

IN THE MATTER OF

THE VALSPAR CORPORATION, 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-3478. Complaint, Jan. 25, 1994--Decision, Jan. 25, 1994

This consent order requires, among other things, a Minnesota-based corporation to divest, within 12 months of the date of the order, certain assets it acquired from Cargill, to Newco, an independent corporation that Valspar forms as a successor corporation to McWhorter, and to obtain Commission approval of the divestiture arrangement prior to consummation. In addition, the consent order requires McWhorter and Newco, for 10 years, to obtain the Commission's approval before acquiring any stock or other interest in any entity that manufactures coating resins in the United States.

Appearances

For the Commission: *Robert S. Tovsky* and *Rhett R. Krulla*.

For the respondents: *James F. Rill* and *Robert M. Huber, Collier, Shannon, Rill & Scott*, 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 The Valspar Corporation ("Valspar"), through its wholly-owned subsidiary McWhorter, Inc. ("McWhorter"), has entered into an agreement with Cargill, Incorporated ("Cargill"), 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, the term “*coating resins*” means alkyd resins, modified alkyd resins, saturated polyester resins, and oil-modified urethane resins (excluding powder coating resins), supplied for use in formulating surface coatings. Such resins generally are produced from the reaction of polybasic acids or anhydrides and polyhydric alcohols.

THE RESPONDENTS

PAR. 2. Respondent The Valspar Corporation 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 1101 Third Street South, Minneapolis, Minnesota.

PAR. 3. Respondent McWhorter, Inc., a wholly-owned subsidiary of The Valspar Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business at 400 East Cottage Place, Carpentersville, Illinois.

PAR. 4. Valspar, through its wholly-owned subsidiary McWhorter, Inc., is a leading producer of coating resins in the United States.

PAR. 5. Cargill, through its Resin Products Division, is a leading producer of coating resins in the United States.

PAR. 6. At all times relevant herein, each of the respondents or their predecessors, and Cargill or its 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. 7. On May 19, 1993, McWhorter entered into an agreement with Cargill for the acquisition of the assets and businesses of Cargill’s Resin Products Division (“the Acquisition”).

THE RELEVANT MARKETS

PAR. 8. For purposes of this complaint, the relevant lines of commerce in which to evaluate the effects of the Acquisition are the manufacture and sale of coating resins, and other markets contained therein.

PAR. 9. For purposes of this complaint, the relevant geographic market is the United States.

PAR. 10. The coating resins market in the United States is concentrated.

PAR. 11. Entry into the manufacture and sale of coating resins is difficult and would take a long time.

PAR. 12. Valspar, through its wholly-owned subsidiary McWhorter, and Cargill are actual competitors in the manufacture and sale of coating resins in the United States.

THE EFFECTS OF THE ACQUISITION

PAR. 13. 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 Valspar and Cargill and others, in the manufacture and sale of coating resins 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. 14. The Acquisition agreement described in paragraph seven violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 15. The Acquisition of the coating resins assets and businesses of Cargill by Valspar, through its wholly-owned subsidiary McWhorter, would, if consummated, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

PAR. 16. The Acquisition of the coating resins assets and businesses of Cargill by Valspar, through its wholly-owned

subsidiary McWhorter, would, if consummated, violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

Commissioner Owen dissenting.

DECISION AND ORDER

The Federal Trade Commission ("the Commission"), having initiated an investigation of the proposed acquisition of assets by The Valspar Corporation ("Valspar") and McWhorter, Inc. ("McWhorter") from Cargill, Incorporated, which acquisition is more fully described at paragraph I.(A) below, and Valspar and McWhorter 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 Valspar and McWhorter with violations of the Clayton Act and Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, 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, 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. Respondent The Valspar Corporation 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 1101 Third Street South, Minneapolis, Minnesota.

2. Respondent McWhorter, Inc., a wholly-owned subsidiary of The Valspar Corporation, is a corporation organized, existing and

doing business under and by virtue of the laws of the State of California, with its principal office and place of business at 400 East Cottage Place, Carpentersville, Illinois.

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

ORDER

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

(A) “*Acquisition*” means the acquisition described in the Sales and Purchase of Assets Agreement entered into on May 19, 1993 by which McWhorter has agreed to acquire and Cargill, Incorporated has agreed to convey certain rights and interests in, and title to, certain of the assets of Cargill.

