

Complaint

**IN THE MATTER OF
THE VALSPAR CORPORATION****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-3995; File No. 0010197**Complaint, January 26, 2001--Decision, January 26, 2001*

This consent order addresses the acquisition by Respondent Valspar Corporation -- a leading supplier of silver, tin and copper solutions ("mirror solutions") and mirror backing paint in the United States -- of Lilly Industries, Inc., another leading supplier of those solutions and paint. The order, among other things, requires Respondent Valspar to divest its mirror coatings business -- which is comprised of silver, tin and copper solutions, mirror backing paint, and any other coating researched, developed, manufactured or sold by Valspar that is used in the production of a mirror -- to Spraylat Corporation. The order also requires the respondent to provide incentives to accept employment from, and remain employed by, the acquiring firm. In addition, the order prohibits the respondent, for one year, from inducing key customers to terminate their contracts with the acquiring firm, and prohibits employees of the respondent involved with its mirror coatings business from disclosing any confidential information to employees involved with the Lilly business.

Participants

For the Commission: *Christina R. Perez, Tamara L. Bond, Ann Malester, Joseph Eckhaus, Elizabeth A. Piotrowski, Morris E. Morkre, Michael Vita and Daniel O'Brien.*

For the Respondent: *Robert M. Huber, Bryan Cave LLP.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that Respondent, The Valspar Corporation. ("Valspar"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Lilly Industries, Inc. ("Lilly"), a corporation subject to the jurisdiction of the Commission, 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

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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. DEFINITIONS

1. "Acquisition Agreement" means the Agreement and Plan of Merger By and Among Lilly Industries, Inc., The Valspar Corporation and VAL Acquisition Corp., dated June 23, 2000.
2. "Silver Solution" means any solution used to produce a reflective surface on a mirror.
3. "Tin Solution" means any solution used to adhere a silver solution to the surface of a piece of glass to make a mirror.
4. "Copper Solution" means any solution used to create a protective barrier between the silver solution and the mirror backing paint.
5. "Mirror Backing Paint" means any paint that is applied to the back of a mirror to provide a hard shell coating.
6. "Respondent" means The Valspar Corporation.

II. THE PARTIES

7. Respondent Valspar, is a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware with its office and principal place of business located at 1101 Third Street South, Minneapolis, Minnesota 55440.
8. Lilly Industries, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Indiana, with its principal executive offices located at 200 W. 103 Street, Indianapolis, Indiana.

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9. Pursuant to the Acquisition Agreement, Valspar will acquire 100 percent of the outstanding voting securities of Lilly Industries, Inc.
10. Respondent and Lilly are, and at all times relevant herein have been, engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and are corporations whose businesses are in, or affect commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. THE ACQUISITION

11. On June 23, 2000, Respondent and Lilly entered into an Agreement and Plan of Merger, under which Valspar is to acquire 100 percent of the voting securities of Lilly in a transaction valued at approximately \$762 million (“Acquisition”).

IV. THE RELEVANT MARKETS

12. For the purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are:
 - a. the research, development, manufacture and sale of Silver Solutions;
 - b. the research, development, manufacture and sale of Tin Solutions;
 - c. the research, development, manufacture and sale of Copper Solutions; and
 - d. the research, development, manufacture and sale of Mirror Backing Paints.

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13. For the purposes of this Complaint, the United States is the relevant geographic area in which to analyze the effects of the Acquisition in the relevant lines of commerce.

V. THE STRUCTURE OF THE MARKETS

14. The market for the research, development, manufacture and sale of Silver Solutions in the United States is highly concentrated. Valspar and Lilly account for over 90% of the Silver Solution market in the United States.
15. The market for the research, development, manufacture and sale of Tin Solutions in the United States is highly concentrated. Valspar and Lilly account for over 90% of the Tin Solution market in the United States.
16. The market for the research, development, manufacture and sale of Copper Solutions in the United States is highly concentrated. Valspar and Lilly account for over 90% of the Copper Solution market in the United States.
17. The market for the research, development, manufacture and sale of Mirror Backing Paint in the United States is highly concentrated. Valspar and Lilly account for over 60% of the Mirror Backing Paint market in the United States.

