

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Timothy J. Muris, Chairman
Sheila F. Anthony
Mozelle W. Thompson
Orson Swindle
Thomas B. Leary

In the Matter of)
)
Valero Energy Corporation,)
a corporation,)
)
and)
)
Ultramar Diamond Shamrock)
Corporation,)
a corporation.)
)

Public Record Version

Docket No. C-4031
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

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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”):

1. Respondent Valero is a corporation organized, existing and doing business under

- 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.
- 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.

- 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.

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

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

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 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

- 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 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 (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.
 - 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 relations services;
 - (7) Processing of accounts payable;
 - (8) Security services;
 - (9) Technical support;
 - (10) Financial accounting services;
 - (11) Procurement of refinery supplies (

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 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.

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.
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 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 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.

III.

IT IS FURTHER ORDERED that

IV.

IT IS FURTHER ORDERED that for the purposes of determining or securing

SCHEDULE B

<u>Store</u>	<u>Address</u>	<u>City</u>	<u>State</u>	<u>Zip</u>	<u>Zone Number</u>
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
3717	2098 Mt Diablo Blvd	Pleasant Hill	CA	94523-3600	TD

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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				

[redacted]

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 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.

Confidential Appendix A

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