

IN THE MATTER OF

SAINT-GOBAIN/NORTON INDUSTRIAL CERAMICS CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket C-3673. Complaint, June 12, 1996--Decision, June 12, 1996

This consent order requires, among other things, a Massachusetts-based corporation to divest businesses and associated assets in the United States markets for fused cast refractories, hot surface igniters, and silicon carbide refractory bricks. If the divestiture is not completed as required, the Commission may appoint one or more trustees to divest the remaining properties and assets.

Appearances

For the Commission: *Howard Morse, Robert Tovsky and William Baer.*

For the respondent: *Mark Leddy, Cleary, Gottlieb, Steen & Hamilton, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Compagnie de Saint-Gobain, through its wholly-owned subsidiary Societe Europeenne des Produits Refractaires ("SEPR"), has entered into a Stock Purchase Agreement with subsidiaries of the British Petroleum Company p.l.c. ("BP") whereby Compagnie de Saint-Gobain will acquire certain of the subsidiaries of BP that together comprise The Carborundum Company ("Carborundum"), and that as part of this agreement, Saint-Gobain/Norton Industrial Ceramics Corporation ("Saint-Gobain") will acquire the United States assets of Carborundum other than assets relating to ceramic fibers, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, and having reason to believe that Compagnie de Saint-Gobain has entered into

such agreements in restraint of trade in violation of Section 5 of the Federal Trade Commission Act, 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. THE RESPONDENT

1. Respondent Saint-Gobain/Norton Industrial Ceramics Corporation is a corporation organized and existing under the laws of Delaware, with its principal place of business at One New Bond Street, Worcester, Massachusetts. Saint-Gobain is a wholly-owned indirect subsidiary controlled by Compagnie de Saint-Gobain, a French company with its principal place of business located at 18, avenue d'Alsace, 92400 Courbevoie, France.

2. At all times relevant herein, the respondent, Saint-Gobain, has been, and is now, engaged in commerce as "commerce" is defined in Section 4 of the FTC Act (15 U.S.C. 44) and Section 1 of the Clayton Act (15 U.S.C. 12), and is a corporation whose business is in or affecting commerce as defined in Section 4 of the Federal Trade Commission Act (15 U.S.C. 44).

II. THE PROPOSED ACQUISITION

3. On or about May 26, 1995, Compagnie de Saint-Gobain, through SEPR, and BP executed a Stock Purchase Agreement wherein Saint-Gobain agreed to acquire certain assets of Carborundum from BP.

4. Saint-Gobain and Carborundum are substantial direct competitors in several markets, including United States markets for fused cast refractories, hot surface igniters, and silicon carbide refractory bricks.

III. FUSED CAST REFRACTORIES

A. Relevant Line of Commerce

5. One relevant line of commerce within which to analyze the effects of the acquisition is the United States market for fused cast refractories. Fused cast refractories are highly dense brick or block materials typically comprised either of alumina, zirconia and silica

together or alumina alone. Glass manufacturers, including producers of float glass (flat glass for homes, offices and automobiles), container glass (for bottles and jars) and other types of glass products (*e.g.*, for video screens, light bulbs, lenses, and beakers), require fused cast refractories to line the interior of the furnaces in which they melt raw materials -- silica, soda ash, limestone, salt cake and dolomite -- into a homogenous mass of molten glass.

6. Fused cast refractories are used by glass manufacturers for their excellent wear-resistant properties. Glass manufacturers would not substitute to other materials for fused cast refractories even in response to a significant price increase. The use of other materials in the applications where fused cast refractories are currently used would generally lead to an unacceptable deterioration in glass quality, and would dramatically reduce the length of furnace campaigns, requiring more frequent costly and time-consuming furnace repairs.

7. Imports of fused cast refractories into the United States are small, and come primarily from Saint-Gobain. The potential for significant imports is constrained by overseas production costs, shipping and handling costs, and duties. Product availability and product quality issues also limit the competitiveness of most of the fused cast refractories produced overseas. In any event, customers in the United States would require extensive testing over several years before using fused cast refractories produced overseas.

8. Total sales of fused cast refractories in the United States are over \$45 million.

B. Market Concentration

9. Saint-Gobain and Carborundum are the only two producers in the United States of fused cast refractories. Therefore, the United States fused cast refractory market is extremely concentrated as measured by the Herfindahl-Hirschmann Index (HHI), and the acquisition would result in a monopoly. In 1994, Carborundum accounted for the majority of sales of fused cast refractories in the United States, and Saint-Gobain accounted for the remainder. Even on a worldwide basis, Saint-Gobain is by far the largest producer of fused cast refractories, and Carborundum the second-largest, with a combined share of sales of approximately 70%.

10. Saint-Gobain has a dangerous probability of obtaining unilateral market power in the United States market for fused cast refractories.

C. Conditions of Entry

11. Entry into the fused cast refractories market would not be timely, likely or sufficient to deter or offset reductions in competition resulting from the acquisition.

12. Product development and plant construction alone would take several years. Obtaining product qualification at glass producers, who require extensive life cycle testing before they will use fused cast refractories in their plants because these products are so critical to the manufacturing process, would require many more years. The total time from initial entry to significant market impact likely would be many years.

13. Entry would also be extremely unlikely as it would require a large sunk capital investment. Efficient production would require entry at a scale that would be relatively large compared to the total sales available in the fused cast refractories market, making entry more risky and unlikely.

D. Effects of the Acquisition

14. The acquisition of Carborundum by Saint-Gobain may substantially lessen competition and tend to create a monopoly in the United States market for fused cast refractories because, among other things:

- a. It will increase concentration substantially in a highly concentrated market;
- b. It will eliminate substantial head-to-head competition between Saint-Gobain and Carborundum;
- c. It will leave Saint-Gobain as the sole producer of fused cast refractories in the United States, allowing Saint-Gobain unilaterally to exercise market power;
- d. It will likely result in increased prices for fused cast refractories; and
- e. It will likely result in diminished product innovation in fused cast refractories.

