

Complaint

IN THE MATTER OF
RECKITT & COLMAN PLC

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

Docket C-3918; File No. 991 0306

Complaint, January 18, 2000--Decision, January 18, 2000

This consent order addresses respondent Reckitt & Colman plc's acquisition of the voting securities of Benckiser N.V. from NRV Vermögensverwaltung GmbH. Reckitt & Colman and Benckiser are two of the leading producers and marketers of a number of household cleaning products in the United States. The Consent Agreement requires Reckitt & Colman to divest Benckiser's Scrub Free® and Delicare® household cleaning product businesses -- which respectively market hard surface bathroom cleaners and fine fabric wash products -- to a third party. These assets include all Scrub Free® and Delicare® trademarks and related intellectual property, trade secrets, technical and manufacturing know-how, and customer and vendor lists and information. Reckitt & Colman will provide the purchaser with short-term integration assistance, including production planning and order and billing processing.

Participants

For the *Commission*: Michael Antalics, Molly Boast, Judith A. Cole, and Richard G. Parker.

For the *Respondents*: Charles E. Koob, Simpson Thacher.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that Respondent, Reckitt & Colman plc ("Reckitt & Colman"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire the voting securities of Benckiser N.V., an entity subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as

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amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent Reckitt & Colman is a corporation organized, existing, and doing business under and by virtue of the laws of England, with its principal place of business located at 67 Alma Road, Windsor, Berkshire SL4 3HD, United Kingdom.

2. Respondent is engaged in, among other things, the research, development, formulation, manufacture, marketing, and sale of Hard Surface Bathroom Cleaners and Fine Fabric Wash Products.

II. JURISDICTION

3. Respondent is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. THE ACQUIRED COMPANY

4. Benckiser N.V. ("Benckiser") is a corporation organized, existing, and doing business under and by virtue of the laws of The Netherlands, with its office and principal place of business located at World Trade Center, Amsterdam Airport, Tower C, Schipholboulevard 229, 1118 BH Schiphol Airport, The Netherlands; and includes, but is not limited to, Benckiser Consumer Products Inc., a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at Greenwich

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American Centre, 5 American Lane, Greenwich, Connecticut 06831-2513. Benckiser's ultimate parent is NRV Vermögensverwaltung GmbH ("Vermögensverwaltung"), a corporation organized, existing, and doing business under and by virtue of the laws of Germany.

5. Benckiser is engaged in, among other things, the research, development, formulation, manufacture, marketing, and sale of Hard Surface Bathroom Cleaners and of Fine Fabric Wash Products.

6. Benckiser is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

IV. THE PROPOSED ACQUISITION

7. On July 27, 1999, Reckitt & Colman entered into a Merger Agreement to acquire up to 100 percent of the voting securities of Benckiser from Vermögensverwaltung for approximately \$2.7 billion (the "Acquisition").

V. THE RELEVANT MARKETS

8. A relevant line of commerce in which to analyze the effects of the Acquisition is the research, development, formulation, manufacture, marketing, and sale of Hard Surface Bathroom Cleaners.

9. Hard Surface Bathroom Cleaners are products used by consumers to remove from fixtures and cabinets the types of soil and stains that are found in the bathroom, such as built-up dirt, mineral deposits, soap scum, and residues from various personal

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care products like shampoo and toothpaste. Hard Surface Bathroom Cleaners generally are sold with a trigger or aerosol delivery system.

10. Hard Surface Bathroom Cleaners for consumer use primarily are differentiated through branding. Reckitt & Colman researches, develops, formulates and manufactures Hard Surface Bathroom Cleaners which it markets and sells under the Lysol® brand name. Benckiser researches, develops, formulates and manufactures Hard Surface Bathroom Cleaners which it markets and sells under the Scrub Free® brand name. Lysol® and Scrub Free® are two of the leading brands of Hard Surface Bathroom Cleaners.

