

IN THE MATTER OF

IMPERIAL CHEMICAL INDUSTRIES PLC, ET AL.

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-3473. Complaint, Nov. 29, 1993--Decision, Nov. 29, 1993

This consent order allows, among other things, the respondents to proceed with the proposed acquisition of certain Du Pont assets, but it requires the respondents to divest, within 15 months, a predetermined acrylic-plastic manufacturing capacity by selling one of their U.S. plants to a Commission-approved purchaser, and to provide the buyer with technical assistance for 18 months, if necessary. In addition, if the divestiture is not accomplished in the specified time-frame, the respondents agree to a Commission-appointed trustee to complete the transaction.

Appearances

For the Commission: *Rhett R. Krulla, Steven Newborn and Robert Tovsky.*

For the respondents: *William Rosoff, Davis, Polk & Wardwell, New York, N. Y.*

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 Imperial Chemical Industries PLC, a corporation, ICI Americas Inc., a corporation, and ICI Acrylics Inc., a corporation, have entered into an agreement with E.I. du Pont de Nemours and Company ("Du Pont"), that violates said Acts, 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:

DEFINITIONS

PARAGRAPH 1. For purposes of this complaint, "*methyl methacrylate*" means the chemical intermediate product, used to produce acrylic resins and plastics.

PAR. 2. For purposes of this complaint, "*polymethyl methacrylate*" means a homopolymer of methyl methacrylate monomer or a copolymer containing more than 50% by weight methyl methacrylate monomer as a constituent monomer. Polymethyl methacrylate does not include acrylic resin for use in the manufacture of latex coatings or acrylic coatings.

PAR. 3. For purposes of this complaint, "*acrylic plastic*" means polymethyl methacrylate or acrylic sheet produced by a continuous-casting manufacturing process.

PAR. 4. For purposes of this complaint, "*acrylic sheet*" means sheet or plate containing more than 50% by weight methyl methacrylate, as produced by cell casting, continuous casting, continuous-process extrusion, or extrusion.

THE RESPONDENTS

PAR. 5. Respondent Imperial Chemical Industries PLC is a public limited company, organized, existing and doing business under and by virtue of the laws of The United Kingdom, with its principal office and place of business at 9 Millbank, London, England. Respondents ICI Americas Inc. and ICI Acrylics Inc. are wholly-owned subsidiaries of Imperial Chemical Industries PLC. (Hereinafter all three respondents are referred to as "ICI")

PAR. 6. Imperial Chemical Industries PLC is a major world-wide producer of commodity and specialty chemicals.

PAR. 7 Imperial Chemical Industries PLC's net income in 1991 was \$1,583 million on sales of \$18.3 billion.

PAR. 8. ICI Americas Inc. 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 at Concord Pike and New Murphy Road, Wilmington, Delaware.

PAR. 9. ICI Acrylics Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its principal office and place of business at 10091 Manchester Road, St. Louis, Missouri.

PAR. 10. At all times relevant herein, each of the respondents or their predecessors have been engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12; and have been corporations whose business is in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

THE ACQUISITION

PAR. 11. On April 23, 1992, ICI entered into an agreement with Du Pont for the acquisition by ICI of Du Pont's acrylic plastic assets and businesses ("the Acquisition"). The Acquisition is structured as an exchange of assets between ICI and Du Pont: ICI is selling to Du Pont its nylon and nylon intermediates assets and businesses in exchange for Du Pont's methyl methacrylate and acrylic plastic assets and businesses plus additional cash consideration.

THE RELEVANT MARKETS

PAR. 12. For purposes of this complaint, the relevant line of commerce in which to evaluate the effects of the Acquisition is the manufacture and sale of acrylic plastic.

PAR. 13. For purposes of this complaint, the relevant geographic market is the United States.

PAR. 14. In 1991, about 600 million pounds of acrylic plastic were produced in the United States. The market is highly concentrated.

PAR. 15. It is difficult to enter into the manufacture and sale of acrylic plastic.

PAR. 16. At the time of the Acquisition described above, ICI and Du Pont were actual competitors in the manufacture and sale of acrylic plastic in the United States.