IV. HOT SURFACE IGNITERS

A. Relevant Line of Commerce

15. A second line of commerce within which to analyze the effects of the acquisition is the United States market for hot surface igniters ("HSIs"). HSIs are ceramic devices which are used as the ignition source in the ignition control system of gas appliances such as range ovens, dryers and furnaces. Depending on the application, HSIs differ in design and price, and are not interchangeable among applications. HSIs are an extremely reliable and cost-effective ignition source for gas appliances.

16. For most of the applications in which HSIs are used, appliance manufacturers would not substitute for HSIs in response to even a significant price increase. Other products, including pilot ignition and spark ignition, are less efficient, less reliable and less cost-effective than HSIs for nearly all gas appliance applications. In addition, appliance manufacturers would need to do extensive product re-design and product testing before substituting another type of ignition source for HSIs.

17. Imports of HSIs into the United States are negligible. Because of differences in line voltages, appliance design and energy efficiency regulations, there is little demand for HSIs overseas, and little production. The only producer of HSIs outside the United States is a Japanese company, Kyocera, which has been trying for several years to develop a commercially viable HSI, and has obtained only minimal sales in the United States. The Kyocera HSI requires a more expensive ignition system.

18. Total sales of HSIs in the United States are over \$45 million.

B. Market Concentration

19. Saint-Gobain and Carborundum together account for nearly all HSI sales in the United States. The only other producer of HSIs in the United States is Igniter Systems, Inc. Igniter Systems' product quality and consistency are questioned by customers, and its sales are limited to a small volume of aftermarket sales.

20. The United States HSI market is extremely concentrated as measured by the Herfindahl-Hirschmann Index ("HHI"), and the acquisition would result in a near-monopoly. In 1994, Saint-Gobain

accounted for the large majority of sales of HSIs and Carborundum accounted for virtually all the remainder. Saint-Gobain's acquisition of Carborundum would increase the HHI to over 9800.

21. Even if one defined a market comprised of all ignition sources for the gas appliances in which HSIs are predominantly used, and included HSIs, pilot ignition and spark ignition, the combined share of Saint-Gobain and Carborundum would be close to 80% of total sales.

22. Saint-Gobain has a dangerous probability of obtaining unilateral market power in the United States market for HSIs.

C. Conditions of Entry

23. There is a history of failed entry into the HSI market, and new entry would not be timely, likely or sufficient to deter or offset reductions in competition resulting from the acquisition. Designing and manufacturing HSIs would require several years for process development, plant construction, and product testing. Entry would require significant sunk investment with uncertain ultimate success. Efficient production would require entry at a scale that would be relatively large compared to the total sales available in the HSI market, making entry more risky and unlikely.

D. Effects of the Acquisition

24. The acquisition of Carborundum by Saint-Gobain may substantially lessen competition and tend to create a monopoly in the HSI market in the United States because, among other things:

- a. It will increase concentration substantially in a highly concentrated market;
- b. It will eliminate substantial head-to-head competition between Saint-Gobain and Carborundum, who are each other's closest competitors in the research and development, manufacture, and sale of HSIs;
- c. It will allow Saint-Gobain unilaterally to exercise market power;
- d. It will likely result in increased prices for HSIs; and
- e. It will likely result in diminished product innovation in HSIs.

V. SILICON CARBIDE REFRACTORY BRICKS

A. Relevant Line of Commerce

25. A third line of commerce within which to analyze the effects of the acquisition is the United States market for silicon carbide refractory bricks. Silicon carbide refractory bricks are fired ceramic bricks made from silicon carbide grain. These products are used to line the interior sidewalls of aluminum reduction cells, steel blast furnaces, and copper shaft furnaces.

26. Aluminum, steel and copper manufacturers would not substitute for silicon carbide bricks in response to even a significant price increase. The choice of a refractory material is sensitive primarily to the performance requirements as established by the design of the manufacturing facility in which the material will be used. Silicon carbide's excellent heat and oxidation resistance makes it a superior product for certain types of aluminum reduction cells, steel blast furnaces and copper shaft furnaces.

27. Imports of silicon carbide refractory bricks are minimal. Overseas production costs are generally higher than production costs in the United States, and imports would be constrained by added shipping and handling costs, and by duties, and would not constrain increased prices in the United States.

28. Total sales of silicon carbide refractory bricks in the United States are approximately \$15 million.

B. Market Concentration

29. The United States silicon carbide refractory brick market is extremely concentrated as measured by the Herfindahl-Hirschmann Index (HHI), and the acquisition would result in a near-monopoly. In 1994, Carborundum accounted for the majority of sales of silicon carbide refractory bricks in the United States, and Saint-Gobain virtually all of the rest. Saint-Gobain's acquisition of Carborundum would increase the HHI to over 9000.

30. Saint-Gobain has a dangerous probability of obtaining unilateral market power in the United States market for silicon carbide refractory bricks.

C. Conditions of Entry

31. Entry into the silicon carbide refractory brick market would not be timely, likely or sufficient to deter or offset reductions in competition resulting from the proposed acquisition. Designing and manufacturing silicon carbide refractory bricks would require product and process development, plant construction, and product testing, all of which could require several years of effort. In addition, entry would require significant sunk investment with uncertain ultimate success.

D. Effects of the Acquisition

32. The acquisition of Carborundum by Saint-Gobain may substantially lessen competition and tend to create a monopoly in the silicon carbide refractory bricks in the United States because, among other things:

- a. It will increase concentration substantially in a highly concentrated market;
- b. It will eliminate substantial head-to-head competition between Saint-Gobain and Carborundum, who are each other's closest competitors in the research and development, manufacture, and sale of silicon carbide refractory bricks;
- c. It will allow Saint-Gobain unilaterally to exercise market power; and
- d. It will likely result in increased prices for silicon carbide refractory bricks.

