decree to which the State (or District) and Respondents are parties, the State or District has failed to approve the divestiture or other relief that is also required under this Order, or (b) a State or District has filed a timely motion in court seeking

Decision and Order

to enjoin the proposed divestiture or other relief under an applicable consent decree to which the State (or District) and Respondents are parties, then, (4) with respect to the particular divestiture or other relief that remains unconsummated, the time in which the divestiture or other relief is required under this Order to be complete shall be extended (a) for ninety (90) days or (b) until the disposition of the motion filed by the State or District pertaining to the proposed divestiture or other relief, whichever is later. During such period of extension, Respondents shall exercise utmost good faith and best efforts to resolve the concerns of the particular State.

By the Commission, Chairman Muris not participating.

Decision and Order

SCHEDULE A

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[Redacted From Public Record Version]

FEDERAL TRADE COMMISSION DECISIONS
VOLUME 133

Decision and Order

SCHEDULE BStoreAddressCityStateZipZone Number

3674851 N. Highway 49JacksonCA95642351

36091021 South StOrlandCA95963-1640351

362118475 N Highway 1Fort BraggCA95437-8774351

36221250 S Main StWillitsCA95490-4306351

36231105 S State StUkiahCA95482-6410351

3628812 Main StreetWeavervilleCA96093351

3678585 E Perkins StUkiahCA95482-4508351

3679440 S Main StRed BluffCA96080-4316351

3680506 6th StOrlandCA95963-1229351

3692975 S Main StLakeportCA95453-5512351

369315010 Lakeshore DrClearlakeCA95422351

35447920 Brentwood BlvdBrentwoodCA94513-1004351

355842245 Fremont BlvdFremontCA94538-4143351

359440500 Fremont BlvdFremontCA94538-4304351

36041619 1st StLivermoreCA94550-4303351

37124321 Clayton RdConcordCA94521-2842351

37132501 Pacheco BlvdMartinezCA94553-2043351

37143767 Alhambra AveMartinezCA94553-3803351

37151616 Oak Park BlvdPleasant HillCA94523-4410351

37161990 San Ramon Valley BlvdSan RamonCA94583-1204351

37172098 Mt Diablo BlvdWalnut CreekCA94596-4302351

37201088 Marina BlvdSan LeandroCA94577-3437351

372144 Lewelling BlvdSan LorenzoCA94580-1628351

35202998 Churn Creek RdReddingCA96002-1130351

FEDERAL TRADE COMMISSION DECISIONS
VOLUME 133

441

Decision and Order

35212071 North StAndersonCA96007-3456351
35493212 S Market StReddingCA96001-3530351
35722700 Gateway DrAndersonCA96007-3531351
363037303 State Highway 299 EBurneyCA96013-4371351
3088I-5 & Road 8DunniganCA95937351
34285040 El Camino AveCarmichaelCA95608-4650351
34473 Main StWoodlandCA95695-3123351
3527601 Sunrise AveRosevilleCA95661-4109351
35424250 Madison AveNorth HighlandsCA95660-5403351
36018070 N. Lake BlvdKings BeachCA95719351
360310299 Folsom BlvdRancho CordovaCA95670-3516351
36426990 Douglas BlvdGranite BayCA95746-6214351
36838651 Folsom BlvdSacramentoCA95826-3708351
36841312 BroadwayPlacervilleCA95667-5902351
36859301 Greenback LnOrangevaleCA95662-4901351
36863430 Taylor RdLoomisCA95650-9583351
36871110 High StAuburnCA95603-5110351
36882304 Lake Tahoe BlvdS. Lake TahoeCA96150-7107351
36941001 Sacramento AveBroderickCA95605-1902351
37837550 Watt AveNorth HighlandsCA95660-2609351
34201370 Camden AveCampbellCA95008-6702351
3586929 Fremont AveLos Altos HillsCA94024-6013351
36021885 N Milpitas BlvdMilpitasCA95035-2505351
37232790 Story RdSan JoseCA95127-3922351
37241365 Kooser RdSan JoseCA95118-3814351
37251598 Alum Rock AveSan JoseCA95116-2425351

FEDERAL TRADE COMMISSION DECISIONS
VOLUME 133

Decision and Order

3786921 W Hamilton AveCampbellCA95008-0405351
3489921 Sebastopol RdSanta RosaCA95407-6830351
3645300 College AveSanta RosaCA95401-5118351
37007898 Old Redwood HwyCotatiCA94931-5107351
3701219 Healdsburg AveHealdsburgCA95448-4103351
37028850 Sonoma HwyKenwoodCA95452-9024351
37032601 Lakeville HwyPetalumaCA94954-5654351
37041080 GravensteinSebastopolCA95472351
350235 N Cherokee LnLodiCA95240-2411351
3513401 W Kettleman LnLodiCA95240-5741351
36962448 W Kettleman LnLodiCA95242-4123351
375613975 E Highway 88LockefordCA95237-9549351
33781800 W Imola AveNapaCA94559-4619351
34161300 Trancas StNapaCA94558-2912351
3522800 Merchant StVacavilleCA95688-6912351
36821105 N 1st StDixonCA95620-2404351
3706385 Silverado TrlNapaCA94559-4013351
3707800 St. Helena HwySaint HelenaCA94574351
37103438 Broadway StAmer. CanyonCA94589-1254351
37111295 Marine World PkwyVallejoCA94589-3104351

Order

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS

The Federal Trade Commission having initiated an investigation of the proposed merger involving Respondents Valero Energy Corporation (“Valero”) and Ultramar Diamond Shamrock Corporation (“Ultramar”), and Respondents having been furnished thereafter with a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and that, if issued by the Commission, would charge Respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. §18; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent 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 Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having determined to accept the executed Agreement Containing Consent Orders and to place such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Hold Separate and Maintain Assets (“Hold Separate”):

Order

1. Respondent Valero is a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at One Valero Place, San Antonio, TX 78212.
2. Respondent Ultramar is a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 6000 N. Loop 1604 West, San Antonio, TX 78249.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in this Hold Separate, the following definitions and provisions shall apply:

- A. “Valero” means Valero Energy Corporation, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Valero, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Ultramar” or “UDS” means Ultramar Diamond Shamrock Corporation, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Ultramar, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

Order

- C. "Commission" means the Federal Trade Commission.
- D. "Decision and Order" means the Decision and Order contained in the Agreement Containing Consent Orders, executed by Respondents in this matter.
- E. "Effective Date of Divestiture" means the date on which the divestiture required by Paragraph II or III of the Decision and Order is consummated.
- F. "Held Separate Business" means (1) Ultramar's Golden Eagle refinery located at Avon, California and all of Ultramar's interest in all tangible assets used in the operation of the refinery, including but not limited to docks, associated tanks, and pipelines; all licenses, agreements, contracts, and permits used in the operation of the refinery; the non-exclusive right to use all patents, know-how, and other intellectual property used by Ultramar in the operation of the refinery; all contracts, agreements or understandings relating to the transportation, terminaling, storage or sale of the refinery's petroleum product output to the extent they relate to the refinery's petroleum product output; all agreements under which Ultramar receives crude oil or other inputs at or for the refinery; and all exchange agreements involving the refinery (but only to the extent the exchange agreements involve output of the refinery); all plans (including proposed and tentative plans, whether or not adopted), specifications, drawings, and other assets (including the non-exclusive right to use patents, know-how, and other intellectual property relating to such plans) related to the operation of, and improvements, modifications, or upgrades to, the Golden Eagle refinery; (2) Ultramar's Divestiture Retail Assets; and (3) all Ultramar employees employed at the Golden Eagle refinery and the Ultramar's Divestiture Retail Assets and all other of Respondents' employees listed in Schedule A attached as a confidential attachment.