VI. BARRIERS TO ENTRY

18. Entry into the relevant markets set forth in paragraphs 12 and 13 would not occur in a timely manner to deter or counteract the adverse competitive effects described in paragraph 19 because of, among other things, the difficulty in developing formulas, establishing a nationwide sales and service network, and gaining brand name recognition and customer acceptance in the markets. In addition, entry into the relevant markets would be relatively costly in light of the size of the markets and is not likely to occur because

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sales opportunities would likely be too small to justify the costs and risks associated with new entry.

VII. EFFECTS OF THE ACQUISITION

19. The effects of the Acquisition, if consummated, may be substantially to lessen competition and to tend to create a monopoly in the relevant markets set forth above 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 Respondent and Lilly in the relevant markets;
 - b. by increasing the likelihood that the combined Valspar and Lilly would increase prices of Silver Solutions, Tin Solutions, Copper Solutions and Mirror Backing Paints unilaterally; and
 - c. by reducing innovation in the relevant markets.

VIII. VIOLATIONS CHARGED

20. The Acquisition agreement described in Paragraph 11 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.
21. The Acquisition described in Paragraph 11, 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.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-sixth day of January, 2001, issues its Complaint against said Respondent.

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DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition by Respondent The Valspar Corporation (“Valspar”) of Lilly Industries, Inc. (“Lilly”), and Respondent having been furnished thereafter with a copy of a draft of Complaint which 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 has reason to believe that Respondent has violated the said Acts and that a Complaint 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 Decision and Order (“Order”):

Decision and Order

1. Respondent Valspar is a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware with its office and principal place of business located at 1101 Third Street South, Minneapolis, Minnesota 55415.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of 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. “Valspar” means The Valspar Corporation, its directors, officers, employees, agents and representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by The Valspar Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Lilly” means Lilly Industries, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the state of Indiana with its office and principal place of business located at 200 W. 103 Street, Indianapolis, Indiana 42690.
- C. “Respondent” means Valspar.
- D. “Spraylat” means Spraylat Corporation, a corporation organized, existing and doing business under and by virtue of the laws of the state of New York with its office and principal place of business located at 716 S. Columbus Ave., Mount Vernon, New York 10550. Spraylat also includes all of the joint ventures, subsidiaries, divisions, groups and affiliates controlled by Spraylat Corporation.

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- E. "Commission" means Federal Trade Commission.
- F. "Acquirer" means Spraylat, or the entity approved by the Commission to acquire the Assets To Be Divested pursuant to Paragraph II. of this Order.
- G. "Acquisition" means the proposed acquisition by Valspar of Lilly pursuant to the Agreement and Plan of Merger By and Among Lilly Industries, Inc., The Valspar Corporation and VAL Acquisition Corp., dated June 23, 2000.
- H. "Assets To Be Divested" means all of Valspar's business, assets, properties, and goodwill, tangible and intangible, as of the date the Consent Agreement is signed by the Respondent, relating to the research, development, manufacture, quality assurance, customer support, marketing or sale of Mirror Coatings, including, but not limited to, the following:
1. a lease for the Greensboro Facility together with appurtenances and improvements;
 2. all fixtures, equipment, furniture, tools and other tangible personal property, together with all licenses and permits located at the Greensboro Facility;
 3. all fixtures, equipment, furniture, tools and other tangible personal property, together with all licenses and permits relating to the research and development of any Mirror Coating located at the High Point Facility;
 4. trade names, trademarks, brand names, formulations, contractual rights, Patents, trade secrets, technology, know-how, inventions, specifications, designs, drawings, processes, production information, manufacturing information, testing and quality control data, research materials, technical information, marketing and distribution information, customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, information

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stored on management information systems (and specifications sufficient for the Acquirer to use such information) and all data, contractual rights, materials and information regarding Regulatory Approvals relating to Mirror Coatings;