VI. VIOLATIONS CHARGED

33. The acquisition agreement between Saint-Gobain and BP described in paragraph three violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

34. The proposed acquisition of Carborundum by Saint-Gobain 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.

35. The proposed acquisition of Carborundum by Saint-Gobain, if consummated, would allow Saint-Gobain to monopolize the United

States markets for fused cast refractories, HSIs and silicon carbide refractory bricks, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission ("the Commission"), having initiated an investigation of the proposed acquisition by Compagnie de Saint-Gobain of certain of the subsidiaries of British Petroleum which together comprise The Carborundum Company ("Carborundum"), in which Saint-Gobain/Norton Industrial Ceramics Corporation ("Saint-Gobain") will acquire substantially all of the Carborundum assets in the United States, which acquisition is more fully described at paragraph I. (F) below, and Saint-Gobain having been furnished with a copy of a draft complaint that the Bureau of Competition has presented to the Commission for its consideration and which, if issued by the Commission, would charge Saint-Gobain with violations of the Clayton Act and Federal Trade Commission Act; and

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

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

1. Respondent Saint-Gobain/Norton Industrial Ceramics is a corporation organized, existing and doing business under and by

virtue of the laws of the State of Delaware, with its principal office and place of business located at One New Bond Street, Worcester, Massachusetts.

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

ORDER

I.

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

A. "*Respondent*" or "*Saint-Gobain*" means Saint-Gobain/Norton Industrial Ceramics Corporation, its directors, officers, employees, agents and representatives, its predecessors, successors, and assigns; subsidiaries, divisions, and groups and affiliates controlled by Saint-Gobain, and the respective directors, officers, employees, agents, representatives, successors and assigns of each; its domestic and foreign parents, including Compagnie de Saint-Gobain, and the subsidiaries, divisions, and groups and affiliates controlled by Compagnie de Saint-Gobain or any other domestic or foreign parent, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

B. "*Carborundum*" means the companies and assets comprising The Carborundum Company that Saint Gobain proposes to acquire from BP pursuant to the Acquisition.

C. "*BP*" means The British Petroleum Company p.l.c.

D. "*Toshiba Monofrax*" means the joint venture between Carborundum and Toshiba Ceramics Company, Limited, pursuant to the Joint Venture Agreement dated December 20, 1965.

E. "*Commission*" means the Federal Trade Commission.

F. "*Acquisition*" means the acquisition described in the Stock Purchase Agreement entered into on May 26, 1995 by which Saint-Gobain has agreed to acquire and BP has agreed to convey certain rights and interests in, and title to, Carborundum.

G. "*Fused cast refractories*" means all grades or types of refractory products which are produced using a fused cast process, *i.e.*, melting components in electric furnaces and casting the molten

product into shaped products, including, but not limited to, fused cast AZS (alumina-zirconia-silica) and fused cast alumina.

H. "*Hot surface igniters*" means all silicon carbide hot surface igniters used in the ignition system of gas appliances.

I. "*Silicon carbide performance refractories*" means all refractory products composed of bonded silicon carbide grains.

J. "*Silicon carbide refractory bricks*" means all refractory products composed of bonded silicon carbide grains which are formed by hydraulic, mechanical or vibratory pressing, and are marketed for use in the manufacture of primary metals, including aluminum reduction cells, steel blast furnaces, and copper shaft furnaces.

K. "*Carborundum silicon carbide refractory brick technology*" means all patents, trade secrets, technology and know-how of Carborundum for producing any silicon carbide refractory brick product sold by Carborundum on or before the date of the Acquisition, all such information being sufficiently detailed for the commercial production and sale of such products, including, but not limited to, all technical information, data, specifications, drawings, design and equipment specifications, manuals, engineering reports, manufacturing designs and reports, operating manuals, and formulations, laboratory research, and quality control data.

L. "*Assets and Businesses*" means assets, properties, businesses, and goodwill, tangible and intangible, including, without limitation, the following:

1. All plant facilities, machinery, fixtures, equipment, vehicles, transportation and storage facilities, furniture, tools, supplies, stores, spare parts, and other tangible personal property;

2. All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, dedicated management information systems, information contained in management information systems, rights to software, trademarks, patents and patent rights, inventions, trade secrets, technology, know-how, ongoing research and development, specifications, designs, drawings, processes and quality control data;

3. Raw material and finished product inventories and goods in process;

4. All right, title and interest in and to real property, together with appurtenances, licenses, and permits;

5. All right, title, and interest in and to the contracts entered into in the ordinary course of business with customers (together with associated bids), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;

6. All rights under warranties and guarantees, express or implied;

7. All separately maintained, as well as relevant portions of not separately maintained books, records and files; and

8. All items of prepaid expense.

M. "*Carborundum fused cast refractories properties to be divested*" means the Carborundum Monofrax Group, Carborundum's manufacturing facility in Falconer, New York, and any other Carborundum Assets and Businesses utilized in connection with the research, development, manufacture, distribution or sale of fused cast refractories (including any assets located at or research or development work ongoing or completed at the Carborundum Technology Center); provided, however, that the "*Carborundum fused cast refractories properties to be divested*" does not include the name "Carborundum" nor any interest of Carborundum in, or contractual relationship with, Toshiba Monofrax.

N. "*Carborundum igniters properties to be divested*" means Carborundum's hot surface igniter manufacturing facility in Mayaguez, Puerto Rico, and any other Carborundum Assets and Businesses utilized in connection with the research, development, manufacture, distribution or sale of hot surface igniters (including any assets located or research and development work done at the Carborundum Technology Center, and any rights of Carborundum in which any person has agreed not to compete with Carborundum in the manufacture or marketing of hot surface igniters); provided, however, that "*Carborundum igniters properties to be divested*" does not include the name "Carborundum."

O. "*Carborundum silicon carbide properties to be divested*" means Carborundum's Keasbey, New Jersey silicon carbide performance refractories manufacturing facility, and any other Carborundum Assets and Businesses utilized in connection with the research, development, manufacture, distribution or sale of all products, including silicon carbide refractory bricks and products, other than silicon carbide refractory bricks, manufactured at that plant (including such assets located, or research and development work

done, at the Carborundum Technology Center); provided, however, that "silicon carbide properties to be divested" does not include the name "Carborundum" or any Carborundum silicon carbide refractory manufacturing facilities other than the Keasbey, New Jersey plant, or any trade names used by Carborundum.