11. Other types of household cleaners (including all purpose cleaners, which generally are pourables and dilutables used to clean large surfaces throughout the home; kitchen cleaners, which are formulated to remove greasy residues from kitchen appliances and other kitchen surfaces; and abrasive powders and creams, which generally are used to remove heavy deposits of rust or other stains in the sink) are not substitutes for Hard Surface Bathroom Cleaners.

12. Consumers are not likely to switch from Hard Surface Bathroom Cleaners to other types of household cleaners in response to a small but significant and nontransitory increase in price because of differences between those products and Hard Surface Bathroom Cleaners in terms of convenience, method of application, and efficacy.

13. Another relevant line of commerce in which to analyze the effects of the Acquisition is the research, development, formulation, manufacture, marketing, and sale of Fine Fabric Wash Products.

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14. Fine Fabric Wash Products are used by consumers to clean safely and to freshen delicate fabrics, such as silk, woolens, undergarments, sportswear and vibrantly colored articles of clothing.

15. Fine Fabric Wash Products primarily are differentiated through branding. Reckitt & Colman researches, develops, formulates and manufactures Fine Fabric Wash Products which it markets and sells under the Woolite® brand name. Benckiser researches, develops, formulates and manufactures Fine Fabric Wash Products which it markets and sells under the Delicare® brand name. These are the only two national brands of Fine Fabric Wash Products.

16. Detergents used to launder washable fabrics contain ingredients not found in Fine Fabric Wash Products. These ingredients are important to the ability of the detergent to remove stains and heavy soils from clothing but are harsh on fabrics. Consequently, detergents are likely to cause fading and delicate fabric fiber damage with continued use, and are not substitutes for Fine Fabric Wash Products.

17. Consumers are not likely to switch from Fine Fabric Wash Products to detergents in response to a small but significant and nontransitory increase in price because of the differences in product performance characteristics.

18. The United States is the relevant geographic area in which to analyze the effects of the Acquisition in the relevant lines of commerce because products sold exclusively outside the United States do not have brand acceptance among United States consumers, and because of the high costs associated with shipping relatively low-value products composed primarily of water.

VI. STRUCTURE OF THE MARKETS

19. The market for the research, development, formulation, manufacture, marketing, and sale of Hard Surface Bathroom Cleaners is highly concentrated as measured by the Herfindahl-Hirschman Index ("HHI"). The post-merger HHI is approximately 2300 points, which is an increase of about 500 points over the premerger HHI level. Reckitt & Colman and Benckiser are two leading suppliers of Hard Surface Bathroom Cleaners in the United States.

20. Reckitt & Colman and Benckiser are actual competitors in the relevant market for the research, development, formulation, manufacture, marketing, and sale of Hard Surface Bathroom Cleaners in the United States.

21. The market for the research, development, formulation, manufacture, marketing, and sale of Fine Fabric Wash Products is highly concentrated as measured by the HHI. The post-merger HHI is approximately 8500 points, which is an increase of about 700 points over the premerger HHI level. Reckitt & Colman and Benckiser are the two leading suppliers of Fine Fabric Wash Products in the United States.

22. Reckitt & Colman and Benckiser are actual competitors in the relevant market for the research, development, formulation, manufacture, marketing and sale of Fine Fabric Wash Products in the United States.

VII. BARRIERS TO ENTRY

23. Entry into the relevant markets is unlikely and would not occur in a timely manner to deter or counteract the adverse competitive effects described in Paragraph 24 because of, among other things, the difficulty of developing a new product, gaining brand name recognition and customer acceptance, and establishing a network of retail distributors.

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VIII. EFFECTS OF THE ACQUISITION

24. The effects of the Acquisition, if consummated, may be substantially to lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

- (a) by eliminating actual, direct, and substantial competition between Reckitt & Colman and Benckiser in the relevant markets;
- (b) by increasing the likelihood that Reckitt & Colman will unilaterally exercise market power in the relevant markets;
- (c) by increasing the likelihood of, or facilitating, collusion or coordinated interaction between Reckitt & Colman and the remaining competitors in Hard Surface Bathroom Cleaners; and
- (d) by increasing the likelihood that consumers of Hard Surface Bathroom Cleaners and Fine Fabric Wash Products would be forced to pay higher prices.