Order

- G. "Hold Separate Period" means the time period during which the Hold Separate is in effect, which shall begin no later than five (5) days after the date the Hold Separate becomes final and terminate pursuant to Paragraph V. hereof.
- H. "Material Confidential Information" means competitively sensitive or proprietary information not independently known to an entity from sources other than the entity to which the information pertains, and includes, but is not limited to, all customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets.
- I. "Merger" means the proposed merger involving Valero and Ultramar.
- J. "Respondents" means Valero and Ultramar, individually and collectively, and the successor corporation.
- K. "Retail Assets" means, for each Retail Site, all fee or leasehold interests of Respondents in the Retail Site, and all of Respondents' interest in all assets, tangible or intangible, that are used at that Retail Site, including, but not limited to, all permits, licenses, consents, contracts, and agreements used in the operation of the Retail Site, and the non-exclusive right to use all patents, know-how, and other intellectual property used by Respondents in the operation of the Retail Sites. "Retail Assets" also includes all of Respondents' interest in all assets relating to all ancillary businesses (including, but not limited to, automobile mechanical service, convenience store, restaurant or car wash) located at each Retail Site, including all permits, licenses, consents, contracts, and agreements used in the operation of the ancillary businesses, and the non-exclusive right to use all know-how, patents, and other intellectual property used in the operation of the ancillary businesses. For purposes of this Hold Separate, "Retail Assets" includes Respondents' proprietary trademarks, trade names, logos, trade dress, and system-wide software and databases.

Order

- L. “Retail Site” means a business establishment from which gasoline is sold to the general public.
- M. “Ultramar’s California Retail Assets” means all of Ultramar’s Retail Assets relating to each and every Retail Site in California that Ultramar operates.
- N. “Ultramar’s Divestiture Retail Assets” means all of Ultramar’s Retail Assets relating to the Retail Sites that are listed in Schedule B.
- O. “Ultramar’s Non-divestiture Retail Assets” means all of Ultramar’s California Retail Assets other than Ultramar’s Divestiture Retail Assets.
- P. “Ultramar’s Wilmington Refinery” means Ultramar’s refinery located at Wilmington, California, and all of Ultramar’s interest in all tangible assets used in the operation of the refinery; all licenses, agreements, contracts, and permits used in the operation of the refinery, including but not limited to docks, associated tanks, and pipelines; the non-exclusive right to use all patents, know-how, and other intellectual property used by Ultramar in the operation of the refinery; all contracts, agreements or understandings relating to the transportation, terminaling, storage or sale of the refinery’s petroleum product output; all agreements under which Ultramar receives crude oil or other inputs at or for the refinery; and all exchange agreements involving the refinery; all plans (including proposed and tentative plans, whether or not adopted), specifications, drawings, and other assets (including the non-exclusive right to use patents, know-how, and other intellectual property relating to such plans) related to the operation of, and improvements, modifications, or upgrades to, the Wilmington refinery.

Order

II.**IT IS FURTHER ORDERED that:**

- A. During the Hold Separate Period, Respondents shall hold the Held Separate Business separate, apart, and independent as required by this Hold Separate and shall vest the Held Separate Business with all rights, powers, and authority necessary to conduct its business; Respondents shall not exercise direction or control over, or influence directly or indirectly, the Held Separate Business or any of its operations, or the Hold Separate Trustee, except to the extent that Respondents must exercise direction and control over the Held Separate Business as is necessary to assure compliance with this Hold Separate, the Consent Agreement, and with all applicable laws, including, in consultation with the Hold Separate Trustee, continued oversight of the Held Separate Business' compliance with policies and standards concerning the safety, health, and environmental aspects of their operations and the integrity of their financial controls; and Respondents shall have the right to defend any legal claims, investigations or enforcement actions threatened or brought against any Held Separate Business.
- B. Until the Effective Date of Divestiture, Respondents shall take such actions as are necessary to maintain the viability and marketability of the Held Separate Business, Ultramar's Wilmington Refinery Assets, and Ultramar's Non-divestiture Retail Assets to prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets, except for ordinary wear and tear, including, but not limited to, continuing in effect and maintaining proprietary trademarks, trade names, logos, trade dress, identification signs, franchise agreements, and renewing or extending any base leases or ground leases that expire or terminate prior to the Effective Date of Divestiture.

Order

- C. The purpose of this Hold Separate is to: (1) preserve the Held Separate Business as a viable, competitive, and ongoing business independent of Respondents until the divestitures required by the Decision and Order are achieved; (2) assure that no Material Confidential Information is exchanged between Respondents and the Held Separate Business, except in accordance with the provisions of this Hold Separate; (3) prevent interim harm to competition pending the relevant divestitures and other relief; and (4) help remedy any anticompetitive effects of the proposed Merger.
- D. Respondent shall hold the Held Separate Business separate, apart, and independent on the following terms and conditions:
1. Richard Shermer of R. Shermer & Company, Inc., shall serve as Hold Separate Trustee, pursuant to the agreement executed by the Hold Separate Trustee and Respondents and attached as Confidential Appendix A (“trustee agreement”).
 - a. The trustee agreement shall require that, no later than five (5) days after this Hold Separate becomes final, Respondents transfer to the Hold Separate Trustee all rights, powers, and authorities necessary to permit the Hold Separate Trustee to perform his/her duties and responsibilities, pursuant to this Hold Separate and consistent with the purposes of the Decision and Order.
 - b. No later than five (5) days after this Order to Hold Separate and Maintain Assets becomes final, Respondents shall, pursuant to the trustee agreement, transfer to the Hold Separate Trustee all rights, powers, and authorities necessary to permit the Hold Separate Trustee to perform his/her duties and responsibilities, pursuant to this Order to Hold Separate and Maintain Assets and consistent with the

Order

purposes of the Decision and Order contained in the Consent Agreement.