(B) “*Acquired Assets*” means all assets, rights, title, interest, and businesses that Valspar acquires from Cargill, Incorporated pursuant to the Acquisition, as defined in paragraph I.(A), above.

(C) “*Valspar*” means The Valspar Corporation, all of its directors, officers, employees, agents, and representatives, all of its predecessors, 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.

(D) “*McWhorter*” means McWhorter, Inc., a wholly-owned subsidiary of Valspar, all of its directors, officers, employees, agents, and representatives, all of its predecessors, subsidiaries, divisions, groups and affiliates (including, but not limited to, 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 (including, but not limited to, Newco as hereinafter defined) and assigns of any of the foregoing.

(E) “*Cargill*” means the Resin Products Division of Cargill, Incorporated, all of its predecessors, 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.

(F) "*Cargill Technology*" means general and specific information developed by Cargill or used in any product sold by Cargill on or before the date of the Acquisition, including all technology transferred in the Acquisition, all such information being sufficiently detailed for the commercial production, sale and use 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. Cargill Technology shall exclude information to the extent disclosure of such information by Cargill is prohibited by a contract between Cargill and any coating producer.

(G) "*McWhorter Technology*" means general and specific information developed by McWhorter or used in any product sold by McWhorter to customers other than Valspar on or before the date of the Acquisition, all such information being sufficiently detailed for the commercial production, sale and use 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. McWhorter Technology shall exclude information to the extent disclosure of such information by McWhorter is prohibited by a contract between McWhorter and any coating producer.

(H) "*Newco*" means McWhorter or a corporation to be formed by Valspar and McWhorter as a successor corporation to McWhorter, in accordance with paragraph II.(C) of this order, and through which Valspar shall divest, in a manner that receives the prior approval of the Commission, the Properties to Be Divested; and includes without limitation all of Newco's 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.

(I) "*Properties to Be Divested*" means the Acquired Assets and all facilities operated by Valspar at Carpentersville, Illinois, Portland, Oregon, and Philadelphia, Pennsylvania, utilized in the production of Coating Resins, including, without limitation, all plant facilities, machinery, fixtures, equipment, vehicles, transportation and storage facilities, furniture, tools, supplies, stores, spare parts, and other tangible personal property, and all right, title and interest in and to real property, together with appurtenances, licenses and permits.

(J) “*Valspar Retained Properties*” means all tangible and intangible assets and businesses of Valspar and McWhorter other than those included within the Properties to Be Divested.

(K) “*Commission*” means the Federal Trade Commission.

(L) “*Coating Resins*” means alkyd resins, modified alkyd resins, saturated polyester resins, and oil-modified urethane resins (excluding powder coating resins), supplied for use in formulating surface coatings. Such resins generally are formed from the reaction of polybasic acids or anhydrides and polyhydric alcohols.

(M) “*Viability and Competitiveness*” of the Properties to Be Divested and of the Valspar Retained Properties means that such respective properties are capable of functioning independently and competitively in the Coating Resins business.

II.

It is ordered, That:

(A) Within twelve (12) months of the date this order becomes final, Valspar shall divest, absolutely and in good faith, the Properties to Be Divested, and shall also divest such additional ancillary assets and businesses and effect such arrangements as are necessary to assure the Viability and Competitiveness of the Properties to Be Divested and to assure the Viability and Competitiveness of the Valspar Retained Properties. Provided, however, that this requirement shall not prohibit any shareholder of Valspar from participating, in his or her personal capacity as a shareholder of Valspar, in the distribution of the authorized common stock of Newco, pursuant to paragraph II.(D) of this order.

(B) Valspar 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 Valspar has divested all the Properties to Be Divested or such other time as stated in said Agreement.