THE EFFECTS OF THE ACQUISITION

PAR. 17. The effect of the Acquisition may be substantially to lessen competition in the relevant market in the United States, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, because, among other things, the Acquisition eliminates substantial actual competition, between ICI and Du Pont and between Du Pont and others, in the manufacture and sale of acrylic plastic in the United States and significantly enhances the likelihood of collusion or interdependent coordination among the remaining firms in the relevant market.

THE VIOLATIONS CHARGED

PAR. 18. The Acquisition of the acrylic plastic assets and businesses of Du Pont by ICI, would, if consummated, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

PAR. 19. The Acquisition agreement described in paragraph eleven violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 20. The Acquisition of the acrylic plastic assets and businesses of Du Pont by ICI, would, if consummated, violate 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 of assets by Imperial Chemical Industries PLC, ICI Americas Inc., and ICI Acrylics Inc. (collectively "ICI") from E. I. du Pont de Nemours

and Company (hereinafter "Du Pont"), which acquisition is more fully described at paragraph I.(A) below, and ICI 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 ICI with violations of the Clayton Act and Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that 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, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Imperial Chemical Industries PLC is a public limited company organized, existing and doing business under and by virtue of the laws of The United Kingdom, with its principal office and place of business at 9 Millbank, London, England.
2. ICI Americas Inc. 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 at Concord Pike and New Murphy Road, Wilmington, Delaware.

3. ICI Acrylics Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its principal office and place of business at 10091 Manchester Road, St. Louis, Missouri.

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

ORDER

I.

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

(A) "*Acquisition*" means the Letter of Intent entered into on April 23, 1992, by which ICI agreed to acquire and Du Pont agreed to convey certain rights and interests in, and title to, certain of the properties, businesses and other assets of Du Pont.

(B) "*ICI*" means Imperial Chemical Industries PLC, ICI Americas Inc., and ICI Acrylics Inc., all of their predecessors, all subsidiaries, divisions, groups and affiliates (including the Properties to Be Divested as hereinafter defined) controlled by any of the foregoing, all of their respective directors, officers, employees, agents, and representatives, and the respective successors and assigns of any of the foregoing.

(C) "*Control*" means control as defined in 16 CFR 801.1(b).

(D) "*Du Pont*" means E.I. du Pont de Nemours and Company, all of its predecessors, all subsidiaries, divisions, groups and affiliates controlled by any of the foregoing, all of their respective directors, officers, employees, agents, and representatives, and the respective successors and assigns of any of the foregoing.

(E) "*Properties to Be Divested*" means all Assets and Businesses at any one of the following facilities in the United States, provided that, at the time of divestiture, the facility shall have PMMA manufacturing capacity of no less than 30 million

pounds per annum and acrylic sheet manufacturing capacity of no less than 12 million pounds per annum:

1. ICI's Memphis, Tennessee, PMMA and acrylic sheet manufacturing facility;
2. ICI's Olive Branch, Mississippi, PMMA and acrylic sheet manufacturing facility; or
3. ICI's Compton, California, PMMA manufacturing facility (excluding, at ICI's option, those tangible and intangible assets currently used by ICI in the research and development of its acrylic plastics products and not required by the acquirer to compete in the manufacture and sale of PMMA and acrylic sheet) together with the Compton Expansion.

(F) "*Compton Expansion*" means such improvements, additions and expansions to ICI's Compton, California manufacturing facility, or, in the sole discretion of the Commission, at such other location as the acquirer may request, as shall accomplish all of the following:

1. Increase to no less than 30 million pounds per annum the capacity of the Properties to Be Divested as defined in paragraph I.(E)3 above for the production of PMMA;
2. Add to the Properties to Be Divested as defined in paragraph I.(E)3 above capacity of no less than 12 million pounds per annum to extrude acrylic sheet by installation of one or more Reifenhäuser extruders heretofore located at ICI's Memphis facility or by installation of comparable extruders that would render the acquirer competitive in the sale of 48-inch by 96-inch acrylic sheet to industrial distributors; and
3. Provide sufficient feedstock storage, PMMA storage, acrylic sheet warehouse space and related facilities, as appropriate to enable the Properties to Be Divested as defined in paragraph I.(E)3 above to operate efficiently at sustained levels of output no less than the above stated capacities.

(G) "*Assets and Businesses*" include but are not limited to all assets, properties, businesses and goodwill, tangible and intangible, utilized in the production, distribution or sale of acrylic plastic and acrylic sheet, 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, management information systems, rights to software, trademarks, patents, inventions, trade secrets, technology, know-how, 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 (to the extent assignable) (together with associated bid and performance bonds), 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.