5. all rights, titles and interest in and to the contracts entered into in the ordinary course of business with customers, suppliers, sales representatives, distributors, agents, personal property lessors and lessees, licensors, licensees, consignors and consignees;
 6. inventory and storage capacity;
 7. all rights under warranties and guarantees, express or implied;
 8. all books, records, and files; and
 9. all items of prepaid expense.
- I. “Cost” means direct cash cost of raw materials and labor.
- J. “Divestiture Agreement” means the agreement(s) by and between Respondent and the Acquirer and all exhibits thereof, incorporated by reference into this Order and made a part hereof as Confidential Appendix I, that has been approved by the Commission.
- K. “Greensboro Facility” means the facility located at 3125 Spring Garden St., Greensboro, North Carolina
- L. “High Point Facility” means the facility located at 1647 English Road, High Point, North Carolina.
- M. “Key Employees” means the employees listed in Confidential Appendix II.

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- N. “Mirror Coatings” means any silver solution, tin solution, copper solution, reducer, mirror backing paint or any other coating researched, developed, manufactured or sold by Valspar that is used in the production of a mirror or an ornament.
- O. “Non-Public Acquirer Information” means any information not in the public domain obtained by Respondent, directly or indirectly, from the Acquirer relating to Mirror Coatings or any information obtained by Respondent, directly or indirectly, while providing assistance to the Acquirer as required by Paragraph III. of this Order. Non-Public Acquirer Information shall not include information already in the public domain or information that subsequently falls within the public domain through no violation of this Order by Respondent.
- P. “Patents” means all patents and patent rights, patent applications, patents of addition, re-examinations, reissues, extensions, granted supplementary protection certificates, substitutions, confirmations, registrations, revalidations, revisions, additions and the like, of or to said patent and patent rights and any and all continuations and continuations-in part and divisionals relating to Mirror Coatings.
- Q. “Regulatory Approvals” means approval by any governmental entity or regulatory approvals held by Valspar for the research, development, manufacture, quality control, marketing or sale of Mirror Coatings as of the date of the Acquisition.
- R. “Sole Source Customer” means any person or company that has a contract, as of the date of the Acquisition, to purchase 100% of its Mirror Coatings from Respondent.
- S. “Sole Source Customer Contract” means any agreement between any Sole Source Customer and Respondent relating to Mirror Coatings existing as of the date the Consent Agreement is signed by the Respondent.

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- T. “Third-Party Consents” means all consents, waivers and approvals from any person, private or public, that are necessary to effect the complete transfer to the Acquirer of the Assets To Be Divested pursuant to this Order.
- U. “Transitional Services” means any services or assistance provided by Respondent to enable or facilitate the transfer of the Assets To Be Divested to the Acquirer, including, but not limited to, all services identified in the Transition Services Agreement.
- V. “Transition Services Agreement” means the Transition Services Agreement entered into by and between Valspar and Acquirer attached as Exhibit C to the Divestiture Agreement.

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

- A. Respondent shall divest the Assets To Be Divested to Spraylat pursuant to and in accordance with the Divestiture Agreement (which agreement shall not vary from or contradict or be construed to vary from or contradict the terms of this Order). The divestiture shall be made no later than ten (10) days after Respondent consummates the Acquisition. Provided, however, that if Respondent has divested the Assets To Be Divested to Spraylat prior to the date the Order becomes final, and if, at the time the Commission determines to make the Order final, the Commission notifies Respondent that Spraylat is not an acceptable purchaser or that the manner of divestiture or the proposed transaction is not acceptable, then Respondent shall immediately rescind the transaction with Spraylat and shall divest the Assets To Be Divested, absolutely and in good faith, within six (6) months of the date the Order becomes final. Respondent shall divest the Assets To Be Divested only to an Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