(C) Valspar shall divest the Properties to Be Divested by forming, in a manner that receives the prior approval of the Commission, Newco, with at least sufficient authorized common stock to comply with the provisions of this order and with by-laws obligating Newco to be bound by this order and containing provisions insuring compliance with paragraph II.(E) hereof, to which

McWhorter shall transfer the Properties to Be Divested by merger with Newco or otherwise. Valspar shall make all necessary regulatory filings to ensure that such common stock is registered, and shall also ensure that the stock is registered for trading on the NASDAQ National Market System or listed for trading on the New York Stock Exchange or the American Stock Exchange. Valspar shall demonstrate the Viability and Competitiveness of the Properties to Be Divested and of the Valspar Retained Properties, respectively, in its application for approval of the proposed divestiture. The purpose of the divestiture of the Properties to Be Divested is (1) to ensure the continuation of the Properties to Be Divested as an ongoing, viable business engaged, in competition with the Valspar Retained Properties and others, in the manufacture and sale of Coating Resins; (2) to ensure the continuation of the Valspar Retained Properties as an ongoing viable business engaged, in competition with the Properties to Be Divested and others, in the manufacture and sale of Coating Resins; and (3) to remedy any lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

(D) Valspar shall divest the Properties to Be Divested, only to an acquirer, including the shareholders of Valspar as a group, and in a manner that receives the prior approval of the Commission, including by distributing the shares of Newco pro rata to the stockholders of record of Valspar.

(E) Valspar (excluding, for purposes of this paragraph II.(E), Newco), McWhorter and Newco shall provide that:

1. After completion of the Acquisition and prior to the divestiture of Newco by distribution of the Newco stock to the stockholders of Valspar or otherwise, Valspar shall vote the stock of Newco for the election of an interim board of directors meeting the requirements of paragraph III.j of the Agreement to Hold Separate, to serve until the election of directors by the stockholders of Newco in accordance with paragraph II.(E)3 of this order;

2. Within seven (7) days of the distribution or other divestiture of the Newco stock, any director of Newco who is also a Valspar director, officer, employee or agent shall resign from the Newco Board, and the remaining directors of Newco shall designate a new director or new directors in accordance with this order who are not directors, officers, employees or agents of Valspar;

3. Newco shall within twelve (12) months of the distribution or other divestiture of the Newco stock call a stockholders' meeting for the purpose of electing directors;

4. No nominee for the board of directors of Newco shall, at the time of his or her election, be an officer, director or employee of Valspar or shall hold, or have under his or her direction or control, greater than 5 percent of the outstanding common stock of Valspar;

5. No officer, director or employee of Valspar shall concurrently serve as an officer, director or employee of Newco nor shall any officer, director or employee of Newco serve concurrently as an officer, director or employee of Valspar;

6. No officer or director of Newco shall hold, or have under his or her direction or control, greater than 5 percent of the outstanding common stock of Valspar; and officers and directors of Newco in aggregate, shall not concurrently hold, or have under their direction or control, greater than 10 percent of the outstanding common stock of Valspar;

7. C. Angus Wurtele shall not, as long as he remains an officer or director of Valspar, hold, or have under his direction or control, more than 12.4 percent of the outstanding common stock of Newco, and the other directors and officers of Valspar in aggregate, shall not concurrently hold, or have under their direction or control, greater than 5 percent of the outstanding common stock of Newco;

8. No officer or director of Valspar shall increase by purchase his or her holdings of Newco authorized common stock beyond the percentage that such officer or director holds as a result of any initial distribution of such stock pursuant to paragraph II.(D) of this order, nor shall such officer or director be permitted to be a creditor of Newco;

9. No officer or director of Valspar shall concurrently serve as an officer or director of any entity that holds or controls, as trustee or otherwise, greater than five percent of the outstanding common stock of Newco, and no officer or director of Newco shall concurrently serve as an officer or director of any entity that holds or controls, as trustee or otherwise, greater than five percent of the outstanding common stock of Valspar;

10. Except as provided for in paragraph II.(E)1 and paragraph II.(E)2 of this order and except with respect to organization matters prior to the divestiture of Newco by distribution of the Newco stock to the stockholders of Valspar or otherwise, no officer or director of

Valspar, who concurrently holds or has under his or her direction or control more than one percent of the outstanding common stock of Newco shall, in his or her personal capacity as a shareholder of Newco or otherwise, vote any stock of Newco which he or she shall hold or which shall be held under his or her direction or control, nor shall any officer, director or employee of Valspar influence, or attempt to control, supervise or influence, directly or indirectly, any other person's voting of Newco stock; and no officer or director of Newco, who concurrently holds or has under his or her direction or control more than one percent of the outstanding common stock of Valspar shall, in his or her personal capacity as a shareholder of Valspar or otherwise, vote any stock of Valspar which he or she shall hold or which shall be held under his or her direction or control, nor shall any officer, director or employee of Newco influence, in his or her personal capacity as a shareholder of Valspar or otherwise, or attempt to control, supervise or influence, directly or indirectly, any other person's voting of Valspar stock;