(H) "*Commission*" means the Federal Trade Commission.

(I) "*Rohm and Haas*" means Rohm and Haas Company, all of its predecessors, all subsidiaries, divisions, groups and affiliates controlled by any of the foregoing, all of their respective directors, officers, employees, agents, and representatives, and the respective successors and assigns of any of the foregoing.

(J) "*CYRO*" means CYRO Industries, all of its predecessors, all subsidiaries, divisions, groups and affiliates controlled by any of the foregoing, all of their respective directors, officers, employees, agents, and representatives, and the respective successors and assigns of any of the foregoing.

(K) "*Polymer Technology*" means Polymer Technology, Inc., all of its predecessors, all subsidiaries, divisions, groups and affiliates controlled by any of the foregoing, all of their respective directors, officers, employees, agents, and representatives, and the respective successors and assigns of any of the foregoing.

(L) "*MMA*" means methyl methacrylate.

(M) "*PMMA*" means polymethyl methacrylate, a homopolymer of MMA or a copolymer containing more than 50% by weight MMA as a constituent monomer. PMMA does not include acrylic resin for use in the manufacture of latex coatings or acrylic coatings.

(N) "*Acrylic sheet*" means sheet or plate containing more than 50% by weight MMA as produced by cell casting, continuous casting, extrusion, or continuous manufacturing.

(O) "*Acrylic plastic*" means PMMA or acrylic sheet produced by a continuous-casting manufacturing process.

(P) "*MMA Entrant*" means any person other than ICI, Rohm and Haas or CYRO who has commenced construction of a facility for the manufacture of MMA in North America.

(Q) "*Capacity*" means actual operating capacity, calculated on the basis of a 7-day, 24-hour operation allowing for normal outages for maintenance and repair.

(R) "*Viability and Competitiveness*" of the Properties to Be Divested means that such properties are capable of operating independently of ICI at an annual output of at least 30 million pounds of acrylic plastic and at least 12 million pounds of acrylic sheet and are capable of functioning independently and competitively in the acrylic plastic business and the acrylic sheet business.

II.

It is ordered, That:

(A) Within fifteen (15) months of the date this order becomes final, ICI shall divest, absolutely and in good faith, the Properties to Be Divested to an acquirer that intends to operate the facilities at or near capacity and shall also divest such additional ancillary Assets and Businesses and effect such arrangements that are necessary to assure the Viability and Competitiveness of the Properties to Be Divested. *Provided, however,* that if ICI elects to divest the paragraph I.(E)3. Properties to Be Divested, ICI shall, prior to such divestiture, have either (i) completed the Compton Expansion, or (ii) made such progress toward the completion of the Compton Expansion that the Commission determines that the expansion will be completed without undue delay, in which case the contract between ICI and the acquirer shall contain a provision to that effect.

(B) ICI 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 until such time as ICI has divested all the Properties to Be Divested or until such other time as the Agreement to Hold Separate provides.

(C) ICI shall divest the Properties to Be Divested only to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. ICI shall demonstrate the Viability and Competitiveness of the Properties to Be Divested in its application for approval of a proposed divestiture. The purpose of the divestiture of the Properties to Be Divested is (1) to ensure the continuation of the assets as ongoing, viable businesses engaged in the manufacture and sale of acrylic plastic and acrylic sheet at or near capacity, and (2) to remedy any lessening of competition in the acrylic plastic market resulting from the Acquisition as alleged in the Commission's complaint.

(D) ICI shall take such action as is necessary to maintain the Viability and Competitiveness and the marketability of the Properties to Be Divested and shall not cause or permit the destruction, removal or impairment of the Properties to Be Divested except (i) in the ordinary course of business, (ii) for ordinary wear and tear, and (iii) to the extent necessary (a) to implement ICI's plans already in place to move certain acrylic sheet assets from its Memphis facility to its Olive Branch facility, or (b) to move from its Compton facility to another one of its facilities the tangible and intangible assets currently used by ICI in the research and development of its acrylic plastic products.

III.

