

Complaint

IN THE MATTER OF

ASAHI CHEMICAL INDUSTRY CO., LTD.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-4051; File No. 9810237
Complaint, June 12, 2002–Decision, June 12, 2002

This consent order addresses conduct engaged in by Respondent Asahi Chemical Industry Co. Ltd., the second largest seller in the world, and the largest supplier in Japan, of microcrystalline cellulose (“MCC”) – derived from purified wood cellulose and used primarily as a binder in the manufacture of pharmaceutical tablets – and FMC Corporation, the largest manufacturer and seller of MCC in the world. The order, among other things, prohibits Respondent Asahi Chemical from agreeing with competitors (1) to divide or allocate markets, customers, contracts, or geographic territories in connection with the sale of MCC, or (2) to refrain in whole or in part from producing, selling, or marketing MCC. The order also prohibits the respondent from inviting or soliciting such agreements not to compete.

Participants

For the Commission: *Geoffrey M. Green, L. Barry Costilo, Veronica G. Kayne, Christopher T. Taylor, Louis Silvia, Jr. and Daniel O’Brien.*

For the Respondent: *Mark Leddy, David Gelfand, and David Snyder, Cleary, Gottlieb, Steen & Hamilton.*

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Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission (“Commission”), having reason to believe that FMC Corporation and Asahi Chemical Industry Co., Ltd., corporations, hereinafter sometimes collectively referred to as “respondents,” have engaged in conduct, as described herein, that violates 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,

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hereby issues its complaint, stating its charges in that respect as follows:

1. Respondent FMC Corporation ("FMC") 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 200 East Randolph Drive, Chicago, Illinois 60601.
2. Respondent Asahi Chemical Industry Co., Ltd. ("Asahi Chemical") is a corporation organized and existing under and by virtue of the laws of Japan, with its office and principal place of business located at 1-2 Yurakucho 1-chome, Chiyoda-ku, Tokyo, Japan. Asahi Chemical does business in the United States both directly and through Asahi Chemical Industry America, Inc. ("Asahi America"). Asahi America is a wholly-owned subsidiary of Asahi Chemical, with its office and principal place of business located at 535 Madison Avenue, 33rd Floor, New York, New York 10022.
3. The acts and practices of FMC and Asahi Chemical, including the acts and practices alleged herein, are in commerce or affect commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
4. For the purpose of this complaint, "MCC" means microcrystalline cellulose. For the purpose of this complaint, "Asia Pacific" refers to the following countries: South Korea, Taiwan, Hong Kong, the Philippines, Indonesia, New Zealand, China, North Korea, Vietnam, and Australia.
5. The line of commerce relevant to assessing respondents' anticompetitive conduct is the manufacture and sale of pharmaceutical MCC worldwide. Pharmaceutical MCC is derived from purified wood cellulose, and is used primarily as a binder in the manufacture of pharmaceutical tablets (prescription and OTC drugs). Pharmaceutical MCC is a component of nearly all pharmaceutical tablets sold in the United States today. Other

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binders are not acceptable substitutes for pharmaceutical MCC for several reasons, including differences in quality, consistency, performance, efficacy, and stability. Entry into the relevant market is difficult and time-consuming.

6. FMC was the first, and for several years the only manufacturer of MCC in the world. To this day, FMC remains the largest manufacturer and seller of MCC in the world. During the period from 1984 to 1995, FMC's share of the relevant market has exceeded 70 percent.

7. FMC operates facilities for the production of MCC in Newark, Delaware and Cork, Ireland. FMC utilizes several trademarks in connection with its marketing of MCC. The most commonly used grades of MCC are sold by FMC in the United States and elsewhere under the trade name "Avicel."

8. Asahi Chemical operates a facility for the production of MCC in Nobeoka, Japan. During the period from 1984 to 1995, Asahi Chemical has been the dominant supplier of MCC in Japan and the second largest seller of MCC in the world.

9. FMC engaged in a course of conduct designed to neutralize or eliminate competing sellers of MCC and to secure monopoly power. FMC entered into a conspiracy with Asahi Chemical to divide territories. In addition, FMC invited three smaller producers of MCC to join with FMC in collusive and anticompetitive conduct. The three firms solicited by FMC were Ming Tai Chemical Co., Ltd. ("Ming Tai"), Wei Ming Pharmaceutical Mfg. Co., Ltd. ("Wei Ming"), and the Mendell division of Penwest, Ltd. ("Mendell").