11. Neither Valspar nor any officer, director or employee of Valspar, in his or her personal capacity as a shareholder of Newco or otherwise, shall participate in any decision by Newco, at shareholders, meetings or otherwise, relating to Newco's production, capacity, development, marketing, pricing or sale of Coating Resins, nor exercise, or attempt to exercise, in any way, directly or indirectly, any control, supervision or influence over any policy, decision or action regarding any aspect of Newco's production, capacity, development, marketing, pricing or sale of Coating Resins, other than through the policies, decisions, and actions of Valspar relating to the purchase, in the ordinary course of business, by Valspar of products from Newco for use in Valspar coatings; and neither Newco nor any officer, director or employee of Newco, in his or her personal capacity as a shareholder of Valspar or otherwise, shall participate in any decision by Valspar, at shareholders' meetings or otherwise, relating to Valspar's production, capacity, development, marketing, pricing or sale of Coating Resins, nor exercise, or attempt to exercise, in any way, directly or indirectly, any control, supervision or influence over any policy, decision or action regarding any aspect of Valspar's production, capacity, development, marketing, pricing or sale of Coating Resins, other than through the policies, decisions, and actions of Newco relating to the sale, in the ordinary course of business, by Newco of products to Valspar for use in Valspar

coatings; provided however that nothing in this Section 11 shall prohibit Valspar and Newco from participating in a buying cooperative or other group formed to purchase raw materials, so long as the formation and practices of such group or cooperative comply with the antitrust laws and any other statutes enforced by the Commission.

12. Neither Valspar nor any officer, director or employee of Valspar, in his or her personal capacity as a shareholder of Newco or otherwise, shall take any action to obtain or attempt to obtain, directly or indirectly, from Newco, any competitively sensitive information regarding Newco, and Newco shall not provide any such competitively sensitive information to Valspar, except as necessary to the purchase, in the ordinary course of business, by Valspar of products from Newco for use in Valspar coatings; and neither Newco nor any officer, director or employee of Newco, in his or her personal capacity as a shareholder of Valspar or otherwise, shall take any action to obtain or attempt to obtain, directly or indirectly, from Valspar, any competitively sensitive information regarding Valspar, and Valspar shall not provide any such competitively sensitive information to Newco, except as necessary to the purchase, in the ordinary course of business, by Valspar of products from Newco for use in Valspar coatings;

(F) Valspar shall take such action as is necessary to maintain the Viability and Competitiveness and the marketability of the Properties to Be Divested and of the Valspar Retained Properties and shall not cause or permit the destruction, removal or impairment of the Properties to Be Divested or of the Valspar Retained Properties except (1) in the ordinary course of business and (2) for ordinary wear and tear.

III.

It is further ordered, That, as part of the divestiture of the Properties to Be Divested pursuant to paragraph II, above: (1) Newco shall provide to Valspar a worldwide paid-up, non-royalty bearing, perpetual and non-exclusive license, without the right to sub-license to third-parties, to use the Cargill Technology to make, use and sell any product; and (2) Valspar shall provide to Newco a worldwide, paid-up, non-royalty bearing, perpetual and nonexclusive license,

without the right to sub-license to third-parties, to use the McWhorter Technology to make, use and sell any product.

IV.

It is further ordered, That:

(A) If Valspar and McWhorter have not divested, absolutely and in good faith and with the Commission's approval, the Properties to Be Divested within twelve (12) months of the date this order becomes final, Valspar, McWhorter and Newco shall consent to the appointment by the Commission of a trustee to divest the Acquired Assets, along with any additional assets and other arrangements that may be necessary to assure the Viability and Competitiveness of the Acquired Assets and of the Valspar Retained Properties. 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 (1), or any other statute enforced by the Commission, Valspar, McWhorter and Newco 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 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 Valspar, McWhorter or Newco to comply with this order.