It is further ordered, That, for a period of eighteen (18) months following the divestiture of the Properties to Be Divested, ICI shall provide to the acquirer as requested by the acquirer, at no cost to the acquirer, such rights to technology, know-how, and technical assistance regarding PMMA and acrylic sheet process and applications technology as may be necessary for the acquirer of the Properties to Be Divested to utilize the Properties to Be Divested and to ensure the continuation of the assets as ongoing, viable businesses capable of operating at or near capacity. *Provided, however*, ICI may, pursuant to its divestiture agreement with the acquirer, require that the acquirer reimburse ICI at a reasonable hourly rate, not to exceed ICI's actual hourly expense for employment of such personnel, for consultation and instruction provided by ICI personnel to the acquirer.

IV.

It is further ordered, That,

(A) For a period of ten (10) years from the date of the divestiture required by this order, ICI shall, at the request of the acquirer of the Properties to Be Divested, contract with such acquirer to

supply MMA to the acquirer, in such quantities as the acquirer may request for use in the Properties to Be Divested, subject only to the capacity constraints of ICI's MMA production facilities in the United States and preexisting contractual obligations to third parties; and

(B) For a period commencing on the date this order becomes final and continuing for ten (10) years, ICI shall, at the request of any person who, after the date this order becomes final, is granted a license to manufacture PMMA in the United States using any of the technology identified in paragraph VI of this order, contract with such licensee to supply MMA to the licensee, in such quantities as the licensee may request for use in the facilities covered by such license, subject only to the capacity constraints of ICI's MMA production facilities in the United States and preexisting contractual obligations to third parties.

(C) The price, terms, and conditions at which ICI shall supply MMA to such acquirer of the Properties to Be Divested, or to any such licensee(s) of the technology identified in paragraph VI of this order, shall be no less favorable to the acquirer, or to the licensee(s), than the price, terms, and conditions at which ICI supplies MMA to any other person engaged in the manufacture of acrylic plastics or acrylic sheet in the United States, including its territories and possessions.

V.

It is further ordered, That, notwithstanding any provision to the contrary, in any contract between ICI and the acquirer of the Properties to Be Divested, or in any contract(s) between ICI and the licensee(s) of the technology identified in paragraph VI of this order, for a period commencing four (4) years after the date of the divestiture required by this order, and continuing for six (6) years, ICI shall permit the acquirer or licensee(s), without penalty or forfeiture of any kind, to purchase or otherwise receive any or all of its MMA requirements in the United States, including its territories and possessions, from any MMA Entrant; and, to the

extent of any such purchases or receipts of MMA by the acquirer ICI shall relieve the acquirer or licensee(s) of any contractual obligation to purchase such quantities of MMA from ICI.

VI.

It is further ordered, That ICI shall relinquish its right to require that Polymer Technology obtain ICI's consent before granting any license for use in the United States, including its territories and possessions, of the Project Technology, as defined in the agreement between Polymer Technology and K-S-H, Inc. dated October 5, 1979.

VII.

It is further ordered, That:

(A) If ICI has not divested, absolutely and in good faith and with the Commission's approval, the Properties to Be Divested within fifteen (15) months of the date this order becomes final, ICI shall consent to the appointment by the Commission of a trustee to divest the Properties to Be Divested and also to divest such additional ancillary Assets and Businesses and to effect such arrangements that are necessary to assure the Viability and Competitiveness of the Properties to Be Divested. In the event the Commission or the Attorney General brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45 (1), or any other statute enforced by the Commission, ICI 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(1) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by ICI to comply with this order.

(B) If a trustee is appointed by the Commission or a court pursuant to paragraph VII.(A) of this order, ICI shall consent to the following terms and conditions regarding the trustee's powers, authorities, duties and responsibilities:

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

2. The trustees shall, subject to the prior approval of the Commission, have the exclusive power and authority to divest any of the Properties to be Divested and to divest such additional ancillary Assets and Businesses of ICI and to effect the additional obligations set out in paragraph II.(A) of this order. The trustees shall additionally have the authority to divest such additional assets of ICI in the United States as the trustee and the Commission determine is necessary to assure the Viability and Competitiveness of the Properties to Be Divested and to comply with the purpose of the order as stated in paragraph II.(C).

3. The trustees shall have eighteen (18) months from the date of appointment to accomplish divestiture. If, however, at the end of the eighteen-month period the trustee has submitted 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 two (2) times.