IX. VIOLATIONS CHARGED

25. The Merger Agreement described in Paragraph 7 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

26. The Acquisition described in Paragraph 7, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

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WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eighteenth day of January, 2000, issues its Complaint against said Respondent.

By the Commission, Commissioner Leary recused.

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The Federal Trade Commission having initiated an investigation of the proposed acquisition by Reckitt & Colman of 100 percent of the voting securities of Benckiser NV, and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations 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; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the Respondent has violated the said Acts, and that a Complaint

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should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and issues the following Order:

1. Respondent Reckitt & Colman plc is a public limited company organized, existing and doing business under and by virtue of the laws of England, with its office and principal place of business at 67 Alma Road, Windsor, Berkshire SL4 3HD, United Kingdom.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent, and the proceeding is in the public interest.

ORDER**I.**

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

- A. "Respondent" or "Reckitt & Colman" means Reckitt & Colman plc, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Reckitt & Colman plc, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. "Vermögensverwaltung" means NRV Vermögensverwaltung, a corporation organized, existing, and doing business under and by virtue of the

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laws of Germany, with its office and principal place of business located at Ludwig-Bertram Strasse 8+10, 67059 Ludwigshafen, Germany.

- C. “Benckiser” means Benckiser N.V., a subsidiary controlled by Vermögensverwaltung, which is organized, existing, and doing business under and by virtue of the laws of The Netherlands, with its office and principal place of business located at World Trade Center, Amsterdam Airport, Tower C, Schipholboulevard 229, 1118 BH Schiphol Airport, The Netherlands, and includes, but is not limited to, Benckiser’s wholly-owned subsidiary, Benckiser Consumer Products Inc., a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at Greenwich American Centre, 5 American Lane, Greenwich, Connecticut 06831-2513.
- D. “Church & Dwight” means Church & Dwight Co., Inc., a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 469 North Harrison Street, Princeton, New Jersey 08543-5297.
- E. “Commission” means the Federal Trade Commission.
- F. “Acquisition” means the acquisition of Benckiser by Reckitt & Colman pursuant to a Merger Agreement dated July 27, 1999.
- G. “Acquirer” means either Church & Dwight, if Respondent divests pursuant to Paragraph II.A.1. of this Order, or such other entity to whom Respondent divests the Divested Assets pursuant to any other provision of this Order.

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- H. “Hard Surface Bathroom Cleaners” means products specially formulated, marketed, and used by consumers to remove built-up soils and stains from bathroom surfaces.
- I. “Fine Fabric Wash Products” means products specially formulated, marketed, and used by consumers to safely clean fine fabrics such as silks, woolens or other delicate fabrics.
- J. “Divested Assets” means all of Respondent’s rights, title, and interest, acquired from Vermögensverwaltung pursuant to the Acquisition, in assets and businesses relating to the research, development, manufacture, sale, and distribution of Hard Surface Bathroom Cleaners and Fine Fabric Wash Products (collectively the “Divested Products”), including, without limitation, the following:
1. the trade dress, brand and trademark, “Scrub Free,” and associated goodwill;
 2. the trade dress, brand and trademark, “Delicare,” and associated goodwill;
 3. all inventory, customer lists, vendor lists, supplier contact lists, price lists, catalogs, sales and promotion plans, materials and literature, advertising materials, cost and pricing information, marketing plans, information and materials, product development information, research materials, technical information, claims support, product liability claim files, business plans (including, but not limited to, actual plans currently in force for the top 20 accounts), trade secrets, technology, technical know-how, formulae,

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manufacturing processes, recipes, blue prints, research records, specifications, packaging designs (including product labels), artwork, drawings, and process and quality control data;