(B) If a trustee is appointed by the Commission or a court pursuant to paragraph IV.(A) of this order, Valspar, McWhorter and Newco 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 Valspar, McWhorter and Newco, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures.

2. The trustee shall, subject to the prior approval of the Commission, have the exclusive power and authority to divest the Acquired Assets, along with any additional assets and businesses and other arrangements that may be necessary to assure the Viability and

Competitiveness of the Acquired Assets and the Viability and Competitiveness of the Valspar Retained Properties.

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

4. The trustee shall have full and complete access to the personnel, books, records and facilities related to the Acquired Assets, or any other relevant information, as the trustee may reasonably request. Valspar, McWhorter and Newco shall develop such financial or other information as such trustee may reasonably request and shall cooperate with any reasonable request of the trustee. Valspar, McWhorter and Newco shall take no action to interfere with or impede the trustee's accomplishment of the divestitures. Any delays in divestiture caused by Valspar, McWhorter or Newco 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 Valspar and McWhorter'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 Acquired Assets. The divestiture shall be made to an acquirer(s), and in a manner, that receives the prior approval of the Commission, 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 Valspar from among those approved by the Commission.

6. The trustee shall serve, without bond or other security, at the cost and expense of Valspar, 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 Valspar, 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 Valspar and McWhorter 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 Acquired Assets.

7. Valspar, McWhorter and Newco 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, Valspar, McWhorter and Newco 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 IV.(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 Acquired Assets.

12. The trustee shall report in writing to Valspar, McWhorter and Newco and to the Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

V.

It is further ordered, That, within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until Valspar, McWhorter and Newco have accomplished the divestitures required by paragraph II of this order, Valspar, McWhorter and Newco shall each submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to

comply, are complying and have complied with those provisions, including the Agreement to Hold Separate. Valspar, McWhorter and Newco shall each include in their 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 paragraphs II and III of this order, including the identity of all parties contacted. Valspar, McWhorter and Newco also shall each include in their compliance reports, among other things, copies of all written communications to and from such parties, all internal memoranda, reports and recommendations concerning divestiture.

VI.

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

(A) Assets used by the seller since January 1, 1990, to manufacture Coating Resins and located in the United States, including its territories and possessions, other than the acquisition of used machinery or equipment from brokers for such machinery or equipment, by means of normal transactions customary in the used equipment market, for which the value, in any given year, shall not exceed five hundred thousand (500,000) dollars; or

(B) all or any part of the stock or share capital of, or any other interest in, any entity that owns or operates assets located in the United States, including its territories and possessions, engaged in the production of Coating Resins.

VII.

It is further ordered, That, for a period commencing on the date this order becomes final and continuing for ten (10) years, Valspar shall not acquire, without the prior approval of the Commission, directly or indirectly, through subsidiaries or otherwise, all or any part of the stock, share capital or assets of, or any interest in, Newco or any of the Properties to Be Divested, other than the acquisition of

used machinery or equipment from brokers for such machinery or equipment, by means of normal transactions customary in the used equipment market, for which the value, in any given year, shall not exceed five hundred thousand (500,000) dollars.

VIII.

It is further ordered, That, one year from the date this order becomes final and annually for nine years thereafter, Valspar, McWhorter and Newco (if Newco is distinct from McWhorter) shall each file with the Commission a verified written report of their compliance with this order. Valspar, McWhorter and Newco shall each maintain and include in such compliance reports a copy of all written correspondence between Valspar and Newco and a detailed description of all other communications or meetings between Valspar and Newco, other than correspondence, communications or meetings relating solely to technical issues of resin performance in Valspar coatings and to matters relating to the purchase and sale of Coating Resins between Valspar and Newco in the ordinary course of business.

IX.

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 Valspar, McWhorter or Newco made to their respective principal office, Valspar, McWhorter and Newco 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 Valspar, McWhorter or Newco relating to any matters contained in this order; and

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

X.

It is further ordered, That Valspar, McWhorter and Newco 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.

XI.

It is further ordered, That, for a period commencing on the date this order becomes final and continuing for a period ending ten (10) years after the completion of the divestitures required by paragraph II of this order, Valspar, McWhorter and Newco shall be bound by the terms of this order and shall comply with the obligations imposed herein. Thereafter this order shall have no further force or effect.