4. Subject to an appropriate confidentiality agreement, the trustee shall have full and complete access to the personnel, books, records and facilities related to all of the Properties to Be Divested, or any other relevant information, as the trustee may reasonably request. ICI shall develop such financial or other information as such trustee may reasonably request and shall cooperate with any reasonable request of the trustee. ICI shall take no action to interfere with or impede the trustee's accomplishment of the divestitures. Any delays in divestiture caused by ICI shall extend the time for divestiture under this paragraph in an amount equal the delay,

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

5. Subject to ICI's absolute and unconditional obligation to divest at no minimum price, and the purpose of the divestiture as stated in paragraph II.(C) of this order, the trustee shall use his or her best efforts to negotiate the most favorable price and terms available for the divestiture of the Properties to Be Divested. The divestiture shall be made in the manner set out in paragraph II, provided, however, if the trustee receives bona fide offers 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 ICI from among those approved by the Commission.

6. The trustee shall serve, without bond or other security, at the cost and expense of ICI, on such reasonable and customary terms and conditions as the Commission or a court may set. Subject to the consent of ICI, which consent shall not be unreasonably withheld, the trustee shall have authority to employ, at the cost and expense of ICI, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants (all of whom shall be subject to appropriate confidentiality agreements) 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 ICI 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 Properties to Be Divested.

7. Except in the case of reckless disregard of his or her duties or intentional wrongdoing, ICI shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, or liabilities arising in any manner out of, or in connection with, the trustee's duties under this order.

8. Within sixty (60) 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, ICI shall execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph VII.(A) of this order.

10. The Commission and, in the case of a court-appointed trustee, the court may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the Properties to Be Divested.

12. The trustee shall report to the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestiture.

VIII.

It is further ordered, That, within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until ICI has fully complied with the provisions of paragraphs II and III of this order, ICI 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. ICI 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 divestiture of the Properties to Be Divested as specified in paragraph II of this order, including the identity of all parties contacted. ICI also shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, reports and recommendations concerning divestiture.

IX.

It is further ordered, That, for a period commencing on the date this order becomes final and continuing for ten (10) years, ICI shall not acquire, without the prior approval of the Commission, directly or indirectly, through subsidiaries or otherwise:

(A) Assets located in the United States, including its territories and possessions, used for or previously used for (and still suitable for use for) the production of acrylic plastic or acrylic sheet;

(B) More than one percent of the total outstanding stock or share capital of, or any other interest in, any entity (other than an entity included within ICI under paragraph I.(B) of this order as of the date the Agreement Containing Consent Order was signed) that owns or operates assets located in the United States, including its territories and possessions, engaged in the production of acrylic plastic or acrylic sheet.

Provided, however, these prohibitions shall not relate to the construction of new facilities, the acquisition of new equipment, or the acquisition of used equipment for less than two million dollars from a single party in a six-month period.

X.

It is further ordered, That, one year from the date this order becomes final and annually for nine years thereafter, ICI shall file with the Commission a verified written report of its compliance with this order.

XI.

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 ICI, made to its principal office, ICI shall permit any duly authorized representatives of the Commission:

(A) Access, during office hours and in the presence of counsel, to inspect and designate for copying all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of ICI, relating to any matters contained in this order; and

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

XII.

It is further ordered, That ICI shall notify the Federal Trade 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 "Agreement") is by and among Imperial Chemical Industries PLC, a corporation organized and existing under the laws of The United Kingdom, with its principal office and place of business located at 9 Millbank, London, England, ICI Americas Inc., a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located at Concord Pike and New Murphy Road, Wilmington, Delaware, ICI Acrylics Inc., a corporation organized and existing under the laws of the State of Missouri, with its principal place of business located at 10091 Manchester Road, St. Louis, Missouri (collectively "ICI"), 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").