- c. The Hold Separate Trustee shall have the responsibility, consistent with the terms of this Hold Separate and the Decision and Order contained in the Consent Agreement, for monitoring the organization of the Held Separate Business; for managing the Held Separate Business through the Manager; for maintaining the independence of the Held Separate Business; and for monitoring Respondents' compliance with their obligations pursuant to this Hold Separate and the Decision and Order contained in the Consent Agreement.
- d. The Hold Separate Trustee shall have full and complete access to all personnel, books, records, documents and facilities of the Held Separate Business or to any other relevant information as the Hold Separate Trustee may reasonably request, including, but not limited to, all documents and records kept by Respondents in the ordinary course of business that relate to the Held Separate Business. Respondents shall develop such financial or other information as the Hold Separate Trustee may request and shall cooperate with the Hold Separate Trustee. Respondents shall take no action to interfere with or impede the Hold Separate Trustee's ability to monitor Respondents' compliance with this Hold Separate and the Consent Agreement or otherwise to perform his/her duties and responsibilities consistent with the terms of this Hold Separate.
- e. The Hold Separate Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Hold Separate Trustee's duties and responsibilities.

Order

- f. The Commission may require the Hold Separate Trustee to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with performance of the Hold Separate Trustee's duties.
- g. Respondents may require the Hold Separate Trustee to sign a confidentiality agreement prohibiting the disclosure of any Material Confidential Information gained as a result of his or her role as Hold Separate Trustee to anyone other than the Commission.
- h. Thirty (30) days after the Hold Separate becomes final, and every thirty (30) days thereafter until the Hold Separate terminates, the Hold Separate Trustee shall report in writing to the Commission concerning the efforts to accomplish the purposes of this Hold Separate. Included within that report shall be the Hold Separate Trustee's assessment of the extent to which the businesses comprising the Held Separate Business are meeting (or exceeding) their projected goals as are reflected in operating plans, budgets, projections or any other regularly prepared financial statements.
- i. If the Hold Separate Trustee ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate, the Commission may appoint a substitute Hold Separate Trustee consistent with the terms of this paragraph, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of the substitute Hold Separate Trustee within five (5) days after notice by the staff of the Commission to Respondents of the identity of any substitute Hold Separate Trustee, Respondents shall be deemed to have consented to the selection of the proposed substitute trustee. Respondents and the

Order

substitute Hold Separate Trustee shall execute a trustee agreement, subject to the approval of the Commission, consistent with this paragraph.

2. No later than one (1) day after this Hold Separate becomes final, Respondents shall enter into a management agreement with, and transfer all rights, powers, and authorities necessary to manage and maintain the Held Separate Business to Bill Haywood.
 - a. In the event that Bill Haywood ceases to act as Manager, then Respondents shall select a substitute Manager, subject to the approval of the Commission, and transfer to the substitute Manager all rights, powers and authorities necessary to permit the substitute Manager to perform his/her duties and responsibilities, pursuant to this Hold Separate.
 - b. The Manager shall report directly and exclusively to the Hold Separate Trustee and shall manage the Held Separate Business independently of the management of Respondents. The Manager shall not be involved, in any way, in the operations of the other businesses of Respondents during the term of this Hold Separate.
 - c. The Manager shall have no financial interests affected by Respondents' revenues, profits or profit margins, except that the Manager's compensation for managing the Held Separate Business may include economic incentives dependent on the financial performance of the Held Separate Business if there are also sufficient incentives for the Manager to operate the Held Separate Business at no less than current rates of operation (including, but not limited to, current rates of production and sales) and to achieve the objectives of this Hold Separate.
 - d. The Manager shall make no material changes in the present operation of the Held Separate Business

Order

except with the approval of the Hold Separate Trustee, in consultation with the Commission staff.

- e. The Manager shall have the authority, with the approval of the Hold Separate Trustee, to remove employees and replace them with others of similar experience or skills. If any person ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate, the Manager, in consultation with the Hold Separate Trustee, may request Respondents to, and Respondents shall, appoint a substitute person, which person the Manager shall have the right to approve.
 - f. In addition to those employees within the Held Separate Business, the Manager may employ such employees as are reasonably necessary to assist the Manager in managing the Held Separate Business, including, without limitation, pricing services personnel, employee relations personnel, legal services personnel, public relations personnel, supply personnel, earnings consolidation and analysis personnel, business performance personnel (balanced scorecard, expense, volume, shared services reporting), customer relations personnel, and marketing administration personnel.
 - g. The Hold Separate Trustee shall be permitted, in consultation with the Commission staff, to remove the Manager for cause. Within fifteen (15) days after such removal of the Manager, Respondents shall appoint a replacement Manager, subject to the approval of the Commission, on the same terms and conditions as provided in Paragraph II.D.2 of this Hold Separate.
3. The Held Separate Business shall be staffed with sufficient employees to maintain the viability and competitiveness of the Held Separate Business. Employees of the Held Separate Business shall include

Order

- (i) all personnel performing responsibilities in connection with the Held Separate Business as of the date Respondents executed the Consent Agreement, and (ii) any persons hired from other sources. To the extent that any employees of the Held Separate Business leave or have left the Held Separate Business prior to the Effective Date of Divestiture, the Manager, with the approval of the Hold Separate Trustee, may replace departing or departed employees with persons who have similar experience and expertise or determine not to replace such departing or departed employees.
4. In connection with support services or products not included within the Held Separate Business, Respondents shall continue to provide, or offer to provide, the same support services to the Held Separate Business as are being provided to such business by Respondents as of the date the Consent Agreement is signed by Respondent. For services that Ultramar previously provided to the Held Separate Business, Respondents may charge the same fees, if any, charged by Respondents for such support services as of the date this Consent Agreement is signed by Respondents. For any other services or products that Respondents may provide the Held Separate Business, Respondents may charge no more than the same price they charge others for the same services or products. Respondents' personnel providing such services or products must retain and maintain all Material Confidential Information of the Held Separate Business on a confidential basis, and, except as is permitted by this Hold Separate Agreement, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any person whose employment involves any of Respondents' businesses, other than the Held Separate Business. Such personnel shall also execute confidentiality agreements prohibiting the disclosure of any Material Confidential Information of Held Separate Business.

Order

- a. Respondents shall offer and the Held Separate Business shall obtain the following services and products only from Respondents:
 - (1) National brand advertising and promotion programs;
 - (2) Federal and state regulatory policy development and compliance;
 - (3) Human resources administrative services, including but not limited to labor relations support;
 - (4) Environmental health and safety services, which develops corporate policies and insures compliance with federal and state regulations and corporate policies;
 - (5) Preparation of tax returns; and
 - (6) Audit services.