10. In or about 1984, FMC and Asahi Chemical entered into both a written agreement governing the shared use of the trademark Avicel and a covert non-written agreement or understanding governing the sale and marketing of MCC.

11. The parties' written agreement, termed a Letter of

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Understanding, continued a trademark license first entered into by FMC and Asahi Chemical in 1968. In the 1984 Letter of Understanding, FMC granted Asahi Chemical, for an additional term of years, the exclusive right to use the trademark Avicel in Japan and Asia Pacific in connection with the sale of MCC products. FMC continued to reserve to itself the exclusive right to use the Avicel mark in North America and Europe.

12. In the parties' non-written agreement, FMC and Asahi Chemical agreed to a territorial division of markets for MCC products. FMC agreed that it would not sell MCC to customers located in Japan or Asia Pacific without the consent of Asahi Chemical. In return, Asahi Chemical agreed that it would not sell MCC to customers located in North America or Europe without the consent of FMC.

13. The market division agreement was in effect from 1984 until 1995. During this period, Asahi Chemical refrained from selling MCC to potential customers located in North America or Europe. During this period, FMC refrained from selling MCC to potential customers located in Japan or Asia Pacific. For example, several of the largest multinational pharmaceutical manufacturers requested that FMC enter into "global agreements" to supply MCC to all of their manufacturing facilities worldwide. Pursuant to its non-written agreement with Asahi Chemical, FMC declined to supply MCC to manufacturing facilities located in Japan and Asia Pacific.

14. In or about 1994, two Taiwan-based manufacturers of MCC, Ming Tai and Wei Ming, emerged as significant suppliers of MCC to portions of the Asian MCC market. FMC was concerned that these Taiwanese manufacturers would next compete for FMC's MCC accounts in North America and Europe. In or about January 1995, FMC proposed to Ming Tai that it grant FMC the exclusive right to distribute all MCC exported from Taiwan by Ming Tai. Ming Tai did not accept FMC's invitation. Also in or about January 1995, FMC proposed to Wei Ming that it sell MCC to FMC on an exclusive basis. Wei Ming did not accept FMC's

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invitation.

15. Later in 1995, FMC joined with Wei Ming to market an MCC product that, as compared to FMC's Avicel-brand MCC, had a lower quality and a lower price. The venture targeted certain customers of Ming Tai. FMC's purposes were to discipline Ming Tai for its aggressive pricing and to pressure Ming Tai to ally itself with FMC. This arrangement was terminated by the parties in 1996.

16. In 1995, Mendell posed a competitive threat to FMC's position as the dominant seller of MCC to pharmaceutical manufacturers in North America and Europe. Mendell had recently opened an MCC manufacturing facility in the United States, and was actively seeking to expand its sales. In April 1995, FMC proposed to Mendell that the two firms enter into a market division agreement. Mendell did not accept FMC's invitation.

17. At all relevant times herein, FMC had either monopoly power or a dangerous probability of achieving monopoly power in the world pharmaceutical MCC market.

18. The acts and practices of respondents, as alleged herein, were engaged in by respondents with the specific intent to exclude competition and to achieve or maintain monopoly power.

19. The acts and practices of respondents, as alleged herein, have had the purpose and effect, or the tendency and capacity, to restrain competition in the manufacture and sale of pharmaceutical MCC and to injure consumers in the United States and worldwide.

Violations Alleged

20. As set forth in Paragraphs 12, 13, and 19 above, FMC and Asahi Chemical conspired to divide markets and unreasonably restrained trade, in violation of Section 5 of the Federal Trade

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Commission Act, as amended.

21. As set forth in Paragraphs 6, 8, 12, 13, 18 and 19 above, FMC and Asahi Chemical conspired to monopolize the relevant market, in violation of Section 5 of the Federal Trade Commission Act, as amended.

22. As set forth in Paragraphs 6 through 19 above, FMC attempted to monopolize the relevant market in violation of Section 5 of the Federal Trade Commission Act, as amended.

23. As set forth in Paragraph 16 above, FMC invited its competitor Mendell to agree not to compete with FMC in violation of Section 5 of the Federal Trade Commission Act, as amended.

24. The conspiracy, acts and practices of respondents, as alleged herein constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such conspiracy, acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twelfth day of June, 2002, issues its complaint against respondents.