P. "*Carborundum properties to be divested*" means the Carborundum fused cast refractories properties to be divested, the Carborundum igniters properties to be divested, and the Carborundum silicon carbide properties to be divested.

Q. "*Carborundum Technology Center*" means Carborundum's research and development facility located in Niagara Falls, New York.

R. "*Saint-Gobain fused cast refractories properties to be divested*" means (i) Saint-Gobain's manufacturing facility in Louisville, Kentucky, and any other Saint-Gobain Assets and Businesses located in North America that are utilized in the research, development, manufacture, sale or distribution of fused cast refractories and (ii) any product or processing technology utilized in connection with the research, development, manufacture, distribution or sale of fused cast refractories (including any ongoing or completed research or development work within Saint-Gobain that is related to fused cast AZS refractories, fused cast alumina refractories, or to any other fused cast products produced or sold by Saint-Gobain in North America; provided, however, that such research shall not include research or development work that relates solely to process technology used by Societe Europeenne des Produits Refractaires in Europe).

S. "*Licensee*" means the person to whom the Carborundum silicon carbide refractory brick technology is licensed pursuant to paragraph II of this order.

T. "*License date*" means the date on which the Carborundum silicon carbide refractory brick technology is licensed following Commission approval pursuant to paragraph II of this order.

U. "*Remaining properties to be divested*" means the following:

1. The Carborundum fused cast refractories properties to be divested if the Carborundum fused cast refractories properties to be divested have not been divested, or divestiture of the Saint-Gobain fused cast refractories properties to be divested has not been

approved by the Commission and divested, by the time that a trustee is appointed in accordance with paragraph III of this order, and

2. The Carborundum igniters properties to be divested if the Carborundum igniter properties to be divested have not been divested by the time that a trustee is appointed in accordance with paragraph III of this order, and

3. The Carborundum silicon carbide properties to be divested if the Carborundum silicon carbide properties to be divested have not been divested, or a license to the Carborundum silicon carbide refractory brick technology has not been approved by the Commission and granted, by the time that a trustee is appointed in accordance with paragraph III of this order.

V. "*Viability and competitiveness*" of the properties to be divested means that such respective properties are capable of functioning independently and competitively in the fused cast refractories, hot surface igniters, and silicon carbide performance refractories businesses.

II.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, at no minimum price, by the earlier of February 28, 1997, or one year from the date the Acquisition is consummated, the Carborundum fused cast refractories properties to be divested as an ongoing business, and shall also divest such additional ancillary Carborundum Assets and Businesses and effect such arrangements as are necessary to assure the viability and competitiveness of the Carborundum fused cast refractories properties to be divested.

B. Respondent may propose, and the Commission may in its sole discretion accept, in lieu of divestiture of the Carborundum fused cast refractories properties to be divested, divestiture of the Saint-Gobain fused cast refractories properties to be divested, to a person that receives the prior approval of the Commission, and in a manner that receives the prior approval of the Commission. Divestiture of the Saint-Gobain fused cast refractories properties to be divested shall, in order to obtain Commission approval, satisfy the purposes of this order and remedy the lessening of competition resulting from the

Acquisition as alleged in the Commission's complaint. Respondent's request that the Commission approve a divestiture of the Saint-Gobain fused cast refractories properties to be divested shall not toll the time in which it is required to divest the Carborundum fused cast refractories properties to be divested, except that if the Commission has not approved or disapproved such request within ninety (90) days of the date on which it was submitted, then, in the event of Commission disapproval of the request, the period shall be extended by the length of time in excess of ninety days before Commission disapproval. Respondent's request that the Commission approve divestiture of the Saint-Gobain fused cast refractories properties to be divested shall not eliminate the requirement that it divest the Carborundum fused cast refractories properties to be divested, unless such substitute divestiture is approved by the Commission and consummated in a timely fashion consistent with the requirements of this order.

C. Respondent shall divest, absolutely and in good faith, at no minimum price, by the earlier of February 28, 1997, or one year from the date the Acquisition is consummated, the Carborundum igniters properties to be divested as an ongoing business, and shall also divest such additional ancillary Carborundum Assets and Businesses and effect such arrangements as are necessary to assure the viability and competitiveness of the Carborundum igniters properties to be divested.

D. Respondent shall divest, absolutely and in good faith, at no minimum price, by the earlier of February 28, 1997, or one year from the date the Acquisition is consummated, the Carborundum silicon carbide properties to be divested, and shall also divest such additional ancillary Carborundum Assets and Businesses and effect such arrangements as are necessary to assure the viability and competitiveness of the Carborundum silicon carbide properties to be divested.

E. Respondent may propose, prior to the earlier of August 30, 1996, or six months from the date the Acquisition is consummated, and the Commission may in its sole discretion accept, in lieu of divestiture of the Carborundum silicon carbide properties to be divested, to grant, with no continuing royalties, a perpetual license to the Carborundum silicon carbide refractory brick technology to a person that obtains the prior approval of the Commission, in a manner that receives the prior approval of the Commission.

Licensing of the Carborundum silicon carbide refractory brick technology shall, in order to obtain Commission approval, satisfy the purposes of this order and remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint. In no event shall any licensing agreement pursuant to this paragraph contain any limitation on the products the licensee is permitted to produce, or the geographic area in which the licensee may produce such products. Respondent's request that the Commission approve a licensee shall not toll the time in which it is required to divest the Carborundum silicon carbide properties to be divested, except that if the Commission has not approved or disapproved such request within ninety (90) days of the date on which it was submitted, then, in the event of Commission disapproval of the request, the period shall be extended by the length of time in excess of ninety days before Commission disapproval. Respondent's request that the Commission approve a licensee shall not eliminate the requirement that it divest the Carborundum silicon carbide properties to be divested, unless such licensing is approved by the Commission and consummated in a timely fashion consistent with the requirements of this order.