- b. Respondents shall offer to the Held Separate Business any services and products that Respondents provide to their other businesses directly or through third party contracts, or that they have provided directly or through third party contracts to the businesses constituting the Held Separate Business at any time since January 1, 2001. The Held Separate Business may, at the option of the Manager with the approval of the Hold Separate Trustee, obtain such services and products from Respondents. The services and products that Respondents shall offer the Held Separate Business shall include, but shall not be limited to, the following:
 - (1) Refined fuels product trading and acquisition;
 - (2) Wholesale engineering services, including engineering, design, and maintenance of terminals;
 - (3) Convenience store category management;
 - (4) Credit card processing;
 - (5) Information systems, which constructs, maintains, and supports all SAP and other computer systems;
 - (6) Public affairs, which provides media and community

Order

- relations services;
 - (7) Processing of accounts payable;
 - (8) Security services;
 - (9) Technical support;
 - (10) Financial accounting services;
 - (11) Procurement of refinery supplies (*e.g.* catalysts, chemicals, repair services, maintenance);
 - (12) Procurement of goods and services utilized in the ordinary course of business by the Held Separate Business;
 - (13) Legal services;
 - (14) Service station design, maintenance, and construction; and
 - (15) Real estate services, including the identification and development of new sites.
- c. In connection with services and products other than those listed in a. above, and including but not limited to those listed in b. above, the Held Separate Business shall have, at the option of the Manager with the approval of the Hold Separate Trustee, the ability to acquire services and products from third parties unaffiliated with Respondents.
5. Respondents shall cause the Hold Separate Trustee, the Manager, and each employee of the Held Separate Business having access to Material Confidential Information to submit to the Commission a signed statement that the individual will maintain the confidentiality required by the terms and conditions of this Hold Separate. These individuals must retain and maintain all Material Confidential Information relating to the Held Separate Business on a confidential basis and, except as is permitted by this Hold Separate, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any of Respondents' businesses other than the Held Separate Business. These persons

Order

shall not be involved in any way in the management, production, distribution, sales, marketing, and financial operations of the competing products of Respondents.

6. No later than ten (10) days after the date this Order to Hold Separate and Maintain Assets becomes final, Respondents shall establish written procedures, subject to the approval of the Hold Separate Trustee, covering the management, maintenance, and independence of the Held Separate Business consistent with the provisions of this Hold Separate.
7. No later than five (5) days after the date this Order to Hold Separate and Maintain Assets becomes final, Respondents shall circulate to employees of the Held Separate Business and to Respondents' employees who are responsible for the sale or distribution of motor fuels in the United States, a notice of this Hold Separate and Consent Agreement, in the form attached as Attachment A.
8. The Hold Separate Trustee and the Manager shall serve, without bond or other security, at the cost and expense of Respondents, on reasonable and customary terms commensurate with the person's experience and responsibilities.
9. Respondents shall indemnify the Hold Separate Trustee and Manager and hold each harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Hold Separate Trustee's or the Manager's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Hold Separate Trustee or the Manager.

Order

10. Respondents shall provide the Held Separate Business with sufficient financial resources:
 - a. as are appropriate in the judgment of the Hold Separate Trustee to operate the Held Separate Business at no less than current rates of operation (including, but not limited to, current rates of refinery production and product sales) and at no less than the rates of operation projected in the 2002 Golden Eagle Profit and Loss Budget, dated November 2001 (including, but not limited to, the rates of refinery production and product sales projected in such Profit and Loss Budget); provided that failure to achieve production or sales goals projected in Respondents' Profit and Loss Budget shall not be deemed to be a violation of this Hold Separate;
 - b. to perform all maintenance to, and replacements of, the assets of the Held Separate Business;
 - c. to carry on capital projects and business plans as reflected in the 2002 Golden Eagle Capital Expenditure Plan, dated November 2001, and
 - d. to maintain the viability, competitive vigor, and marketability of the Held Separate Business.
 - e. Such financial resources to be provided to the Held Separate Business shall include, but shall not be limited to, (i) general funds, (ii) capital, (iii) working capital, and (iv) reimbursement for any operating losses, capital losses, or other losses; provided, however, that, consistent with the purposes of the Decision and Order contained in the Consent Agreement, the Manager may reduce in scale or pace any capital or research and development project, or substitute any capital or research and development project for another of the same cost.

Order

11. Respondents shall not, during the Hold Separate Period, offer employees of the Held Separate Business positions with Respondents. The acquirer approved by the Commission pursuant to the Decision and Order shall have the option of offering employment to any employees of the Held Separate Business. Respondents shall not interfere with the employment, by the Commission-approved acquirer, of such employees; shall not offer any incentive to such employees to decline employment with the Commission-approved acquirer or to accept other employment with the Respondents; and shall remove any impediments that may deter such employees from accepting employment with the Commission-approved acquirer including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts that would affect the ability of such employees to be employed by the Commission-approved acquirer, and the payment, or the transfer for the account of the employee, of all current and accrued bonuses, pensions and other current and accrued benefits to which such employees would otherwise have been entitled had they remained in the employment of the Respondents. Provided, however, that Respondents may, if they determine to do so, make offers of employment to the employees listed in Schedule C, attached as a confidential attachment, during the Hold Separate Period; provided further that, if the acquirer approved by the Commission also determines to make an offer to any of the employees listed in Schedule C, Respondents may not convey the terms of Respondents' offer to such employee until such time as the Commission-approved acquirer makes its offer.
12. For a period of one (1) year commencing on the Effective Date of Divestiture, Respondents shall not employ or make offers of employment to employees

Order

of the Held Separate Business who have accepted offers of employment with the Commission-approved acquirer unless the individual has been terminated by the acquirer.

13. Notwithstanding the requirements of Paragraph II.D.11., Respondents shall offer a bonus or severance to employees included in the Held Separate Business that continue their employment with the Held Separate Business until termination of the Hold Separate Period (in addition to any other bonus or severance to which the employees would otherwise be entitled).
14. Except for the Manager, employees of the Held Separate Business, and support services employees involved in providing services to the Held Separate Business pursuant to Paragraph II.D.4., and except to the extent provided in Paragraph II.A., Respondents shall not permit any other of its employees, officers, or directors to be involved in the operations of the Held Separate Business.
15. Respondents shall assure that employees of the Held Separate Business receive, during the Hold Separate Period, their salaries, all current and accrued bonuses, pensions and other current and accrued benefits to which those employees would otherwise have been entitled.
16. Except as required by law, and except to the extent that necessary information is exchanged in the course of consummating the Merger, negotiating agreements to divest assets pursuant to the Consent Agreement and engaging in related due diligence; complying with this Hold Separate or the Consent Agreement; overseeing compliance with policies and standards concerning the safety, health and environmental aspects of the operations of the Held Separate

Order

Business and the integrity of the Held Separate Business' financial controls; defending legal claims, investigations or enforcement actions threatened or brought against the Held Separate Business; or obtaining legal advice, Respondents' employees (excluding support services employees involved in providing support to the Held Separate Business pursuant to Paragraph II.D.4.) shall not receive, or have access to, or use or continue to use any Material Confidential Information, not in the public domain, of the Held Separate Business. Nor shall the Manager or employees of the Held Separate Business receive or have access to, or use or continue to use, any Material Confidential Information not in the public domain about Respondents and relating to Respondents' businesses, except such information as is necessary to maintain and operate the Held Separate Business. Respondents may receive aggregate financial and operational information relating to the Held Separate Business only to the extent necessary to allow Respondents to prepare United States consolidated financial reports, tax returns, reports required by securities laws, and personnel reports. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph.

17. Respondents and the Held Separate Business shall jointly implement, and at all times during the Hold Separate Period maintain in operation, a system, as approved by the Hold Separate Trustee, of access and data controls to prevent unauthorized access to or dissemination of Material Confidential Information of the Held Separate Business, including, but not limited to, the opportunity by the Hold Separate Trustee, on terms and conditions agreed to with Respondents, to audit Respondents' networks and systems to verify compliance with this Hold Separate.