1. Premises

Whereas, on April 23, 1992, ICI entered into an Asset Purchase Agreement providing for the acquisition (hereinafter the "Acquisition") of certain properties, businesses and other assets (hereinafter "the Acquired Assets") of E.I. du Pont de Nemours and Company ("Du Pont") including the continuous cast sheet facility at Memphis (the "Memphis Cast Sheet Facility"); and

Whereas, Du Pont manufactures and sells methyl methacrylate ("MMA") and acrylic sheet; 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 attached 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 the Acquired Assets during the period prior to the final acceptance of the Consent Order by the Commission (after the 60-day public notice 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 the Properties to Be Divested as described in paragraph I of the Consent Order and the Commission's right to seek a viable competitor to ICI; and

Whereas, the purpose of this Agreement and the Consent Order is to:

(i) Preserve the Acquired Assets as a viable business, independent of ICI, 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 Memphis Cast Sheet Facility as a viable business independent of ICI, engaged in the manufacture and sale of acrylic plastics pending the divestiture of the Properties to Be Divested as viable and ongoing enterprises, and

(iii) Remedy anticompetitive effects of the Acquisition in the acrylic plastic market; and

Whereas, ICI entering into this Agreement shall in no way be construed as an admission by ICI that the Acquisition is illegal; and

Whereas, ICI understands that no act or transaction contemplated by this Agreement 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 Agreement.

Now, therefore, the Parties agree, upon understanding that the Commission has determined that it has reason to believe the Acquisition may substantially lessen competition in the market for acrylic plastic and in consideration of the Commission's agreement that, unless the Commission determines to reject the Consent order it will not seek a temporary restraining order, preliminary injunction, or permanent injunction with respect to the Acquisition, except that the Commission may further investigate the Acquisition, and may issue an administrative complaint concerning the acquisition by ICI of Du Pont's MMA properties, businesses and other assets, and except that the Commission may exercise any and all rights to enforce this Agreement and the Consent Order to which it is annexed and made a part thereof, and, in the event the required divestitures are not accomplished, to seek divestiture of the Properties to Be Divested, and other relief, as follows:

1. ICI agrees to execute and be bound by the attached Consent Order.

2. ICI agrees that from the date this Agreement is accepted until the earliest of the dates listed in subparagraphs 2. a or 2. b, it will comply with the provisions of paragraph 4 of this Agreement with respect to the Acquired Assets:

a. Ten days after the Commission withdraws its acceptance of the Consent Order pursuant to the provisions of Section 2.34 of the Commission's Rules; or

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.

3. ICI agrees that from the date this Agreement is accepted until the earliest of the dates listed in subparagraphs 3.a or 3.b, it will comply with the provisions of paragraph 4 of this Agreement with respect to the Memphis Cast Sheet Facility:

a. Ten days after the Commission withdraws its acceptance of the Consent Order pursuant to the provisions of Section 2.34 of the Commission's Rules; or

b. The day after the divestiture required by the Consent Order has been completed.

4. ICI will hold the Acquired Assets or the Memphis Cast Sheet Facility, as applicable pursuant to paragraphs 2 and 3, as they are presently constituted (hereafter the "Held-Separate Assets") separate and apart on the following terms and conditions:

a. The Held-Separate Assets shall be held separate and apart and shall be operated independently of ICI (meaning here and hereinafter, ICI excluding the Held-Separate Assets and excluding all personnel connected with the Held-Separate Assets as of the date this Agreement was signed) except to the extent that ICI must

exercise direction and control over the Held-Separate Assets to assure compliance with this Agreement or the Consent Order.

b. ICI shall not exercise direction or control over, or influence directly or indirectly, the Held-Separate Assets; *provided, however*, that ICI may exercise only such direction and control over the Held-Separate Assets as is necessary to assure compliance with this Agreement or with the Consent Order.

c. ICI shall not cause or permit any destruction, removal, wasting, deterioration or impairment of the Held-Separate Assets, except for ordinary wear and tear. ICI shall also maintain the viability and marketability of the Held-Separate Assets and shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair their marketability or viability.

d. Except for the single ICI director, officer, employee, or agent serving on the "New Board" or "Management Committee" (as defined in subparagraph 4.I), ICI shall not permit any director, officer, employee, or agent of ICI to also be a director, officer or employee of the Held-Separate Assets. In the event any members of the existing management of the Held-Separate Assets should choose not to accept employment with the Acquired Assets or with the Memphis Cast Sheet Facility, respectively, or retire or otherwise leave their management positions, the non-ICI (as ICI is defined in subparagraph 4.a hereof) directors or members serving on the New Board or Management Committee (as defined in subparagraph 4.i hereof) shall have the power to replace such members of management.