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DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of Respondent, Asahi Chemical Industry Co., Ltd., and Respondent having been furnished thereafter with a copy of the draft of Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued, would charge Respondent with violations of 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 respondent has violated the said Act, 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 Order:

1. Respondent Asahi Chemical Industry Co., Ltd. is a corporation organized and existing under the laws of Japan, with its office and principal place of business located at 1-2 Yurakucho 1-chome, Chiyoda-ku, Tokyo, Japan.

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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 Decision and Order, the following definitions shall apply:

- A. “Asahi Chemical” or “Respondent” means Asahi Chemical Industry Co., Ltd., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Asahi Chemical Industry Co., Ltd.; and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Commission” means the Federal Trade Commission.
- C. “MCC” means microcrystalline cellulose, and includes any product consisting in whole or in part of microcrystalline cellulose. The term MCC shall not include a Drug Product. The term MCC shall not include a food product in its finished form that is intended for direct human consumption and not as an ingredient or input into another product.
- D. “Drug Product” means a finished dosage form (for example, tablet, capsule, or solution) that contains an active drug ingredient in association with inactive ingredients.
- E. “Producer of MCC” means any person, firm, company, corporation, partnership, joint venture, or other entity that produces or manufactures MCC. The term Producer of MCC shall include FMC.
- F. “Excipient” means an inert or inactive substance used in the production of pharmaceutical products, including without

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limitation any product used as a binder, disintegrant, or super disintegrant. The term Excipient shall include MCC.

- G. “FMC” means FMC Corporation, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by FMC Corporation; and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- H. “License” means a written agreement between Respondent and a Producer of MCC other than FMC that provides for the license, cross-license, or other transfer of intellectual property that is protected by patent, copyright, and/or trade secret law and that is related to MCC.
- I. “Joint Venture Agreement” means a written agreement between Respondent and a Producer of MCC other than FMC that provides that the parties to the agreement shall collaborate in the production or distribution of MCC.
- J. “Written Communication” means any non-oral statement, information, comment, question, or answer, and includes any letter, memorandum, fax, or electronic mail.
- K. “United States” means the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, and all territories, dependencies, and possessions of the United States of America.
- L. “Officers” means the President and all Executive Vice Presidents of Asahi Chemical Industry Co., Ltd.

II.

IT IS FURTHER ORDERED that Respondent shall cease and desist from, directly, indirectly, or through any corporate or other device, in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, inviting, entering into or

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attempting to enter into, organizing or attempting to organize, implementing or attempting to implement, continuing or attempting to continue, soliciting, or otherwise facilitating any combination, agreement, or understanding, either express or implied, with any Producer of MCC to allocate or divide markets, customers, contracts, lines of commerce, or geographic territories in connection with the sale of MCC.

III.

IT IS FURTHER ORDERED that Respondent shall cease and desist from, directly, indirectly, or through any corporate or other device, in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, inviting, entering into or attempting to enter into, implementing or attempting to implement, continuing or attempting to continue, soliciting, or otherwise facilitating any combination, agreement, or understanding, either express or implied, with any Producer of MCC that Respondent and/or such Producer of MCC shall refrain in whole or in part from producing, selling, or marketing MCC.

IV.

IT IS FURTHER ORDERED that:

- A. For a period of ten (10) years after the date on which this Decision and Order becomes final, Respondent shall cease and desist from, directly, indirectly, or through any corporate or other device, in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, inviting, entering into or attempting to enter into, implementing or attempting to implement, continuing or attempting to continue, soliciting, or otherwise facilitating any combination, agreement, or understanding, either express or implied, that FMC shall distribute, sell, merchandise, or otherwise market in the United States MCC produced by Respondent.
- B. For a period of five (5) years after the date on which this Decision and Order becomes final, Respondent shall cease and

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desist from, directly, indirectly, or through any corporate or other device, in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, inviting, entering into or attempting to enter into, implementing or attempting to implement, continuing or attempting to continue, soliciting, or otherwise facilitating any combination, agreement, or understanding, either express or implied, that FMC shall distribute, sell, merchandise, or otherwise market in the United States any Excipient produced by Respondent.