4. intellectual property rights (including, but not limited to, an assignment of all rights under a Patent and Know-How License Agreement (July 1, 1987) between Ecolab, Inc., and Joh. A. Benckiser GmbH, and the First Amendment to the Patent and Know-How Agreement (November 4, 1999) between Benckiser N.V. and Ecolab, Inc.), copyrights, trademarks, trade dress, trade names, and Universal Product Code Product Identifier Codes (but excluding Universal Product Code Company Identifier Codes);
 5. all rights, title and interest in and to the contracts entered into in the ordinary course of business with customers, retailers of Divested Products (including, but not limited to, letters of confirmation of trade promotions and slotting letters), suppliers, sales representatives, brokers, licensees, or any other person;
 6. all rights under warranties and guarantees, express or implied;
 7. all books, records, files, and supporting documents; and,
 8. all Environmental Protection Agency applications, registrations, permits, and the like, and all documents related thereto.
- K. "Divestiture Agreement" means each and all of the following:

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1. the agreement for the sale of the Divested Assets to Church & Dwight dated October 12, 1999, as amended by the First Amendment to the Asset Purchase Agreement (November 5, 1999);
 2. the Trademark Purchase Agreement between Benckiser and Church & Dwight dated October 12, 1999;
 3. the Transitional Services Agreement between Benckiser and Church & Dwight dated October 21, 1999; and,
 4. the Assignment and Assumption Agreement between Benckiser and Church & Dwight.
- L. “New Divestiture Agreement” means all agreements for the sale of the Divested Assets other than the Divestiture Agreement, and includes any divestiture agreements entered into by a trustee pursuant to Paragraph III of this Order.
- M. “Cost” means direct cash cost of raw materials, packaging and labor.
- N. “Non-Public Acquirer Information” means any information not in the public domain obtained by Respondent directly or indirectly from the Acquirer in the course of negotiation or performance of the Divestiture Agreement or the New Divestiture Agreement. Non-Public Acquirer Information shall not include information that falls within the public domain through no violation of this Order by Respondent.

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

- A.
 - 1. Respondent shall divest, absolutely and in good faith, the Divested Assets to Church & Dwight pursuant to the Divestiture Agreement (which agreement shall not be read to vary or contradict the terms of this Order), subsequently to the date upon which the Commission accepts the Consent Agreement for public comment, but on or before the date that Respondent consummates the Acquisition.
 - 2. *Provided, however,* that if Respondent divests pursuant to Paragraph II.A.1., Respondent need divest only (a) such Divested Assets that are identified in Paragraph I.J.1. through I.J.8., and (b) such assets that are included in the Divestiture Agreement.
- B. *Provided, however,* that if the Commission determines to make the Order final, but notifies the Respondent either that Church & Dwight is not an acceptable acquirer, or that the Divestiture Agreement is not an acceptable manner of divestiture, then Respondent shall rescind the Divestiture Agreement and rescind any divestiture to Church & Dwight, and Respondent shall divest the Divested Assets, absolutely and in good faith, and at no minimum price, pursuant to a New Divestiture Agreement within ninety (90) days of the date the Order becomes final to an Acquirer or Acquirers that receive the prior approval of the Commission and in a manner that receives the prior approval of the Commission.
- C. Any New Divestiture Agreement shall require Respondent to:

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1. Indemnify, defend and hold the Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses arising from any manufacture or sale of the Hard Surface Bathroom Cleaners and/or Fine Fabric Wash Products supplied to the Acquirer by Respondent pursuant to the New Divestiture Agreement; *provided, however,* that the obligations of this Paragraph II.C.1. may be contingent upon the Acquirer's giving Respondent prompt, adequate notice of such claim, cooperating fully in the defense of such claim, and permitting Respondent to assume the sole control of all phases of the defense and/or settlement of such claim, including the selection of counsel; *and provided further* that the obligations of this Paragraph II.C.1. may not require Respondent to be liable for any negligent act or omission of the Acquirer or for any representations and warranties, express or implied, made by the Acquirer that exceed the representations and warranties made by Respondent to the Acquirer;
2. Make available to the Acquirer, upon reasonable notice and request by the Acquirer, for a period not to exceed eighteen (18) months from the date Respondent begins delivery of products pursuant the New Divestiture Agreement, all records kept in the normal course of business that relate to the Cost of manufacturing or supplying the Hard Surface Bathroom Cleaners and Fine Fabric Wash Products;
3. Make available to the Acquirer, upon reasonable notice and request by the Acquirer, for a period not to exceed eighteen (18) months from the date

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Respondent first provides assistance, personnel, or training to the Acquirer pursuant to the New Divestiture Agreement, all records kept in the normal course of business that relate to the Cost of providing such assistance, personnel, or training to the Acquirer.

- D. If Respondent or a trustee divests pursuant to Paragraph II.B. or Paragraph III. of this Order, Respondent shall, at the option of the Acquirer, enter into a contract:
1. To supply and deliver to the Acquirer in a timely manner and under reasonable terms and conditions, up to a twelve (12) month supply of any and all of the Hard Surface Bathroom Cleaners and Fine Fabric Wash Products at Cost, in such quantities as the Acquirer may request up to 110% of Benckiser's 1999 or 2000 production forecast, whichever is greater;
 2. To assign or otherwise convey to the Acquirer all of Respondent's right, title, and interest in any contract with any person relating to research, development, manufacture, marketing, sale, brokerage, or distribution of Hard Surface Bathroom Cleaners and/or Fine Fabric Wash Products; *provided that* if such assignment or conveyance may not be made or be made effective without the consent of any person, Respondent shall use its best efforts to obtain all necessary consents from such person and, failing such consent, shall enter into an agreement with the Acquirer to provide to the Acquirer all the benefits flowing to Respondent pursuant to such contract;

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3. To provide to the Acquirer, at Cost, for a period not to exceed six (6) months from the date of consummation of the New Divestiture Agreement, such assistance, personnel and training as requested by the Acquirer (including its agents and contractors) relating to:
 - (a) the research, development, manufacture, sale, and distribution of the Hard Surface Bathroom Cleaners and/or Fine Fabric Wash Products; and
 - (b) any Environmental Protection Agency applications, registrations, procedures, proceedings, or approvals related to the research, development, manufacture, sale and distribution of Hard Surface Bathroom Cleaners and Fine Fabric Wash Products in the United States;
4. To sell any capital equipment, fixtures, machines, buildings, structures, vehicles, real property, or other tangible assets (other than books and records) used in the research, development, manufacture, sale, or distribution of the Divested Products;

provided, however, that with respect to the assets that are to be divested and the contracts that are to be entered into pursuant to this Paragraph II.D. at the option of the Acquirer or Acquirers, Respondent need not divest such assets or enter into such contracts only if the Acquirer or Acquirers choose not to acquire such assets or enter such contracts and the Commission approves the divestiture without such assets or contracts.

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- E. Respondent shall comply with the terms of the Divestiture Agreement (if Respondent divests pursuant to Paragraph II.A. of this Order) or the New Divestiture Agreement (if Respondent, or a trustee, divests pursuant to Paragraph II.B. or Paragraph III. of this Order), which terms are incorporated by reference into this Order, and made a part hereof. Any failure by Respondent to comply with the Divestiture Agreement or the New Divestiture Agreement shall constitute a failure to comply with this Order.
- F. The purpose of the divestiture of the Divested Assets is to ensure the continued use of the Divested Assets in the same businesses in which the Divested Assets are engaged at the time of the Acquisition, and to remedy any lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.
- G. Respondent shall not provide, disclose or otherwise make available to any of its employees any Non-Public Acquirer Information, nor shall Respondent use any Non-Public Acquirer Information obtained or derived by Respondent in connection with the negotiation or performance of either the Divestiture Agreement or New Divestiture Agreement; *provided, however*, that Respondent may provide, disclose, or otherwise make available Non-Public Acquirer Information to its employees whose duties include negotiating, or performing Respondent's obligations under, the Divestiture Agreement or New Divestiture Agreement, and Respondent may use Non-Public Acquirer Information in connection with negotiating or performing the Divestiture Agreement or New Divestiture Agreement.
- H. Pending divestiture of the Divested Assets, Respondent shall take such actions as are necessary to maintain the viability, marketability and