F. If respondent licenses the Carborundum silicon carbide refractory brick technology pursuant to paragraph II.E. of this order, then for a period of six (6) months after the license date, upon reasonable notice and request from the licensee, respondent shall provide to the licensee information, technical assistance, and advice sufficient to effect the transfer to the licensee of the silicon carbide refractory brick technology and to enable the licensee to manufacture silicon carbide refractory bricks. Upon reasonable notice and request from the licensee, respondent shall also provide to the licensee consultation and training with knowledgeable employees of respondent, including a qualified engineer, at the licensee's facility for a period of time, not to exceed three (3) months, sufficient to satisfy the licensee's management that its personnel are adequately trained in the manufacture of silicon carbide refractory bricks. Respondent may require reimbursement from the licensee for all of its direct out-of-pocket expenses, including a reasonable labor loss fee for on-site assistance incurred in providing the services required by this paragraph II.F. of this order.

G. If respondent licenses the Carborundum silicon carbide refractory brick technology pursuant to paragraph II.E. of this order,

then respondent shall provide the licensee with all promotional, advertising, and marketing materials regarding silicon carbide refractory bricks prepared by Carborundum at any time during the period commencing twelve (12) months prior to the date this order becomes final, a list of all customers of Carborundum's silicon carbide refractory bricks during the period commencing twenty-four (24) months prior to the date this order becomes final, and a list of Carborundum's suppliers of silicon carbide, other raw materials, and production components used to produce Carborundum's silicon carbide refractory bricks.

H. Respondent shall comply with all terms of the Agreement to Hold Separate attached to this order and made a part hereof as Appendix I. Said Agreement shall continue in effect with respect to the Carborundum fused cast refractories properties to be divested until such time as respondent has divested the Carborundum fused cast refractories properties to be divested, with respect to the Carborundum igniters properties to be divested until such time as respondent has divested the Carborundum igniters properties to be divested, and with respect to the Carborundum silicon carbide properties to be divested until such time as respondent has divested the Carborundum silicon carbide properties to be divested, or until such other time as stated in said Agreement, provided that said Agreement to Hold Separate shall not continue in effect with respect to the Carborundum fused cast refractories properties to be divested if respondent divests, with Commission approval, the Saint-Gobain fused cast refractories properties to be divested, and shall not continue in effect with respect to the Carborundum silicon carbide properties to be divested if respondent licenses, with Commission approval, the Carborundum silicon carbide refractory brick technology.

I. Respondent shall divest each of the Carborundum properties to be divested only to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestitures of the Carborundum properties to be divested is to ensure the continuation of the Carborundum properties to be divested as ongoing, viable businesses engaged in the manufacture and sale of fused cast refractories, hot surface igniters, and silicon carbide performance refractories, respectively, and to remedy any lessening

of competition resulting from the Acquisition as alleged in the Commission's complaint.

III.

It is further ordered, That:

A. If respondent has not divested, absolutely and in good faith and with the Commission's approval, each of the Carborundum properties to be divested, or, pursuant to paragraph II.B. of this order, the Saint-Gobain fused cast refractories properties to be divested, or has not licensed, with the Commission's approval, pursuant to paragraph II.E. of this order, the Carborundum silicon carbide refractory brick technology, the Commission may appoint one or more trustees to divest the remaining properties to be divested, along with any reasonable ancillary Carborundum assets and other reasonable arrangements that are necessary to assure the viability and competitiveness of such remaining properties to be divested.

B. In the event the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, respondent shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by respondent 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, respondent shall consent to the following terms and conditions regarding the powers, authorities, duties and responsibilities of the trustee:

1. The Commission shall select the trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondent has 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

identity of any proposed trustee, respondent 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 remaining properties to be divested, along with any reasonable ancillary Carborundum assets and other reasonable arrangements that are necessary to assure the viability and competitiveness of such remaining properties to be divested.

3. The trustee shall have twelve (12) months from the date of appointment to accomplish the divestiture or divestitures. If, however, at the end of the twelve-month period the trustee has submitted a plan of divestiture or believes that divestiture can be accomplished within a reasonable time, the divestiture period may be extended by the Commission; provided, however, the Commission may only extend the divestiture period or divestiture periods, as applicable, two (2) times, but not more than one (1) year in the aggregate for each divestiture.

4. The trustee shall have full and complete access to the personnel, books, records and facilities related to the remaining properties to be divested, or any other relevant information, as the trustee may reasonably request. Respondent shall develop such financial or other information as such trustee may reasonably request and shall cooperate with any reasonable request of the trustee. Respondent shall take no action to interfere with or impede any trustee's accomplishment of the divestiture or divestitures. Any delays in divestiture caused by respondent shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or the court for a court-appointed trustee.

5. Subject to respondent's absolute and unconditional obligation to divest at no minimum price, the trustee shall use his or her best efforts to negotiate the most favorable price and terms available for the divestiture of the remaining properties to be divested. If the trustee receives *bona fide* offers for the remaining properties to be divested from more than one acquiring entity or entities, 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 respondent from among those approved by the Commission.

6. The trustee shall serve, without bond or other security, at the cost and expense of respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have authority to employ, at the cost and expense of respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the sale 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 respondent 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 remaining properties to be divested.

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

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

9. If a 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 appropriate trustee, issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the remaining properties to be divested.

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

IV.

It is further ordered, That within thirty (30) days after the date this order becomes final and every sixty (60) days thereafter until respondent has fully complied with paragraphs II and III of this order, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying and has complied with those provisions, including the Agreement to Hold Separate. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of substantive contacts or negotiations for the divestitures of the Carborundum fused cast refractories properties to be divested, Carborundum igniter properties to be divested, Carborundum silicon carbide properties to be divested, and divestiture of the Saint-Gobain fused cast refractories properties to be divested or licensing of the Carborundum silicon carbide refractory brick technology, as specified in paragraph II of this order, including the identity of all parties contacted. Respondent also shall include in compliance reports, among other things, copies of all written communications to and from such parties, all internal memoranda, reports and recommendations concerning the divestitures.

V.

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

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

B. Upon ten (10) days, notice to respondent, and without restraint or interference from respondent, to interview officers or employees of respondent, who may have counsel present, regarding such matters.

VI.