e. Except as required by law or as reported by the auditor (provided for in subparagraph 4.f) and except to the extent that necessary information is exchanged in the course of evaluating and consulting the Acquisition, defending investigations or litigation, obtaining legal advice, acting to assure compliance with this Agreement or the Consent Order (including accomplishing the divestitures), or negotiating agreements to dispose of assets, ICI shall not receive or have access to, or the use of, any "material confidential information" of the Held-Separate Assets, as applicable, not in the public domain, except as such information would be available to

ICI in the normal course of business if the Acquisition had not taken place. 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 herein, means competitively sensitive or proprietary information not independently known to ICI from sources other than Du Pont or the Held-Separate Assets, 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). *Provided, however*, that ICI may assign ICI personnel to perform the accounting and tax functions for the Held-Separate Assets provided that such ICI personnel shall enter into confidentiality agreements in accordance with the provisions of paragraph 4.j hereof and provided further that those ICI personnel working with sales and credit information shall not be involved in ICI's PMMA or acrylic sheet business, as defined in paragraph I. of the Consent Order for the period that ICI must comply with paragraph 4 hereof. *Provided further*, that the New Board or Management Committee, as defined in subparagraph 4.i hereof, may designate and contract with ICI, excluding ICI Acrylics Inc. and excluding further ICI Americas Inc., as a non-exclusive sales agent for sales by the Held-Separate Assets outside the United States, provided that all ICI personnel with access to material confidential information of the Held-Separate Assets in connection with such contract or agency shall, prior to gaining such access, enter into confidentiality agreements in accordance with the provisions of paragraph 4.j hereof.

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

g. ICI shall not change the composition of the management of the Held-Separate Assets except that the non-ICI (as ICI is defined in subparagraph 4.a hereof) directors or members serving on the

New Board or Management Committee (as defined in subparagraph 4.i hereof) shall have the power to remove any employee for cause.

h. All material transactions, out of the ordinary course of business and not precluded by subparagraphs 4.a through 4.g hereof, shall be subject to a majority vote of the New Board or Management Committee (as defined in subparagraph 4.i hereof).

i. ICI shall either (1) separately incorporate the Held-Separate Assets and adopt new Articles of Incorporation and By-laws for each that are not inconsistent with other provisions of this Agreement or (2) establish a separate business venture with articles of agreement covering the conduct of the Held-Separate Assets, in accordance with this Agreement. ICI shall also elect a new three-person board of directors of the Held-Separate Assets ("New Board") or Management Committee of the Held-Separate Assets ("Management Committee") once it obtains title to the Held-Separate Assets. ICI may elect the directors to the New Board or select the members of the Management Committee; *provided, however*, that such New Board or Management Committee shall consist of at least two non-ICI directors, officers, or employees and no more than one ICI (but not ICI Acrylics, Inc.) director, officer, employee, or agent, *provided, however*, that such ICI director, officer, employee, or agent shall enter into a confidentiality agreement in accordance with the provisions of paragraph 4.j hereof and shall not be a person involved in ICI's PMMA or acrylic sheet business, as defined in paragraph I. of the director or Management Committee member who is also an ICI director, officer, employee, or agent shall participate in matters that come before the New Board of Management Committee only for the limited purpose of considering a capital investment or other transactions exceeding \$500,000 and carrying out ICI's and the Held-Separate Assets' responsibilities under this Agreement or under the Consent Order. Except as permitted by this Agreement, such Director or Management Committee member shall not participate in any matter, or attempt to influence the votes of the other directors or Management Committee members with respect to matters that would involve a conflict of interest if ICI and the Held-Separate Assets were

separate and independent entities. Meetings of the New Board or Management Committee during the term of this Agreement shall be stenographically transcribed and the transcripts retained for two (2) years after the termination of this Agreement.

j. Any ICI director, officer, employee, or agent who obtains or may obtain confidential information under this Agreement shall enter a confidentiality agreement prohibiting disclosure of confidential information until the day after the divestitures required by the Consent Order have been completed.

k. All earnings and profits of the Held-Separate Assets shall be retained separately in the Held-Separate Assets, and separate financial and operating records shall be prepared for the Memphis Cast Sheet Facility and for the remainder of the Acquired Assets, respectively. If necessary, ICI shall provide the Held-Separate Assets with sufficient working capital to operate at current rates of operation.

l. Should the Federal Trade Commission seek in any proceeding to compel ICI (meaning here and hereinafter ICI including the Held-Separate Assets) to divest itself of the Acquired Assets or to compel ICI to divest any assets or businesses of the Acquired Assets that it may hold, or to seek any other injunctive or equitable relief, ICI 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. ICI also waives all rights to contest the validity of this Agreement.