Order

III.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondents such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this Hold Separate.

IV.

IT IS FURTHER ORDERED that for the purposes of determining or securing compliance with this Hold Separate, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents, Respondents shall permit any duly authorized representatives of the Commission:

- A. Access, during office hours of Respondents and in the presence of counsel, to all facilities, and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of the Respondents relating to compliance with this Hold Separate; and
- B. Upon five (5) days' notice to Respondents and without restraint or interference from Respondents, to interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

V.

IT IS FURTHER ORDERED that this Hold Separate shall terminate at the earlier of:

- A. three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or

Order

B. the day after the divestiture required by the Consent Agreement is completed.

By the Commission, Chairman Muris not participating.

Order

SCHEDULE A

Confidential

[redacted]

Order

SCHEDULE B

Store	Address	City	State	Zi
p	Zone Number			
3674	851 N. Highway 49	Jackson	CA	
95642	351			
3609	1021 South St	Orland	CA	
95963-1640		351		
3621	18475 N Highway 1	Fort Bragg	CA	
95437-8774		351		
3622	1250 S Main St	Willits	CA	
95490-4306		351		
3623	1105 S State St	Ukiah	CA	
95482-6410		351		
3628	812 Main Street	Weaverville	CA	
96093	351			
3678	585 E Perkins St	Ukiah	CA	
95482-4508		351		
3679	440 S Main St	Red Bluff	CA	
96080-4316		351		
3680	506 6th St	Orland	CA	
95963-1229		351		
3692	975 S Main St	Lakeport	CA	
95453-5512		351		
3693	15010 Lakeshore Dr	Clearlake	CA	
95422	351			
3544	7920 Brentwood Blvd	Brentwood	CA	
94513-1004		351		
3558	42245 Fremont Blvd	Fremont	CA	
94538-4143		351		
3594	40500 Fremont Blvd	Fremont	CA	
94538-4304		351		
3604	1619 1st St	Livermore	CA	
94550-4303		351		
3712	4321 Clayton Rd	Concord	CA	
94521-2842		351		
3713	2501 Pacheco Blvd	Martinez	CA	
94553-2043		351		
3714	3767 Alhambra Ave	Martinez	CA	
94553-3803		351		
3715	1616 Oak Park Blvd	Pleasant Hill	CA	
94523-4410		351		
3716	1990 San Ramon Valley Blvd	San Ramon	CA	
94583-1204		351		

Order

3717	2098 Mt Diablo Blvd	Walnut Creek	CA
94596-4302		351	
3720	1088 Marina Blvd	San Leandro	CA
94577-3437		351	
3721	44 Lewelling Blvd	San Lorenzo	CA
94580-1628		351	
3520	2998 Churn Creek Rd	Redding	CA
96002-1130		351	
3521	2071 North St	Anderson	CA
96007-3456		351	
3549	3212 S Market St	Redding	CA
96001-3530		351	
3572	2700 Gateway Dr	Anderson	CA
96007-3531		351	
3630	37303 State Highway 299 E	Burney	CA
96013-4371		351	
3088	I-5 & Road 8	Dunnigan	CA
95937	351		
3428	5040 El Camino Ave	Carmichael	CA
95608-4650		351	
3447	3 Main St	Woodland	CA
95695-3123		351	
3527	601 Sunrise Ave	Roseville	CA
95661-4109		351	
3542	4250 Madison Ave	North Highlands	CA
95660-5403		351	
3601	8070 N. Lake Blvd	Kings Beach	CA
95719	351		
3603	10299 Folsom Blvd	Rancho Cordova	CA
95670-3516		351	
3642	6990 Douglas Blvd	Granite Bay	CA
95746-6214		351	
3683	8651 Folsom Blvd	Sacramento	CA
95826-3708		351	
3684	1312 Broadway	Placerville	CA
95667-5902		351	
3685	9301 Greenback Ln	Orangevale	CA
95662-4901		351	
3686	3430 Taylor Rd	Loomis	CA
95650-9583		351	
3687	1110 High St	Auburn	CA
95603-5110		351	
3688	2304 Lake Tahoe Blvd	S. Lake Tahoe	CA
96150-7107		351	
3694	1001 Sacramento Ave	Broderick	CA

FEDERAL TRADE COMMISSION DECISIONS
VOLUME 133

467

Order

95605-1902	351	
3783 7550 Watt Ave	North Highlands	CA
95660-2609	351	
3420 1370 Camden Ave	Campbell	CA
95008-6702	351	
3586 929 Fremont Ave	Los Altos Hills	CA
94024-6013	351	
3602 1885 N Milpitas Blvd	Milpitas	CA
95035-2505	351	
3723 2790 Story Rd	San Jose	CA
95127-3922	351	
3724 1365 Kooser Rd	San Jose	CA
95118-3814	351	
3725 1598 Alum Rock Ave	San Jose	CA
95116-2425	351	
3786 921 W Hamilton Ave	Campbell	CA
95008-0405	351	
3489 921 Sebastopol Rd	Santa Rosa	CA
95407-6830	351	
3645 300 College Ave	Santa Rosa	CA
95401-5118	351	
3700 7898 Old Redwood Hwy	Cotati	CA
94931-5107	351	
3701 219 Healdsburg Ave	Healdsburg	CA
95448-4103	351	
3702 8850 Sonoma Hwy	Kenwood	CA
95452-9024	351	
3703 2601 Lakeville Hwy	Petaluma	CA
94954-5654	351	
3704 1080 Gravenstein	Sebastopol	CA
95472 351		
3502 35 N Cherokee Ln	Lodi	CA
95240-2411	351	
3513 401 W Kettleman Ln	Lodi	CA
95240-5741	351	
3696 2448 W Kettleman Ln	Lodi	CA
95242-4123	351	
3756 13975 E Highway 88	Lockeford	CA
95237-9549	351	
3378 1800 W Imola Ave	Napa	CA
94559-4619	351	
3416 1300 Trancas St	Napa	CA
94558-2912	351	
3522 800 Merchant St	Vacaville	CA
95688-6912	351	

Order

3682	1105 N 1st St	Dixon	CA
95620-2404		351	
3706	385 Silverado Trl	Napa	CA
94559-4013		351	
3707	800 St. Helena Hwy	Saint Helena	CA
94574	351		
3710	3438 Broadway St	Amer. Canyon	CA
94589-1254		351	
3711	1295 Marine World Pkwy	Vallejo	CA
94589-3104		351	

Order

SCHEDULE C

Confidential

[redacted]

Order

ATTACHMENT A**NOTICE OF DIVESTITURE AND REQUIREMENT FOR
CONFIDENTIALITY**

Valero Energy Corporation and Ultramar Diamond Shamrock Corporation, hereinafter referred to as Respondents (which includes the entity resulting from the proposed merger of Valero and Ultramar), have entered into an Agreement Containing Consent Orders (“Consent Agreement”) with the Federal Trade Commission relating to the divestiture of certain assets and other relief.