Commissioner Owen dissenting.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate (the "Agreement") is by and among The Valspar Corporation, a corporation organized and existing under the laws of Delaware, with its principal office and place of business located at 1101 Third Street South, Minneapolis, Minnesota, its wholly-owned subsidiary, McWhorter, Inc. (collectively "Valspar"), a corporation organized and existing under the laws of California, with its principal office and place of business located at 400 East Cottage Place, Carpentersville, Illinois 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 19, 1993, Valspar 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 Cargill, Incorporated ("Cargill"); and

Whereas, Valspar and Cargill each manufacture and sell Coating Resins; 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 Valspar and to the Properties to Be Divested; and

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

(i) Preserve the Acquired Assets as a viable business, independent of Valspar, 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 Properties to Be Divested as a viable business, independent of Valspar, engaged in the manufacture and sale of

Coating Resins pending the divestiture of the Properties to Be Divested as viable and ongoing enterprises, and

(iii) Remedy anticompetitive effects of the Acquisition in the Coating Resins market; and

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

Whereas, Valspar 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 Coating Resins, and in recognition 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. Valspar agrees to execute and be bound by the attached consent order. Terms capitalized herein shall have the same definitions as terms capitalized in the consent order.

2. Valspar 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 3 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 divestiture required by the consent order has been completed.

3. Valspar will hold the Acquired Assets as they are presently constituted (hereafter the "Held-Separate Assets") separate and apart on the following terms and conditions:

a. Valspar may elect at any time after this order becomes final to establish as Held Separate Assets the Properties to be Divested, in lieu of the Acquired Assets. At such time, the provisions of this paragraph 3 shall apply to the Properties to be Divested.

b. The Held-Separate Assets shall be held separate and apart and shall be operated independently of Valspar (meaning here and hereinafter, Valspar 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 Valspar must exercise direction and control over the Held-Separate Assets to assure compliance with this Agreement or with the consent order.

c. Valspar shall not exercise direction or control over, or influence directly or indirectly, the Held-Separate Assets; provided, however, that Valspar 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.

d. Valspar shall not cause or permit any destruction, removal, wasting, deterioration or impairment of the Held-Separate Assets, except for ordinary wear and tear. Valspar 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.

e. Except for the single Valspar director, officer, employee, or agent serving on the "New Board" or "Management Committee" (as defined in subparagraph 3.j), Valspar shall not permit any director, officer, employee, or agent of Valspar also to 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 Newco, or retire or otherwise leave their management positions, the non-Valspar (as Valspar is defined in subparagraph 3.b hereof) directors or members serving on the New Board or Management Committee (as defined in subparagraph 3.j hereof) shall have the power to replace such members of management.

f. Except as required by law or as reported by the auditor (provided for in subparagraph 3.g) and except to the extent that necessary information is exchanged in the course of evaluating and consummating the Acquisition, defending investigations or litigation, obtaining legal advice, acting to assure compliance with this

Agreement or the consent order (including accomplishing the technology licensing required by paragraph III of the order, and the divestitures), or negotiating agreements to dispose of assets, Valspar 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 Valspar 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 Valspar from sources other than Cargill 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).

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

h. Valspar shall not change the composition of the management of the Held-Separate Assets except that the non-Valspar (as Valspar is defined in subparagraph 3.b hereof) directors or members serving on the New Board or Management Committee (as defined in subparagraph 3.j hereof) shall have the power to remove any employee for cause. Provided, however, that at such time as Valspar elects to establish as Held-Separate Assets the Properties to Be Divested, in lieu of the Acquired Assets, Valspar may separate permanently from Valspar and transfer to the Held-Separate Assets such McWhorter management and other McWhorter personnel as Valspar may elect.

i. All material transactions, out of the ordinary course of business and not precluded by subparagraphs 3.b through 3.h hereof, shall be subject to a majority vote of the New Board or Management Committee (as defined in subparagraph 3.j hereof).

j. Valspar shall either (1) separately incorporate the Held-Separate Assets and adopt new Articles of Incorporation and By-laws 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. Valspar shall elect a new 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. Valspar 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-Valspar directors, officers, or employees and no more than one Valspar director, officer, employee, or agent, provided, however, that such Valspar director, officer, employee, or agent shall enter into a confidentiality agreement in accordance with the provisions of paragraph 3.1 hereof and shall not be a person involved in Valspar's Coating Resins business. Such director or Management Committee member who is also a Valspar director, officer, employee, or agent shall participate in matters that come before the New Board or Management Committee only for the limited purpose of considering a capital investment or other transactions exceeding \$500,000 and carrying out Valspar'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 Valspar 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.

k. Any current officer or employee of Valspar may confer with the New Board or the Management Committee of the Held-Separate Assets, for the purposes of establishing or organizing the administrative functions within the Properties to Be Divested in order to comply with the terms of the consent order, but shall not be provided access to any material confidential information of the Held-Separate Assets.