It is further ordered, That until the obligations set forth in paragraphs II and III of this order are met, respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation, dissolution or sale of subsidiaries, or any other change that may affect compliance obligations arising out of the order.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate (the "Hold Separate") is by and between Saint-Gobain/Norton Industrial Ceramics Corporation ("Saint-Gobain"), a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its principal office and place of business at One New Bond Street, Worcester, Massachusetts, and the Federal Trade Commission (the "Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively, the "Parties").

PREMISES

Whereas, on May 26, 1995, Compagnie de Saint-Gobain, the parent company of Saint-Gobain/Norton Industrial Ceramics Corporation, entered into, through its wholly-owned subsidiary Societe Europeenne Des Produits Refractaires ("SEPR"), a Stock Purchase Agreement with The Standard Oil Company, BP International Limited, and BP Exploration (Alaska), Inc., subsidiaries of British Petroleum Company, p.l.c. ("BP") providing for the acquisition (the "Acquisition") of the voting securities of the

companies that together comprise The Carborundum Company ("Carborundum"); and

Whereas, Carborundum, with its principal office and place of business at 1625 Buffalo Avenue, Niagara Falls, New York, manufactures and sells a range of products, including fused cast refractories, hot surface igniters, and silicon carbide performance refractories; and

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

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

Whereas, the Commission is concerned that if an understanding is not reached, preserving the *status quo ante* of Carborundum, during the period prior to the final acceptance and issuance of the consent order by the Commission (after the sixty (60) day public comment period), divestiture resulting from any proceeding challenging the legality of the Acquisition might not be possible, or might be less than an effective remedy; and

Whereas, the Commission is concerned that if the Acquisition is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of Carborundum and the Commission's right to have Carborundum or the Carborundum properties to be divested continue as viable competitors independent of Saint-Gobain; and

Whereas, even if the Commission determines to finally accept the consent order, it is necessary to hold separate the Carborundum properties to be divested to protect interim competition pending divestiture or other relief; and

Whereas, the purpose of this Agreement and the consent order is to

(i) Preserve Carborundum as a viable and competitive business, independent of Saint-Gobain, and engaged in the research and development, manufacture and sale of fused cast refractories, hot surface igniters and silicon carbide performance refractories pending final acceptance or withdrawal of acceptance of the consent order by

the Commission pursuant to the provisions of Section 2.34 of the Commission's Rules;

(ii) Preserve the Carborundum properties to be divested as viable and competitive businesses, independent of Saint-Gobain, and engaged in the research and development, manufacture and sale of fused cast refractories, hot surface igniters and silicon carbide performance refractories pending divestiture or other relief pursuant to paragraph II or paragraph III of the consent order;

(iii) Preserve Carborundum as a viable and competitive business, independent of Saint-Gobain, and engaged in the research and development, manufacture and sale of fused cast refractories, hot surface igniters and silicon carbide performance refractories and prevent any interim harm to consumers as a result of the Acquisition;

(iv) Remedy the anticompetitive effects of the Acquisition as alleged in the Commission's complaint; and

Whereas, entering into this Hold Separate shall in no way be construed as an admission by Saint-Gobain that the Acquisition is illegal or would have any anticompetitive effects; and

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

Now, therefore, the Parties agree, upon the understanding that the Commission has not yet determined whether the Acquisition will be challenged, and in consideration of the Commission's agreement at the time it accepts the consent order for public comment that, unless the Commission determines to reject the consent order, the Commission will not seek a temporary restraining order, preliminary injunction, or permanent injunction to prevent consummation of the Acquisition, and will grant early termination of the Hart-Scott-Rodino waiting period, as follows:

1. Saint-Gobain agrees to execute and be bound by the attached consent order.

2. The terms "fused cast refractories," "hot surface igniters," "silicon carbide performance refractories," "carborundum fused cast refractories properties to be divested," "Carborundum igniters properties to be divested," "Carborundum silicon carbide properties

to be divested," "Carborundum properties to be divested," and "Acquisition" have the same definitions as in the consent order;

3. Saint-Gobain agrees that from the date this Hold Separate is accepted until the earliest of the dates listed in subparagraphs 3.a. or 3.b., it will comply with the provisions of paragraph 5 of this Hold Separate with respect to Carborundum:

a. Five (5) business days after the Commission withdraws its acceptance of the consent order pursuant to the provisions of Section 2.34 of the Commission's Rules;

b. The day after the Commission accepts as final the consent order pursuant to the provisions of Section 2.34 of the Commission's Rules.

Provided, however, that Saint-Gobain is not required to hold separate pursuant to this Hold Separate any of the following business groups or businesses of Carborundum: ceramic fiber; microelectronics; structural ceramics; boron nitride; ekonol polyester resin; Carborundum specialty products; irrigation; or Carborundum's silicon carbide refractory manufacturing plants in Germany, The United Kingdom or Australia.

4. Saint-Gobain agrees that from the date this Hold Separate is accepted until the earliest of the dates listed in subparagraphs 4.a., or 4.b., it will comply with the provisions of paragraph 5 of this Hold Separate with respect to each of the Carborundum properties to be divested:

a. Five (5) business days after the Commission withdraws its acceptance of the consent order pursuant to the provisions of Section 2.34 of the Commission's Rules;

b. The day after the respective divestiture required by the consent order is completed, or, as applicable with regard to the Carborundum silicon carbide properties to be divested, an approved license granted.