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competitiveness of the Divested Assets, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Divested Assets.

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

- A. If Respondent fails to divest absolutely and in good faith the Divested Assets pursuant to Paragraph II. of this Order, the Commission may appoint a trustee to divest the Divested Assets. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondent shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondent to comply with this Order.
- B. If a trustee is appointed by the Commission or a court pursuant to Paragraph III.A. of this Order, Respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:
 - 1. The Commission shall select the trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in

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acquisitions and divestitures. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed trustee, Respondent shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to accomplish the divestiture described in Paragraph III.A. of the Order.
3. Within ten (10) days after appointment of the trustee, Respondent shall execute a trust agreement that, subject to the prior approval of the Commission, and in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this Order and to execute a New Divestiture Agreement on behalf of Respondent.
4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph III.B.3. to accomplish the divestiture, which shall be to an Acquirer or Acquirers who receive the prior approval of the Commission, and in a manner and pursuant to a New Divestiture Agreement that receive the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan for divestiture, or believes that the divestiture required by this Order can be achieved within a reasonable time, then the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court;

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provided, however, the Commission may extend the trustee's period for divestiture only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the Divested Assets or to any other relevant information, as the trustee may request. Respondent shall develop such financial or other information as the trustee may request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in any divestiture caused by Respondent shall extend the time for that divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.
6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to divest expeditiously at no minimum price. The divestiture shall be made in a manner consistent with the terms of this Order; *provided, however,* if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by Respondent from among those approved by the Commission; *provided further, however,* that Respondent shall select such entity within five (5) days of receiving notification of the Commission's approval.

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7. The trustee shall serve, without bond or other security, at the cost and expense of Respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Respondent, and at reasonable fees, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the Respondent, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's accomplishing the divestiture required by Paragraph III.A. of this Order.
8. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

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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 this Paragraph.
10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be reasonably necessary or appropriate to accomplish the divestiture required by this Order.
11. The trustee may divest such additional ancillary assets related to the Divested Assets and effect such ancillary arrangements as are necessary to satisfy the requirements or purposes of this Order.
12. The trustee shall have no obligation or authority to operate or maintain the Divested Assets.
13. The trustee shall report in writing to Respondent and the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestiture required by this Order.

IV.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order becomes final, and every thirty (30) days thereafter until Respondent has completed the divestiture of the Divested Assets and every ninety (90) days thereafter until Respondent has fully complied with the provisions of Paragraphs II. and III. of this Order, Respondent shall submit to the Commission verified written reports setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with the requirements of this Order. Respondent shall include in its compliance reports, among other things that are

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required from time to time, a full description of the efforts being made to comply with Paragraphs II. and III. of the Order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal documents (except privileged documents), and all reports and recommendations, concerning the divestiture.

V.

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

VI.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, Respondent shall permit any duly authorized representative of the Commission:

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

Analysis to Aid Public Comment

VII.

IT IS FURTHER ORDERED that this order shall terminate five (5) years after the divestiture required in Paragraph II.A. of this order has been accomplished.

By the Commission, Commissioner Leary recused.