5. For the purpose of determining or securing compliance with this Agreement, subject to any legally recognized privilege, and upon written request with reasonable notice to ICI made to its principal office, ICI shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of ICI 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 ICI or the Held-Separate Assets relating to compliance with this Agreement;

b. Upon ten (10) days notice to ICI, and without restraint or interference from it, to interview officers or employees of ICI or the Held-Separate Assets, who may have counsel present, regarding any such matters.

6. This agreement shall not be binding until approved by the Commission.

DISSENTING STATEMENT OF COMMISSIONER DEBORAH K. OWEN

I agree that there is reason to believe that the proposed acquisition by Imperial Chemical Industries PLC of the acrylic plastics business of E. I. Du Pont de Nemours and Company may substantially lessen competition in the relevant market. I am concerned, however, that the somewhat novel remedy adopted by the Commission in this matter may constitute undue government involvement in the workings of the market.

In order to assure that competition is not diminished, the consent order requires ICI to divest (at its discretion) any one of three manufacturing facilities. The two larger facilities identified in the order (those located in Memphis, Tennessee and Olive Branch, Mississippi) may be divested essentially "as is." Alternatively, ICI may elect to divest its smaller plant in Compton, California -- subject to the proviso that it, first, more than double that facility's capacity to produce polymethyl methacrylate ("PMMA"), and add to that facility the capacity to manufacture no less than 12 million pounds of acrylic sheet per annum.¹

If there were a need for additional capacity in this market, then the expansion of Compton contemplated by the Commission's proposed order would perhaps be a socially useful expenditure of resources. However, at the present time, capacity in the PMMA industry is significantly under-utilized, one factor that we tradition-

¹ Alternatively, the acquirer may elect to have ICI construct this new production capacity at some location other than Compton.

ally view as a deterrent to new entry. The new, additional capacity generated by the Commission's order appears to exacerbate this problem, may diminish the ability of Compton's acquirer to become an efficient competitor, and may ultimately prove to be a wasted investment. I do not think that the Commission is the best, or the appropriate, judge of whether and when additional resources should be invested in a market.

Accordingly, I would prefer a consent that limits the divestiture alternatives to the Tennessee and Mississippi plants.²

² During the public comment period, the Commission received and placed on the public record two letters from acrylic producers that, *inter alia*, objected to the order provision requiring the addition of new capacity. Letter from Plaskolite, Inc. (Sept. 10, 1993) (The expansion of the Compton facility "will further contribute to a market in which there is over- capacity of PMMA and Acrylic Sheet currently and in the near future. This will make it unattractive to a purchaser."); Letter from CYRO Industries (Sept. 10, 1993) ("We believe the government inspired creation of a new acrylic molding compound producer represents an unwise intervention of government in the business sector and specifically applies a remedy in an area that is both already overburdened with excess capacity and intensely competitive.").

IN THE MATTER OF

NUTRI/SYSTEM, INC.

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

Docket C-3474. Complaint, Dec. 22, 1993--Decision, Dec. 22, 1993

This consent order prohibits, among other things, a Pennsylvania diet program company from misrepresenting the performance or safety of any weight-loss program it offers in the future; requires it to have competent and reliable scientific evidence to back up future claims it makes about weight loss and maintenance; requires it to include, in conjunction with maintenance success claims, the statement "For many dieters, weight loss is temporary"; requires it to disclose to its customers that failure to eat all of the food recommended in the program may put their health at risk; requires it to disclose, if it makes price representations, either all mandatory fees or a list of the additional products or services consumers will need to purchase; and requires it to disclose all material connections between its program and any entity that endorses or evaluates it.

Appearances

For the Commission: *Richard Kelly and Matthew Daynard.*

For the respondent: *Judith L. Oldham, Collier, Shannon, Scott & Rill, Washington, D.C. Margaret S. Woodruff, Philadelphia, PA.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Nutri/System, Inc., a corporation ("Nutri/System" or "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 Nutri/System, Inc., is a Pennsylvania corporation, with its office and principal place of business located at 380 Sentry Parkway, Blue Bell, Pennsylvania.