1. Any Valspar director, officer, employee, or agent who obtains or may obtain confidential information under this Agreement shall enter a confidentiality agreement prohibiting disclosure of confiden-

tial information until the day after the divestitures required by the consent order have been completed.

m. All earnings and profits of the Held-Separate Assets shall be retained separately in the Held-Separate Assets. If necessary, Valspar shall provide the Held-Separate Assets with sufficient working capital to operate at current rates of operation.

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

4. 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 Valspar made to its principal office, Valspar shall permit any duly authorized representative or representatives of the Commission:

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

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

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

DISSENTING STATEMENT OF COMMISSIONER DEBORAH K. OWEN

In order to approve the final issuance of a consent order, the Commission must necessarily find that there is reason to believe that the law has been violated and that issuing the order would be in the public interest. Because I do not find reason to believe that the law has been violated, I dissent from the commission's action today.¹

My decision here is based on many of the same considerations that led me to partially dissent in the Occidental case.² As I view the available evidence, and calculate the Herfindahl-Hirschmann Index, the proposed acquisition by Valspar Corporation of Cargill, Inc.'s Resin Products Division would increase concentration in a moderately concentrated market by an amount that would potentially raise competitive concerns under the Merger Guidelines.³ Based on my reading of Section 1.51 of the Guidelines and the Commission's opinion in *B.F. Goodrich Co.*, 110 FTC 207 (1988), the amount of evidence needed to overcome these concerns is not immense.⁴ There is abundant evidence here that anticompetitive effects are unlikely.⁵ Specifically, the large number of competitors, and the heterogeneity of many of the products, would militate against the success of any attempted collusive scheme. Moreover, there is compelling evidence that customers can, and do, switch suppliers in response to a 5 percent price increase, including switching to many non-Cargill suppliers.

In light of this evidence, I cannot find reason to believe that the originally proposed combination would result in a violation of the law, and I must dissent from the decision to approve final issuance of the consent order.

¹ Because of my decision on the underlying case, I do not need to reach any issues that might be presented by the proposed remedies.

² Statement of Comm. Deborah K. Owen, Concurring in Part, and Dissenting in Part, Occidental Petroleum Corporation, Dkt. No. 9205, slip. op. (Dec. 22, 1982), appeal pending, No. 93-4122 (Second Circuit, June 2, 1993).

³ U.S. Department of Justice & Federal Trade Commission Horizontal Merger Guidelines, Section 1.51, reprinted in 4 Trade Reg. Rep. (CCH) paragraph 13,104.

⁴ Occidental Petroleum, *supra* note 2, slip op. at 8.

⁵ This obviates any need to consider entry or possible defenses to an otherwise anticompetitive combination.

IN THE MATTER OF

DETROIT AUTO DEALERS ASSOCIATION, INC., ET AL.

Docket 9189. Interlocutory Order, Jan. 27, 1994

ORDER

On December 13, 1993, counsel for respondent John L. Drummy, Sr. filed "Respondent's Unopposed Motion to Reconsider Decision As To Deceased Respondent, John L. Drummy, Sr." The Motion requests that the complaint against Mr. Drummy be dismissed and the order of February 22, 1989, be modified to delete his name because he passed away on November 30, 1993. The motion recites that Drummy Oldsmobile, Inc. will remain as a respondent. Complaint counsel do not oppose the motion.

The Commission has considered the motion and has determined to grant it. Accordingly,

It is ordered, That the complaint against John L. Drummy, Sr. be and hereby is dismissed.

It is further ordered, That the order of February 22, 1989, of the Commission be and hereby is modified to delete the name of John L. Drummy, Sr.