As used herein, the term “Held Separate Business” means the businesses and personnel as defined in Paragraph I.F. of the Order to Hold Separate and Maintain Assets (the “Hold Separate Order”) contained in the Consent Agreement. Under the terms of the Decision and Order contained in the Consent Agreement, Respondents must divest certain assets, which are included within the Held Separate Business, within 12 months of the date Respondents executed the Consent Agreement.

During the Hold Separate Period (which begins after the Hold Separate Order becomes final and ends after Respondents have completed the required divestiture), the Held Separate Business shall be held separate, apart, and independent of Respondents’ businesses. The Held Separate Business must be managed and maintained as a separate, ongoing business, independent of all other businesses of Respondents until Respondents have completed the required divestiture. All competitive information relating to the Held Separate Business must be retained and maintained by the persons involved in the operation of the Held Separate Business on a confidential basis, and such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any other of Respondents’ businesses, except as otherwise provided in the Hold Separate Order. These persons involved in the operation of the Held Separate Business shall not be involved in any way in the

Order

management, production, distribution, sales, marketing, or financial operations of Respondents relating to competing products. Similarly, persons involved in similar activities in Respondents' businesses shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any similar information to or with any other person whose employment involves the Held Separate Business, except as otherwise provided in the Hold Separate Order.

Any violation of the Consent Agreement may subject Respondents to civil penalties and other relief as provided by law.

Order

Confidential Appendix A

[redacted]

Analysis

Analysis of Proposed Consent Order to Aid Public Comment

I. Introduction

The Federal Trade Commission (“Commission” or “FTC”) has issued a complaint (“Complaint”) alleging that the proposed merger of Valero Energy Corporation (“Valero”) and Ultramar Diamond Shamrock Corporation (“Ultramar”) (collectively “Respondents”) 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 has entered into an agreement containing consent orders (“Agreement Containing Consent Orders”) pursuant to which Respondents agree to be bound by a proposed consent order that requires divestiture of certain assets (“Proposed Consent Order”) and a hold separate order that requires Respondents to hold separate and maintain certain assets pending divestiture (“Hold Separate Order”). The Proposed Order remedies the likely anticompetitive effects arising from Respondents’ proposed merger, as alleged in the Complaint. The Hold Separate Order preserves competition pending divestiture.

II. Description of the Parties and the Transaction

Valero, headquartered in San Antonio, Texas, is an independent domestic refining company. Valero is engaged in national refining, transportation, and marketing of petroleum products and related petrochemical products. Valero reported 2000 net income of \$611 million on revenues of nearly \$15 billion. Valero’s revenues are generated almost exclusively in the United States from seven fuel refineries.

Ultramar is an independent North American refining and marketing company also headquartered in San Antonio, Texas. It is primarily engaged in the refining, marketing and transportation of petroleum products and petrochemicals. Ultramar reported 2000 net earnings of \$444 million on operating revenues of \$17.1 billion. Ultramar operates seven refineries in the United States

Analysis

and Canada with a total throughput of 850,000 barrels per day, marketed through a network of over 5,000 branded retail stations.

Pursuant to an agreement and plan of merger dated May 6, 2001, Valero proposes to merge with Ultramar in a transaction valued at approximately \$6 billion. Valero intends to acquire 100% of the voting stock of Ultramar. As a result of the merger, Valero will be one of the largest refiners in the United States.

III. The Investigation and the Complaint

The Complaint alleges that the merger of Valero and Ultramar 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, by substantially lessening competition in each of the following markets: (1) the refining and bulk supply of CARB 2 and CARB 3 gasoline for sale in Northern California; and (2) the refining and bulk supply of CARB 2 and CARB 3 gasoline in the State of California.

To remedy the alleged anticompetitive effects of the merger, the Proposed Order requires Respondents to divest the Ultramar Golden Eagle refinery located in Avon, California. Along with the refinery assets, Respondents will divest bulk gasoline supply contracts and 70 Ultramar Northern California retail service stations. This will assure the new entrant a consistent CARB gasoline demand to assure that the entrant possesses the same incentives to produce CARB gasoline that Ultramar had pre-merger.

The Commission's decision to issue the Complaint and enter into the Agreement Containing Consent Orders was made after an extensive investigation in which the Commission examined competition and the likely effects of the merger in the markets alleged in the Complaint and in several other markets, including markets for asphalt refining and pipeline transportation, and terminaling or marketing of gasoline or other fuels in sections of the country other than those alleged in the Complaint. The Commission has concluded that the merger is unlikely to reduce

Analysis

competition significantly in markets other than those alleged in the Complaint.

The Commission conducted the investigation leading to the Complaint in collaboration with the Attorneys General of the States of California and Oregon. As part of this joint effort, Respondents have entered into State Decrees with these States settling charges that the merger would violate both state and federal antitrust laws.

The Complaint alleges that the merger would violate the antitrust laws in four product and geographic markets, each of which is discussed below. The analysis applied in each market generally follows the analysis set forth in the FTC and U.S. Dep't of Justice *Horizontal Merger Guidelines* (1997) ("*Merger Guidelines*").

Count I - Refining and Bulk Supply of CARB 2 and CARB 3 Gasoline for Sale in Northern California

Valero and Ultramar compete in the refining and bulk supply of CARB gasoline for sale in Northern California.¹ Refining and bulk supply of CARB 2 and CARB 3 gasoline are relevant product markets. CARB gasoline meets the specifications of the California Air Resources Board ("CARB"). CARB 2 automotive gasoline meets the current Phase 2 specifications in effect since 1996 and is the only gasoline that can be sold to California gasoline consumers. CARB 3 automotive gasoline meets the proposed Phase 3 specifications that are scheduled to go into effect on January 1, 2003. After that date, CARB 3 will be the only gasoline that can be sold to California gasoline consumers. Thus, there are no substitutes for CARB 2 gasoline today and there will be no substitutes for CARB 3 gasoline. In the current investigation and in past decisions, the Commission concluded

¹ A bulk supply market consists of firms that have the ability to deliver large quantities of gasoline on a regular and continuing basis, such as pipelines or local refineries.

Analysis

that the refining and bulk supply of CARB 2 gasoline is a relevant market.²

The North Coast (Northern California and Northwest refineries) constitutes a relevant geographic market for the refining and bulk supply of CARB 2 and CARB 3 gasoline for sale in Northern California. The North Coast refiners can profitably raise prices in Northern California by a small but significant and nontransitory amount without losing significant sales to other bulk suppliers. Five California refiners (ChevronTexaco (Chevron), Equilon (Shell/Texaco), Phillips (Tosco), Ultramar, and Valero) supply more than 94% of the CARB gasoline consumed in Northern California; Kern Oil (Bakersfield, California) and Tesoro (Anacortes, Washington) supply virtually all the remainder during normal market operations. The next closest refineries, located in the Los Angeles area, are unlikely to supply CARB gasoline to Northern California in response to a small but significant and nontransitory increase in price because of the transportation costs to ship from Southern California.