**ANALYSIS OF AGREEMENT CONTAINING CONSENT
ORDER TO AID PUBLIC COMMENT**

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Order ("Consent Agreement") from Reckitt & Colman plc ("Reckitt & Colman"), which is designed to remedy the anticompetitive effects resulting from Reckitt & Colman's acquisition of the voting securities of Benckiser N.V. from NRV Vermögensverwaltung GmbH ("Vermögensverwaltung"). Under the terms of the Decision & Order, Reckitt & Colman will be required to divest Benckiser's Scrub Free[®] and Delicare[®] businesses to Church & Dwight Co., Inc. ("Church & Dwight") after the date upon which the Commission preliminarily accepts the Consent Agreement. Church & Dwight produces a number of household products under the Arm & Hammer[®] brand name.

The proposed Consent Agreement has been placed on the public record for thirty (30) days for reception of comments from interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the proposed Consent Agreement and the comments received, and will decide whether it should

withdraw from the proposed Consent Agreement or make final the Decision & Order.

On July 27, 1999, Reckitt & Colman and entities controlled by Vermögensverwaltung entered into a Merger Agreement under which Reckitt & Colman agreed to purchase all of the voting securities of Benckiser N.V. for approximately \$2.7 billion. The Commission's Complaint alleges that the merger, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, in the markets for the research, development, formulation, manufacture, marketing and sale of hard surface bathroom cleaners and fine fabric wash products.

Hard surface bathroom cleaners are products specially formulated, sold and used by consumers to remove built-up soils and stains from bathroom surfaces. Reckitt & Colman, which sells Lysol,[®] and Benckiser, which sells Scrub Free,[®] are two significant U.S. suppliers of hard surface bathroom cleaners. Fine fabric wash products are specially formulated, sold and used by consumers to launder fine fabrics such as silks, woolens or other delicate fabrics. Reckitt & Colman, which sells Woolite,[®] and Benckiser, which sells Delicare,[®] are the two largest suppliers of fine fabric wash products.

The United States is the relevant geographic area in which to evaluate the effects of the proposed acquisition of Benckiser by Reckitt & Colman. It is unlikely that the competition eliminated by the proposed transaction would be replaced by foreign manufacturers of hard surface bathroom cleaners and fine fabric wash products. Foreign manufacturers of these products are unable to compete effectively in the U.S. because they lack the necessary brand recognition among U.S. consumers and face substantial transportation costs, which make importing their products into the U.S. uneconomical.

Analysis to Aid Public Comment

The hard surface bathroom cleaner and fine fabric wash markets are highly concentrated in the United States, and the proposed acquisition would substantially increase concentration in each market. In the hard surface bathroom cleaner market, the acquisition would result in an increase in the Herfindahl-Hirschman Index ("HHI") to approximately 2300 points, which is an increase of about 500 points over the premerger HHI level. In the fine fabric wash market, the post-merger HHI would be approximately 8500 points, which is an increase of about 700 points over the premerger HHI level.

By eliminating competition between these competitors in these highly concentrated markets, the proposed acquisition could allow Reckitt & Colman unilaterally to exercise market power or could facilitate coordinated interaction among the remaining competitors in the hard surface bathroom cleaner market, and could allow Reckitt & Colman unilaterally to exercise market power in the fine fabric wash market, thereby increasing the likelihood that consumers of hard surface bathroom cleaners and fine fabric wash products would be forced to pay higher prices.

In addition, new entry would not deter or counteract the anticompetitive effects likely to flow from the proposed transaction. A new entrant into either the hard surface bathroom cleaner or fine fabric wash market would need to undertake the difficult, expensive and time-consuming process of developing a competitive product, creating brand recognition among U.S. consumers, and establishing a viable retail distribution network. Because of the difficulty of accomplishing these tasks, new entry into either market could not be accomplished in a timely manner. Moreover, because of the high sunk costs involved, it is not likely that new entry into either market would occur at all, even in response to a small, nontransitory increase in price in either market after the transaction. Similarly, entry through brand name product line extension is not likely. Large, vertically integrated manufacturers of household cleaners are set up for high volume

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production and not for the production of small or individual stock keeping units for niche markets.