5. Saint-Gobain shall hold Carborundum or the Carborundum properties to be divested, as applicable pursuant to paragraphs 3 and 4 (the "Held-Separate Businesses"), as they are constituted on the date the Acquisition is consummated, separate and apart on the following terms and conditions:

a. The Held-Separate Businesses shall be held separate and apart and shall be operated independently of Saint-Gobain (meaning here and hereinafter, Saint-Gobain excluding the Held-Separate Businesses and excluding all personnel connected with the Held-Separate Businesses as of the date this Hold Separate is signed) except to the extent that Saint-Gobain must exercise direction and control over the Held-Separate Businesses to assure compliance with this Hold Separate or with the consent order.

b. Saint-Gobain shall not exercise direction or control over, or influence directly or indirectly, the Held-Separate Businesses, the New Board or Management Committee (as defined in subparagraph 5.d. any of its operations or businesses; provided, however, that Saint-Gobain may exercise only such direction and control over the Held-Separate Businesses as is necessary to assure compliance with this Hold Separate or with the consent order.

c. Saint-Gobain shall maintain the marketability, viability and competitiveness of the Held-Separate Businesses, and shall not take such action that will cause or permit the destruction, removal, wasting, deterioration or impairment of the Held-Separate Businesses, except in the ordinary course of business and except for ordinary wear and tear, and shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair the marketability, viability or competitiveness of the Held-Separate Businesses.

d. Upon consummation of the Acquisition, Saint-Gobain shall elect a three-person Board of Directors for the Held-Separate Businesses (the "New Board"), or a three-person Management Committee. After the order is made final pursuant to Section 2.34 of the Commission's rules, Saint-Gobain may elect a separate New Board or Management Committee for each of the Held-Separate Businesses. Each New Board or Management Committee for each Held-Separate Business shall consist of at least two Carborundum officers knowledgeable about the Held-Separate Business, one of whom shall be named Chairman of the New Board or Management Committee, and who shall remain independent of Saint-Gobain and competent to assure the continued viability and competitiveness of the Held-Separate Business, and one New Board or Management Committee Member who may also be an officer, agent or employee of Saint-Gobain (the "Saint-Gobain New Board or Management Committee Member"). The Saint-Gobain New Board or Management

Committee Member for each New Board or Management Committee for each Held-Separate Business shall not have any direct responsibility relating to any Saint-Gobain business that manufactures, markets or uses the products, or products that compete with, products manufactured or marketed by such Held-Separate Business. Except for the Saint-Gobain New Board or Management Committee Member, Saint-Gobain shall not permit any director, officer, employee or agent of Saint-Gobain also to be a director, officer, employee or agent of Carborundum. Each New Board or Management Committee member shall enter into a confidentiality agreement agreeing to be bound by the terms and conditions of this Hold Separate.

e. Except as required by law and except to the extent that necessary information is exchanged in the course of complying with this Hold Separate or the consent order, or in the course of defending investigations or litigation or obtaining legal advice, or providing risk management services, Saint-Gobain shall not receive or have access to, or the use of, any Material Confidential Information of the Held-Separate Businesses, not in the public domain, except as such information would be available to Saint-Gobain in the ordinary course of business if the Acquisition had not taken place. Saint-Gobain may receive on a regular basis from the Held-Separate Businesses aggregate financial information necessary and essential to allow Saint-Gobain to file financial reports, tax returns and personnel reports, and such other information, other than information relating specifically to the Carborundum properties to be divested, necessary in the course of evaluating and consummating the Acquisition. Any such information that is obtained pursuant to this subparagraph shall only be used for the purposes set out in this subparagraph. ("Material Confidential Information," as used in this Hold Separate, means competitively sensitive or proprietary information not independently known to Saint-Gobain from sources other than the Held-Separate Businesses or the New Board or Management Committee, as applicable, and includes but is not limited to customer lists, customers, price lists, prices, individual transactions, marketing methods, patents, technologies, processes, or other trade secrets.) In no event shall Saint-Gobain receive Material Confidential Information relating to any specific customer of Carborundum.

f. Saint-Gobain may retain an independent auditor to monitor the operation of the Held-Separate Businesses. Said auditor may report in writing to Saint-Gobain on all aspects of the operation of the Held-Separate Businesses other than information on customer lists, customers, price lists, prices, individual transactions, marketing methods, patents, technologies, processes, or other trade secrets.

g. Except as permitted by this Hold Separate, the New Board or Management Committee member appointed by Saint-Gobain who is also an officer, agent, or employee of Saint-Gobain shall not receive any Material Confidential Information of the Held-Separate Businesses or Material Confidential Information of any person other than Saint-Gobain and shall not disclose any such information obtained through his or her involvement with the Held-Separate Businesses to Saint-Gobain or use it to obtain any advantage for Saint-Gobain. The Saint-Gobain New Board or Management Committee Member shall participate in matters that come before the New Board or Management Committee only for the limited purpose of considering any capital investment of over \$250,000 for the Carborundum fused cast refractories properties to be divested, any capital investment over \$150,000 for the Carborundum igniters properties to be divested, any capital investment over \$150,000 for the Carborundum silicon carbide properties to be divested, approving any proposed budget and operating plans, authorizing dividends and repayment of loans consistent with the provisions hereof, reviewing any material transactions described in paragraph 5.g., and carrying out Saint-Gobain's responsibilities under the Hold Separate and the consent order. Except as permitted by the Hold Separate, the Saint-Gobain New Board or Management Committee Member shall not participate in any other matter.

h. All material transactions, out of the ordinary course of business and not precluded by paragraph 5 hereof, shall be subject to a majority vote of the New Board or Management Committee (as defined in paragraph 5.d. hereof).

i. Saint-Gobain shall not change the composition of the New Board or Management Committee unless the Chairman of the New Board or Management Committee consents, or unless it is necessary to do so in order to assure compliance with this Hold Separate or with the consent order. The Chairman of the New Board or Management Committee shall have the power to remove members of the New Board or Management Committee for cause and to require Saint-

Gobain to appoint replacement members of the New Board or Management Committee. Saint-Gobain shall not change the composition of the management of the Held-Separate Businesses except that the New Board or Management Committee shall have the power to remove management employees for any legal reason. If the Chairman ceases to act or fails to act diligently, a substitute Chairman shall be appointed in the same manner as provided in paragraph 5.d. Saint-Gobain shall circulate to the management employees of Carborundum and appropriately display a notice of the Hold Separate and the Consent Agreement at a conspicuous place at all offices and facilities of the Held-Separate Businesses.

j. All earnings and profits of the Held-Separate Businesses shall be retained separately by Carborundum or the Carborundum properties to be divested, as applicable. If necessary, Saint-Gobain shall provide the Held-Separate Businesses with sufficient working capital to operate at current rates of operation, upon commercially reasonable terms.

k. Should the Federal Trade Commission seek in any proceeding to compel Saint-Gobain to divest itself of Carborundum or to compel Saint-Gobain to divest any assets or businesses of Carborundum that it may hold, or to seek any other injunctive or equitable relief, Saint-Gobain shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the Acquisition. Saint-Gobain also waives all rights to contest the validity of this Hold Separate.