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- B. Respondent shall obtain all Third-Party Consents prior to the closing of the divestiture pursuant to the Divestiture Agreement required by Paragraph II.A. of this Order.
- C. Respondent shall comply with all of the terms of the Divestiture Agreement approved by the Commission pursuant to which the Assets To Be Divested are divested to the Acquirer (either Spraylat or the entity approved by the Commission to acquire the Assets To Be Divested pursuant to this Order). The Divestiture Agreement with the Acquirer shall be deemed incorporated by reference into this Order and any failure by Respondent to comply with the terms of the Divestiture Agreement shall constitute a failure to comply with this Order.
- D. The purpose of the divestiture pursuant to this Order is to ensure the continued use of the Assets To Be Divested in the same businesses in which they were engaged at the time of the announcement of the proposed Acquisition and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

- A. No later than ten (10) days prior to the divestiture, Respondent shall provide the Acquirer with a complete list of all non-clerical employees of Respondent who are engaged, or have been engaged, in the research, development, manufacture, quality assurance, customer support, marketing or sale of Mirror Coatings at any time during the period from June 23, 2000, until the date of the divestiture. The list shall state each individual's name, position or positions held from June 23, 2000, until the date of the divestiture, address, telephone number, and a description of the duties and work performed by the individual in connection with Mirror Coatings. Respondent shall provide the Acquirer the opportunity to enter into employment contracts with such individuals, provided that

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such contracts are contingent upon the Commission's approval of the divestiture.

- B. Respondent shall provide the Acquirer with an opportunity to inspect the personnel files and other documentation relating to the individuals identified pursuant to Paragraph III.A. of this Order to the extent permissible under applicable laws, at the request of the Acquirer any time after the execution of the Divestiture Agreement between the Acquirer and Respondent.
- C. Respondent shall not enforce any confidentiality or non-compete restrictions relating to the Assets To Be Divested that apply to any employee identified pursuant to Paragraph III.A. who accepts employment with the Acquirer that would interfere with the Acquirer's ability to interview or hire such employee.
- D. Respondent shall provide all employees identified pursuant to Paragraph III.A. with reasonable financial incentives to continue in their positions until the date the divestiture is accomplished. Such incentives shall include a continuation of all employee benefits offered by Respondent until the date the divestiture of the Assets to Be Divested is accomplished, including regularly scheduled raises and bonuses, and a vesting of all pension benefits (as permitted by law). In addition, Respondent shall provide all Key Employees incentives to accept employment with the Acquirer at the time of the divestiture. Such incentives shall include a bonus for each Key Employee, equal to 10% of the employee's current annual salary and commissions (including any annual bonuses) as of the date this Order is accepted by the Commission for public comment, who accepts an offer of employment on or prior to the date the Order becomes final from the Acquirer and remains employed by the Acquirer for a period of three (3) years, payable by the Acquirer three (3) years after the commencement of the employee's employment by the Acquirer.

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- E. For a period of one (1) year following the date the divestiture is accomplished, Respondent shall not, directly or indirectly, solicit or otherwise attempt to induce any employees to terminate their employment relationship with the Acquirer; provided, however, it shall not be deemed to be a violation of this provision if: (i) Respondent advertises for employees in newspapers, trade publications or other media not targeted specifically at the employees, or (ii) Respondent hires employees who apply for employment with Valspar, as long as such employees were not solicited by Valspar in violation of this Paragraph III.E. During the one-year period following the divestiture, Respondent shall not, directly or indirectly, hire or enter into any arrangement for the services of any employees employed by the Acquirer, unless the individual's employment has been terminated by the Acquirer.
- F. Respondent shall not transfer, without the consent of the Acquirer, any of the individuals identified in Paragraph III.A. of this Order to any other position until the divestiture is accomplished.
- G. For the period beginning on the date the Divestiture Agreement is signed and ending one (1) year following the divestiture ("Extended Restricted Period"), Respondent shall not:
1. solicit, induce or attempt to induce any Sole Source Customer to terminate or modify any Sole Source Customer Contract or, in the case of any Sole Source Customer Contract which by its terms expires or terminates within one (1) year of the date this order is signed by Respondent, solicit the Sole Source Customer which is a party to such Sole Source Customer Contract to not renew such Sole Source Customer Contract; or

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2. solicit, induce, or attempt to induce any Sole Source Customer to transfer to Respondent any business that is subject to any Sole Source Customer Contract during the term of such Sole Source Customer Contract.