The Consent Agreement effectively remedies the acquisition's anticompetitive effects in the hard surface bathroom cleaner and fine fabric wash markets by requiring Reckitt & Colman to divest Benckiser's Scrub Free[®] and Delicare[®] businesses to a third party. These assets include all Scrub Free[®] and Delicare[®] trademarks and related intellectual property, trade secrets, technical and manufacturing know-how, and customer and vendor lists and information. Pursuant to the Consent Agreement, the Benckiser businesses must be divested to Church & Dwight after the Commission accepts this Consent Agreement for public comment, but on or before the date that Reckitt & Colman acquires Benckiser. Church & Dwight is a well established, financially viable company that offers value priced consumer cleaning products under established brands including Arm & Hammer[®], Parsons[®], Brillo[®], and Sno Bol[®]. In order to ensure an orderly transition, Reckitt & Colman will provide Church & Dwight with short-term integration assistance, including production planning and order and billing processing. In the event that these businesses are not divested to Church & Dwight, the Decision & Order contains a provision that requires Reckitt & Colman to divest Benckiser's Scrub Free[®] and Delicare[®] businesses to an alternative acquirer approved by the Commission within ninety (90) days of the date the Decision & Order becomes final. At the alternative acquirer's option, additional related assets may be divested including fixtures, machines, buildings, structures, vehicles, real property, or other tangible assets used in the research, development, formulation, manufacture, sale, or distribution of these businesses.

In the event that the Benckiser Scrub Free[®] and Delicare[®] businesses are not divested to Church & Dwight or to an alternative acquirer within 90 days of the date the Commission's Decision & Order becomes final, the Decision & Order provides that the Commission may appoint a trustee to divest these assets,

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and, at the purchaser's option, to divest additional related assets to a Commission-approved purchaser.

The Order also requires Reckitt & Colman to provide to the Commission a report of compliance with the divestiture provisions of the Decision & Order within thirty (30) days following the date the Decision & Order becomes final, every thirty (30) days thereafter until Reckitt & Colman has completed the required divestiture, and every ninety (90) days thereafter until Reckitt & Colman has completed its divestiture obligations under the Order.

The purpose of this analysis is to facilitate public comment on the Consent Agreement, and it is not intended to constitute an official interpretation of the Consent Agreement or to modify its terms in any way.

Complaint

IN THE MATTER OF

**MACDERMID, INC. AND POLYFIBRON
TECHNOLOGIES, INC.**

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

Docket C-3911; File No. 991 0167
Complaint, December 21, 1999--Decision, February 4, 2000

This consent order addresses the proposed acquisition by respondent MacDermid, Inc. of Polyfibron Technologies, Inc. Under the terms of the consent order, respondents are required to divest Polyfibron's North American liquid photopolymer business. The consent order requires that respondents divest to a Commission-approved acquirer all trade secrets, know-how, trademarks and trade names, and intangible and tangible assets, including equipment, supply contracts, and business information relating to Polyfibron's liquid photopolymer business. The consent order also requires that respondents provide incentives to certain employees identified by the acquirer as important to the continued competitiveness and viability of the liquid photopolymer business and that they facilitate of know-how to the acquirer. The respondents are also required to terminate their distribution agreements with BASF and Asahi. The Order to Maintain Assets requires that respondents preserve the Polyfibron liquid photopolymer business as a viable and competitive business until it is transferred to the Commission-approved acquirer. The respondents are obligated to maintain a sufficient inventory of liquid photopolymers to ensure there is no shortage during the transition of the liquid photopolymer business to the Commission-approved acquirer.

Participants

For the Commission: *Michael Antalics, Morris Bloom, Randall Conner, Daniel P. Ducore, Timothy J. Feighery, Erica S. Mintzer, and Jacqueline Tapp.*

For the Respondents: *Robert C. Jones and Phil Proger, Jones, Day, Reavis & Pogue; Suzanne L. Glassburn and Neil Motenko, Nutter, McClennen & Fish, LLP.*