The North Coast market would be highly concentrated following the proposed merger.³ Based on current CARB refining capacity, the proposed merger would increase concentration for the refining of CARB 2 gasoline by Northern California and Northwest refineries by more than 750 points to an HHI level

² Shell Oil Co., C-3803 (1998); Exxon, C-3907 (2000); Chevron, C-4023 (Proposed Order 2001).

³ The Commission measures market concentration using the Herfindahl-Hirschman Index (“HHI”), which is calculated as the sum of the squares of the shares of all firms in the market. *FTC and Department of Justice Horizontal Merger Guidelines* (“*Merger Guidelines*”) § 1.5. Markets with HHIs between 1000 and 1800 are deemed “moderately concentrated,” and markets with HHIs exceeding 1800 are deemed “highly concentrated.” *Merger Guidelines* § 1.51.

Analysis

above 2,700. Based on forecasted CARB 3 refining capacity, the proposed merger would increase concentration for the refining and bulk supply of CARB 3 gasoline by Northern California and Northwest refineries by more than 1,050 points to an HHI level above 3,050.

Entry is difficult and would not be timely, likely, or sufficient to prevent anticompetitive effects arising from the proposed merger. Building a new refinery is extremely unlikely due to the severe environmental constraints and substantial sunk costs. Imports of CARB gasoline from outside California are unlikely because of substantial import barriers, including (1) geographic isolation from potential outside sources; (2) cost and difficulty of producing CARB gasoline; (3) lack of potential customers because of the extensive integration of refining and marketing that has eliminated most independent gasoline marketers and retailers; and (4) price risk stemming from spot market volatility in Northern California.

The efficiency claims of the Respondents, to the extent they relate to these markets, are not cognizable under the *Merger Guidelines*, are small compared to the magnitude of the potential harm, and would not restore the competition lost by the merger even if the efficiencies were achieved.

The Complaint charges that the proposed merger would likely substantially reduce competition in refining and bulk supply of CARB gasoline for sale in Northern California, thereby increasing wholesale prices of CARB gasoline by (1) eliminating direct competition between Valero and Ultramar; (2) increasing the likelihood that the combined company will unilaterally raise prices; and (3) increasing the ability and likelihood of coordinated interaction between the combined company and its competitors in Northern California. The proposed merger would create a highly concentrated market in Northern California. The combined company would control between 40 and 45% of CARB gasoline refining capacity in Northern California. Under the *Merger Guidelines*, these figures trigger a presumption that “the merger will create or enhance market power or facilitate its exercise . . . ”

Analysis

Merger Guidelines § 1.51(c). These anticompetitive effects could result either from unilateral action by the combined firm or from coordinated interaction among the remaining refiners. Valero's post-merger market share supports a presumption under the *Merger Guidelines* that it would have the ability and incentive to unilaterally reduce supply in Northern California and raise prices. It could do this in a variety of ways, including reducing or eliminating capacity expansions at the Bay Area refineries, running the refineries at below capacity, or exporting gasoline out of the market.

The merger increases the likelihood of coordinated interaction in Northern California by reducing the number of significant refiners in the market from five to four. The market exhibits characteristics that are conducive to coordinated interaction, including (1) homogenous product; (2) small number of market participants; (3) high concentration; (4) recognition by participants that individual output decisions impact the market; (5) difficult entry conditions that insulate the market from outside supply; (6) vertical integration that eliminates potential low-cost competitors and creates a finite and identifiable collusive group; and (7) industry practices and conditions that allow the collusive group to easily detect and punish cheating on the tacit agreement.

The merger could raise the costs of CARB gasoline to Northern California consumers substantially; even a one cent per gallon price increase would cost Northern California consumers more than \$60 million annually. To remedy the harm, the Proposed Order requires the Respondents to divest Ultramar's Golden Eagle refinery, which refines CARB gasoline, and 70 Ultramar retail service stations supplied from the Golden Eagle refinery, as described more fully below. This divestiture will eliminate the refining and bulk supply overlap in the North Coast market otherwise presented by this merger.

Analysis

Count II - Refining and Bulk Supply of CARB Phase 2 and CARB Phase 3 Gasoline for Sale in California

Valero and Ultramar compete in refining and bulk supply of CARB gasoline for sale in California. As explained in Count I, only CARB gasoline can be sold legally in California. Refining and bulk supply of CARB 2 and CARB 3 gasoline are relevant product markets.

The West Coast constitutes a relevant antitrust geographic market for refining and bulk supply of CARB 2 and CARB 3 gasoline for sale in California. The West Coast refiners can profitably raise prices by a small but significant and nontransitory amount without losing significant sales to other refiners. Seven California refiners (BP (Arco), ChevronTexaco (Chevron), Equilon (Shell/Texaco), ExxonMobil, Phillips (Tosco), Ultramar, and Valero) supply more than 97% of the CARB gasoline consumed in California; Kern Oil (Bakersfield, California) and Tesoro (Anacortes, Washington) supply virtually all the remainder during normal market operations.

The seven refiner-marketers also account for more than 95% of retail gasoline sales in California through their branded retail stations. One effect of the close integration between refining and marketing in California is that refiners outside the West Coast cannot easily find outlets for imported cargoes of CARB gasoline, since nearly all the outlets are controlled by incumbent refiner-marketers. Likewise, the extensive integration of refining, marketing and bulk storage makes it more difficult for the few non-integrated marketers to turn to imports as a source of supply, since the few remaining independent marketers lack the scale to import cargoes economically and thus must rely on California refiners for their usual supply.

Other than the California refineries and one Washington refinery, no other refineries regularly produce CARB gasoline in significant quantities. The next closest refineries, located in the U.S. Virgin Islands, Texas and Louisiana, do not supply CARB gasoline to California except during significant price spikes

Analysis

caused by supply disruptions at California refineries. These refineries are unlikely to supply CARB gasoline to California in response to a small but significant and nontransitory increase in price due to (1) transportation costs from other refineries; (2) limited access to marine and bulk storage facilities; (3) lack of potential customers because of the extensive integration of refining and marketing that has eliminated most independent gasoline marketers and retailers; and (4) price risk stemming from spot market volatility in California.

The West Coast market for the refining and bulk supply of CARB 2 gasoline would be at the upper end of the moderately concentrated range following the proposed merger. Based on current refining capacity, the proposed merger would increase concentration for the refining of CARB 2 gasoline by California and Washington refineries by more than 325 points to an HHI level above 1,750. Based on forecasted CARB 3 refining capacity, the proposed merger would result in a highly concentrated market, increasing concentration for the refining and bulk supply of CARB 3 gasoline by California and Washington refineries by more than 390 points to an HHI level above 1,850.

Entry is difficult and would not be timely, likely, or sufficient to prevent anticompetitive effects arising from the proposed merger. Building a new refinery is unlikely due to the severe environmental constraints and substantial sunk costs. Imports of CARB gasoline from outside California are unlikely because of the substantial import barriers listed above.

The efficiency claims of the Respondents, to the extent they relate to these markets, are not cognizable under the *Merger Guidelines*, are small compared to the magnitude of the potential harm, and would not restore the competition lost by the merger even if the efficiencies were achieved.