Nothing in this paragraph shall prevent Respondent from responding to an unsolicited invitation to bid on a contract from any Sole Source Customer during the Extended Restricted Period.

- H. Respondent shall, at the request of the Acquirer, at Cost to the Acquirer, provide: (a) for a period not to exceed one (1) year after the divestiture is accomplished, such Transitional Services as are necessary to enable the Acquirer to manufacture and distribute Mirror Coatings in substantially the same manner and quality employed or achieved by Respondent; and (b) for a period not to exceed one (1) year after the divestiture is accomplished, such assistance, personnel and training as are reasonably necessary to enable the Acquirer to obtain any necessary Regulatory Approvals to manufacture and sell Mirror Coatings.
- I. Respondent shall not provide, disclose or otherwise make available to any of its employees not involved in providing Transitional Services any Non-Public Acquirer Information, nor shall Respondent use any Non-Public Acquirer Information obtained or derived by Respondent in its capacity as provider of Transitional Services pursuant to Paragraph III.H. of this Order except for the sole purpose of providing Transitional Services pursuant to Paragraph III.H. of this Order. Respondent shall cause each individual involved in providing Transitional Services pursuant to Paragraph III.H. of this Order and having access to Non-Public Acquirer Information to sign an agreement that the individual will maintain the confidentiality of any Non-Public Acquirer Information as required by the terms and conditions of this Paragraph.

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Such individuals shall not be involved in any way in the management, sales, marketing, or financial operations of the competing products of Respondent.

- J. Pending divestiture of the Assets To Be Divested, Respondent shall take such actions as are necessary to maintain the viability, marketability and competitiveness of the Assets To Be Divested, and to prevent the destruction, removal, wasting, deterioration or impairment of the Assets To Be Divested except for ordinary wear and tear.

IV.

IT IS FURTHER ORDERED that:

- A. If Respondent has not divested, absolutely and in good faith and with the Commission's prior approval, the Assets To Be Divested within the time required by Paragraph II. of this Order, the Commission may appoint a trustee to divest the Assets To Be Divested in a manner that satisfies the requirements of Paragraphs II. and III. of this Order.
- B. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(1), or any other statute enforced by the Commission, Respondent shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(1) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondent to comply with this Order.

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- C. If a trustee is appointed by the Commission or a court pursuant to Paragraph IV.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 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 receipt of 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 divest the Assets To Be Divested.
 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.
 4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph IV.C.3. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend the period for no more than two (2) additional periods.

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5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the Assets To Be Divested or to any other relevant information as the trustee may request. Respondent shall develop such financial or other information as such 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 divestiture caused by Respondent shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, 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 that receives the prior approval of the Commission and to an Acquirer that receives the prior approval of the Commission; provided, however, if the trustee receives bona fide offers for the Assets To Be Divested from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest such assets 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.
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, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties

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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 Respondent, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Assets To Be Divested.

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 claims, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.
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 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 necessary or appropriate to accomplish the divestiture required by this Order.
11. In the event that the trustee determines that he or she is unable to divest the Assets To Be Divested, in a manner consistent with the Commission's purpose as described in Paragraph II.D., the trustee may divest additional ancillary assets and businesses of Respondent and effect such arrangements as are necessary to satisfy the requirements of this Order.

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12. The trustee shall have no obligation or authority to operate or maintain the Assets To Be Divested.
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.

V.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order becomes final and every sixty (60) days thereafter until Respondent has fully complied with the provisions of Paragraphs II. through IV. of this Order, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with Paragraphs II. through IV. of this Order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II. through IV. of the Order, including a description of all substantive contacts or negotiations relating to the divestiture and the approvals and consents. Respondent shall include in its compliance reports copies, other than of privileged materials, of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the divestitures and approvals. The final compliance report required by this Paragraph V. shall include a statement that the divestiture has been accomplished in the manner approved by the Commission and shall include the date the divestiture was accomplished.