6. For the purpose of determining or securing compliance with this Hold Separate, subject to any legally recognized privilege, and upon written request and ten days, notice to Saint-Gobain, Saint-Gobain shall permit any duly authorized representative(s) of the Commission:

a. Access during the office hours of Saint-Gobain and in the presence of counsel to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Saint-Gobain or Carborundum relating to compliance with this Hold Separate;

b. Without restraint or interference from Saint-Gobain, to interview Saint-Gobain's or Carborundum's officers, directors or

employees, who may have counsel present, regarding any such matters.

7. This agreement shall be binding upon acceptance by Saint-Gobain and the Commission.

IN THE MATTER OF

BUDGET RENT A CAR SYSTEMS, INC.

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

Docket C-3674. Complaint, June 17, 1996--Decision, June 17, 1996

This consent order prohibits, among other things, an Illinois-based corporation from failing to disclose, clearly and prominently, any representation relating to the renter's liability for loss of or damage to a rental vehicle, and from failing to post at each Budget rental location a sign, clearly and prominently, containing the disclosure statement. In addition, the consent order prohibits the respondent from misrepresenting: the obligation of the renter to make any payment as a result of loss of or damage to a rental vehicle; and the value of a vehicle that has been lost or damaged.

Appearances

For the Commission: *Randall Brook, Charles Harwood and Robert Schroeder.*

For the respondent: *Robert Aprati, in-house counsel, Lisle, IL. and Lisa Jose Fales, Collier, Shannon, Rill & Scott, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Budget Rent A Car Systems, Inc., a corporation ("respondent"), has violated the provisions of The Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Budget Rent a Car Systems, Inc., is a Delaware corporation with its principal office and place of business located at 4225 Naperville Road, Lisle, Illinois.

PAR. 2. Respondent has advertised, offered for rent, and rented, directly and through franchisees, vehicles to consumers.

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

PAR. 4. In connection with the renting of vehicles, respondent has disseminated or caused to be disseminated promotional and informational material through advertisements, an 800-number that contains recorded messages, respondent's own telephone reservation system, third-party computerized reservation systems operated by airline and travel agency employees, and point of sale disclosures.

PAR. 5. Some of respondent's promotional and informational material including, but not limited to, the vehicle rental contract, brochure, and telephone script attached as Exhibits A - C, describe the renter's liability for loss of or damage to vehicles under various circumstances.

PAR. 6. In connection with the renting of vehicles, respondent has offered renters in most states a choice of either accepting or declining an option called the loss damage waiver ("LDW"). If a renter accepted LDW, respondent would add an additional fee to the total rental charge. In 1993 respondent typically charged renters approximately \$13 per day for LDW. LDW is not insurance but instead waives respondent's claim against the renters for damages in the event the vehicle is damaged or stolen during the pendency of the rental agreement.

PAR. 7. The renter's own vehicle insurance company or credit card issuer will often pay for loss of or damage to rental vehicles when a renter declines to purchase LDW. Respondent's informational materials, referred to in paragraph five, and numerous public sources of information, have made this fact known to potential renters.

PAR. 8. In numerous instances respondent has sought and obtained from renters who declined LDW and who have been involved in accidents as much as \$4,500 more than the vehicle's repair cost or market value. This charge is called "loss of turnback". "Turnback" is a sales incentive some manufacturers offer Budget. It occurs when the manufacturer, using a pre-negotiated formula, agrees to repurchase a used vehicle from Budget. The formula's repurchase price can be much higher than the car's market value. Respondent did not inform the renter about this potential extra charge for loss of turnback until respondent made a claim against the renter for loss or damage. Insurance companies and credit card issuers usually refuse to pay respondent's claim for loss of turnback because it exceeds the vehicle's cost of repairs or its fair market value.

PAR. 9. In the informational materials referred to in paragraph five, respondent has represented that renters were liable for loss of or

damage to the rental vehicle if they did not purchase LDW. Respondent failed to disclose that it might include, in a damage or loss claim against renters who decline LDW, as much as \$4,500 for loss of turnback. This fact would have been material to consumers' decisions to rent a vehicle from respondent and to purchase LDW. The failure to disclose this material fact, in light of the representations made, was, and is, a deceptive act or practice.

PAR. 10. In the informational materials referred to in paragraph five, respondent has represented that only two charges related to damages, a loss of use fee and the insurance policy deductible, might not be covered by the renter's vehicle insurance. Respondent failed to disclose that the renter's vehicle insurance would likely not cover a loss of turnback charge. This fact would have been material to consumers' decisions to rent a vehicle from respondent and to purchase LDW. The failure to disclose this material fact, in light of the representations made, was, and is, a deceptive act or practice.

PAR. 11. In numerous instances where vehicles were damaged, respondent has sent, or caused to be sent, written communications to renters who declined LDW demanding that they reimburse respondent for "loss of turnback."

PAR. 12. By demanding reimbursement for loss of turnback, respondent has represented, directly or by implication, that the signed rental contract entitled it to collect this charge.

PAR. 13. In truth and in fact, the signed rental contract did not entitle respondent to collect loss of turnback. Therefore, the representation set forth in paragraph twelve was, and is, false and misleading.

PAR. 14. In numerous instances where vehicles were stolen or declared "totaled," respondent has charged renters who declined LDW for loss based on "Budget book value" or "net vehicle cost."

PAR. 15. In charging a renter for loss based on the "Budget book value" or "net vehicle cost" when a vehicle was stolen or declared a total loss, respondent has represented, directly or by implication, that it was charging the fair market value of the vehicle.

PAR. 16. In truth and in fact, respondent was not charging the fair market value of the vehicle. Instead, it was charging the value that included loss of turnback. Therefore, the representation set forth in paragraph fifteen was, and is, false and misleading.

PAR. 17. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