The Complaint charges that the proposed merger would likely reduce competition in refining and bulk supply of CARB gasoline for sale in California, thereby increasing wholesale prices of CARB gasoline by (1) eliminating direct competition between

Analysis

Valero and Ultramar; and (2) increasing the ability and likelihood of coordinated interaction between the combined company and its competitors in California. This market exhibits the same characteristics conducive to coordinated interaction identified in Count I. The proposed merger reduces the number of CARB gasoline refiners in California and increases concentration, thereby increasing the likelihood of coordination.

The merger could raise the costs of CARB gasoline to all California consumers substantially; even a one cent per gallon price increase would cost California consumers more than \$150 million annually. To remedy the harm, the Proposed Order requires the Respondents to divest the refining and marketing assets identified above in Count I. This divestiture will eliminate the refining and bulk supply overlap in the West Coast market otherwise presented by this merger.

IV. Resolution of the Competitive Concerns

A. CARB Gasoline Refining and Bulk Supply

The Commission has provisionally entered into the Agreement Containing Consent Orders with Valero and Ultramar in settlement of the Complaint. The Agreement Containing Consent Orders contemplates that the Commission would issue the Complaint and enter the Proposed Order and the Hold Separate Order for the divestiture of certain assets described below. The Commission will appoint R. Shermer & Company, Inc. as the hold separate trustee.

To remedy the lessening of competition in refining and bulk supply of CARB 2 and CARB 3 gasoline alleged in Counts I and II of the Complaint, Paragraph II of the Proposed Order requires Respondents to divest Ultramar's Golden Eagle refinery and 70 Ultramar-owned and operated gas stations supplied from the Golden Eagle refinery to an acquirer approved by the Commission. (§ II.A.) The retail divestiture is ordered to maintain the likelihood that the owner of the Golden Eagle refinery will have incentives to produce CARB gasoline and other

Analysis

petroleum products equivalent to Ultramar's pre-merger incentives. The divestiture of Ultramar's Golden Eagle refinery, with associated Ultramar retail assets, will not significantly reduce the amount of gasoline available to non-integrated marketers, since the refinery will likely continue to produce CARB gasoline and other products and will need outlets for its sale.

Divestiture of the Golden Eagle refinery will effectively restore the competitive status quo *ante* in both markets. Valero and Ultramar are the only major refiners in California with excess capacity above their direct marketing needs. This excess (or "swing") capacity helps to dampen price spikes during shortages resulting from refinery shutdowns. Elimination of this swing production would lead to greater and longer price spikes during refinery outages. The divestiture will eliminate the combined company's ability and incentive to unilaterally reduce production and raise prices. In addition, Valero and Ultramar are the primary suppliers of unbranded wholesale gasoline to independent marketers and, in Northern California, they compete directly for this business. These unbranded marketers provide lower-cost competition to the branded refiner-marketers. The divestiture will insure that the remaining independent marketers have two vigorous competitors for their business, thus helping them to survive and continue to provide a lower-cost alternative for consumers. This competition, in turn, will increase the incentive for Valero and the acquirer to supply more CARB gasoline, thus, increasing swing capacity. The divestiture will complicate the ability of the Northern California refiners to coordinate their production because there will be more refiners than there would be without the divestiture. Valero and the acquirer will likely have different incentives than the integrated refiner-marketers and may be less willing to coordinate output decisions with the refiner-marketers. Although the divestiture will have the most direct effect in Northern California, it will also help competition in California as a whole; since supplies are longer in Northern California, CARB gasoline typically flows north to south. Maintaining production in Northern California will therefore result in more product availability throughout the state.

Analysis

In considering an application to divest the Ultramar Golden Eagle refinery and associated marketing assets to an acquirer, the Commission will consider the acquirer's ability and incentive to invest and compete in the businesses in which Ultramar was engaged in California. The Commission will consider, *inter alia*, whether the acquirer has the business experience, technical judgment and available capital to continue to invest in the refinery in order to maintain CARB gasoline production even in the event of changing environmental regulation.

B. Other Terms

Paragraphs III - VII of the Proposed Order detail certain general provisions. Pursuant to Paragraph III, if Respondents fail to comply with the divestiture ordered in Paragraph II, the Commission may appoint a trustee to effectuate the divestiture of the Golden Eagle Refinery and the 70 retail stations, or substitute a package containing Ultramar's two California refineries and all of Ultramar's company-operated retail stations. Paragraph IV requires the Respondents to provide the Commission with a report of compliance with the Proposed Order every sixty days until the divestitures are completed.

Paragraph V provides for notification to the Commission in the event of any changes in the corporate Respondents. Paragraph VI requires that Respondents provide the Commission with access to their facilities and employees for the purposes of determining or securing compliance with the Proposed Order. Finally, to avoid conflicts between the Proposed Order and the State consent decrees, Paragraph VII provides that if a State fails to approve any of the divestitures contemplated by the Proposed Order, then the period of time required under the Proposed Order for such divestiture shall be extended for sixty days.

V. Opportunity for Public Comment

The Proposed Order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. The Commission, pursuant to a change in its Rules of Practice,

Analysis

has also issued its Complaint in this matter, as well as a Hold Separate Order. Comments received during this thirty day comment period will become part of the public record. After thirty (30) days, the Commission will again review the Proposed Order and the comments received and will decide whether it should withdraw from the Proposed Order or make final the Proposed Order.

By accepting the Proposed Order subject to final approval, the Commission anticipates that the competitive problems alleged in the Complaint will be resolved. The purpose of this analysis is to invite public comment on the Proposed Order, including the proposed divestitures, and to aid the Commission in its determination of whether it should make final the Proposed Order contained in the agreement. This analysis is not intended to constitute an official interpretation of the Proposed Order, nor is it intended to modify the terms of the Proposed Order in any way.

Complaint

IN THE MATTER OF

LEINER HEALTH PRODUCTS, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 AND SEC. 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-4035; File No. 0123039

Complaint, February 19, 2002--Decision, February 19, 2002

This consent order addresses claims on certain packaging and labeling for acetaminophen tablets produced by Respondent Leiner Health Products, Inc. that such products are all or virtually all made in the United States. The order, among other things, prohibits the respondent from misrepresenting the extent to which any non-prescription drug product containing an analgesic is made in the United States, while permitting the respondent to represent that such products are made in the United States as long as all, or virtually all, of the ingredients or component parts of such products are made in the United States and all, or virtually all, of the labor in manufacturing such products is performed in the United States. The order also permits the respondent to represent that a product containing imported active ingredient(s) is "Processed in the United States with Foreign Ingredients" when describing a product that has been "significantly processed" in the United States.

Participants

For the Commission: *Laura D. Koss, Walter C. Gross, Joni Lupovitz, Elaine D. Kolish and Keith Anderson.*

For the Respondent: *Harvey Applebaum, Covington & Burling.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Leiner Health Products, Inc. ("respondent") has 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 is a Delaware corporation with its principal office or place of business at 901 233rd Street, Carson, California 90745.