VI.

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

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corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this Order.

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent, 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 compliance with this Order; and
- B. Upon five (5) days' notice to Respondent and without restraint or interference from it, to interview officers, directors, or employees of Respondent, who may have counsel present, regarding any such matters.

By the Commission.

Decision and Order

CONFIDENTIAL APPENDIX I

[Redacted From Public Record Version]

CONFIDENTIAL APPENDIX II

[Redacted From Public Record Version]

Analysis

**Analysis of Agreement Containing Consent Order to Aid
Public Comment**

Issued when the Commission tentatively approved a proposed consent order on December 15, 2001

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Order (“Consent Agreement”) from Valspar Corporation (“Valspar”), which is designed to remedy the anticompetitive effects resulting from Valspar’s acquisition of Lilly Industries, Inc. (“Lilly”). Under the terms of the agreement, within ten days of the date the Consent Agreement is placed on the public record, Valspar will be required to divest its mirror coatings business, which is comprised of silver, tin and copper solutions, mirror backing paint, and any other coating researched, developed, manufactured or sold by Valspar that is used in the production of a mirror, to Spraylat Corporation. Should Valspar fail to do so, the Commission may appoint a trustee to divest the mirror coatings business.

The proposed Consent Agreement has been placed on the public record for thirty (30) days for reception of comments by 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.

Pursuant to an Asset Purchase Agreement dated June 23, 2000, Valspar has agreed to acquire Lilly for approximately \$762 million. The Commission's Complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, in the markets for silver solutions, tin solutions, copper solutions and mirror backing paint.

Valspar and Lilly are the two leading suppliers of silver, tin and copper solutions (“mirror solutions”) in the United States and two of three suppliers of mirror backing paint in the United States.

Analysis

Five basic inputs are needed to make a mirror: glass, a tin solution, a silver solution, a copper solution, and mirror backing paint. Most mirrors are made by placing clean pieces of glass flat on a conveyor belt, which moves the glass through the various stations where the solutions and paint are applied to the back of each piece of glass. The first layer applied to the glass is a tin solution, which is an adhesion promoter so that the silver will bond to the glass. After the tin solution, a silver solution is applied, which creates a metal film on the glass surface, giving the mirror its reflective surface. The third step is to apply a copper solution, which helps keep the silver from oxidizing and creates a surface to which the mirror backing paint will adhere. Finally, the mirror backing paint is applied. This adds a hard coating that protects the solutions from becoming scratched or damaged and further protects the silver solution from corrosion.

Both Lilly and Valspar produce all of the components, other than glass, necessary to make a mirror. The United States mirror solutions and mirror backing paint markets are highly concentrated, and the proposed acquisition would produce a firm controlling over 90% of the mirror solutions markets and over 60% of the mirror backing paint market. Both companies have frequently competed against each other for customers. By eliminating competition between the two most significant competitors in these highly concentrated markets, the proposed acquisition would allow the combined firm to exercise market power unilaterally, thereby increasing the likelihood that purchasers of mirror solutions as well as mirror backing paint would be forced to pay higher prices and that innovation and service levels in these markets would decrease.

Significant impediments to new entry exist in the mirror solutions and mirror backing paint markets. A new entrant into any of these markets would need to undertake the difficult, expensive and time-consuming process of developing a competitive product, establishing reliable U.S. distribution and technical support, and developing a reputation among mirror manufacturers for consistently producing a high-quality product.

Analysis

Because of the difficulty of accomplishing these tasks, new entry into either the mirror solutions markets or the mirror backing paint market could not be accomplished in a timely manner. Additionally, new entry into any one of these markets is made more unlikely because of the limited sales opportunities available to new entrants.

The Consent Agreement effectively remedies the acquisition's anticompetitive effects in the United States mirror solutions and mirror backing paint markets by requiring Valspar to divest its mirror coatings business. Pursuant to the Consent Agreement, Valspar is required to divest its mirror coatings business to Spraylat Corporation within ten days of the date the Commission places the Order on the public record. Should Valspar fail to do so, the Commission may appoint a trustee to divest the business.

The Commission's goal in evaluating possible purchasers of divested assets is to maintain the competitive environment that existed prior to the acquisition. A proposed buyer of divested assets must not itself present competitive problems. The Commission is satisfied that Spraylat is a well-qualified acquirer of the divested assets. Based in Mount Vernon, New York, Spraylat is a family owned company that manufactures and sells specialty paints and coatings for industrial uses. Spraylat possesses the necessary industry expertise to replace the competition that existed prior to the proposed acquisition. Furthermore, Spraylat poses no separate competitive issues as the acquirer of the divested assets.

The Consent Agreement includes a number of provisions that are designed to ensure that the transfer of Valspar's mirror coatings business to the acquirer is successful. The Consent Agreement requires Valspar to provide incentives to certain key employees to accept employment, and remain employed, by the acquirer. Valspar is also prohibited from inducing key customers from terminating their contracts with the acquirer for a period of one year. Finally, Valspar employees involved with its mirror

Analysis

coatings business are prohibited from disclosing any confidential information to employees involved with the Lilly business.

In order to ensure that the Commission remains informed about the status of the Valspar mirror coatings business pending divestiture, and about efforts being made to accomplish the divestiture, the Consent Agreement requires Valspar to report to the Commission within 30 days, and every thirty days thereafter until the divestiture is accomplished. In addition, Valspar is required to report to the Commission every 60 days regarding its obligations to provide transitional services and facilities management.

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 in any way its terms.

Complaint

IN THE MATTER OF

EXXON CORPORATION AND MOBIL CORPORATION

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-3907; File No. 9910077

Complaint, November 30, 1999--Decision, January 26, 2001

This consent order addresses the merger of Respondent Exxon Corp. -- one of the world's largest integrated oil companies, whose businesses operate petroleum refineries, own or lease gasoline stations nationally; and sell gasoline to distributors or dealers that operate another 6,475 retail outlets throughout the United States -- and Respondent Mobil Corp., another of the world's largest integrated oil companies, whose businesses operate petroleum refineries; and retail outlets that sell Mobil-branded gasoline throughout the United States. The order, among other things, requires the respondents to divest or otherwise surrender control of: (1) all of Mobil's gasoline marketing in the Mid-Atlantic (New Jersey, Pennsylvania, Delaware, Maryland, Virginia, and the District of Columbia), and all of Exxon's gasoline marketing in the Northeast (Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, and New York); (2) Mobil's gasoline marketing in the Austin, Bryan/College Station, Dallas, Houston and San Antonio, Texas, metropolitan areas; (3) Exxon's option to repurchase retail gasoline stores from Tosco Corp. in Arizona; (4) Exxon's refinery located in Benicia, California ("Exxon Benicia Refinery"), and all of Exxon's gasoline marketing in California; (5) the terminal operations of Mobil in Boston and in the Washington, D.C. area, and the ability to exclude a terminal competitor from using Mobil's wharf in Norfolk; (6) either Mobil's interest in the Colonial pipeline or Exxon's interest in the Plantation pipeline; (7) Mobil's interest in the Trans Alaska Pipeline System; (8) the terminal and retail operations of Exxon on Guam; (9) a quantity of paraffinic lubricant base oil equivalent to the amount of paraffinic lubricant base oil refined in North America that is controlled by Mobil; and (10) Exxon's jet turbine oil business. An accompanying Order to Hold Separate and Maintain Assets requires the respondents to maintain all the assets to be divested as separate, competitively viable businesses, in a manner that will preserve their viability, competitiveness and marketability pending their divestiture.

Participants

For the Commission: *Dennis F. Johnson, Renee S. Henning,
Peter Richman, Philip Eisenstat, Constance M. Salemi, Marc*