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

- A. It shall not, of itself, constitute a violation of Paragraph II. or Paragraph III. of this Decision and Order for Respondent to enter into, attempt to enter into, or comply with a written agreement that is reasonably related to a lawful License or lawful Joint Venture Agreement and that is reasonably necessary to achieve its procompetitive benefits.
- B. It shall not, of itself, constitute a violation of Paragraph II. or Paragraph III. of this Decision and Order for Respondent to enter into, attempt to enter into, or comply with a written agreement that: (1) licenses a Producer of MCC to use, on an exclusive basis and in any geographic area, any trademark owned by Respondent, or (2) licenses Respondent to use, on an exclusive basis and in any geographic area, a trademark owned by a Producer of MCC.
- C. It shall not, of itself, constitute a violation of Paragraph II. or Paragraph III. of this Decision and Order for Respondent to threaten, initiate, or settle litigation to protect its intellectual property that is protected by patent, copyright, and/or trade secret law, provided that there is a reasonable basis in law and in fact for the claims alleged by Respondent in such litigation.
- D. It shall not, of itself, constitute a violation of Paragraph IV. of this Decision and Order for Respondent to enter into, attempt to

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enter into, or comply with an agreement to sell to FMC, on a temporary basis, any grade of MCC produced by both Respondent and FMC, provided that FMC's production of such grade of MCC is insufficient to meet FMC's actual or forecast demand due to plant closure, governmental action, health or safety hazards, a mechanical failure or a failure in the chemical reaction process in FMC's production facility, Act of God or Force Majeure.

E. It shall not, of itself, constitute a violation of Paragraph IV. of this Decision and Order for Respondent to enter into, attempt to enter into, or comply with an agreement to sell MCC to FMC for use by customers in food products only (hereinafter referred to as a "Distribution Agreement"). Provided, however, that for a period of ten (10) years after the date on which this Decision and Order becomes final, this exclusion shall not apply to any agreement that authorizes FMC to distribute, sell, merchandise or otherwise market MCC for use in pharmaceutical products or other tablets.

F. It shall not, of itself, constitute a violation of Paragraph IV. of this Decision and Order for Respondent to sell to FMC MCC meeting the current specifications of Ceolus, Grade KG-801, as set forth in confidential Exhibit A, attached to this Decision and Order, provided that such product is re-sold by FMC to the single customer identified in confidential Exhibit B, attached to this Decision and Order.

G. It shall not, of itself, constitute a violation of Paragraph II. or Paragraph III. of this Decision and Order for Respondent to enter into, attempt to enter into, or comply with a written Distribution Agreement providing FMC with the right to be Respondent's sole or exclusive re-seller of MCC for use by customers in food products only. Provided, however, that for a period of ten (10) years after the date on which this Decision and Order becomes final, this exclusion

shall not apply to any agreement that authorizes FMC to distribute, sell, merchandise or otherwise market MCC for use in pharmaceutical products or other tablets.

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H. Where, pursuant to a lawful Joint Venture Agreement, Respondent and a Producer of MCC other than FMC collaborate in the creation of new MCC manufacturing capacity, it shall not, of itself, constitute a violation of Paragraph II. or Paragraph III. of this Decision and Order for Respondent to enter into, attempt to enter into, or comply with a written agreement to distribute, sell, merchandise or otherwise market, on an exclusive or non-exclusive basis, the MCC that is the output of such new manufacturing capacity.

I. In any action by the Commission alleging violations of this Decision and Order, Respondent shall bear the burden of proof in demonstrating that its conduct satisfies the conditions of Paragraph(s) V.A., V.B., V.C., V.D., V.E., V.F., V.G., and/or V.H. of this Decision and Order.

VI.

IT IS FURTHER ORDERED that for a period of six (6) years after the date on which this Decision and Order becomes final:

A. Respondent shall retain, for a period of three (3) years from the date of delivery or receipt thereof, a copy of each Written Communication between Respondent and FMC relating to the pricing, marketing, or sale of MCC in or into the United States.

B. Upon written request from any duly authorized representative of the Commission, Respondent shall produce to the Commission, at its offices in Washington D.C. and within a reasonable period of time: (1) a copy of each Written Communication between Respondent and FMC, and (2) copies of all other documents reasonably necessary for the purpose of determining or securing compliance with this Decision and Order. The requirements of this Paragraph VI.B. shall apply to all documents in the possession or under the control of Respondent without regard to whether the documents are physically located in the United States or in another jurisdiction.

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VII.

IT IS FURTHER ORDERED that:

- A. Within sixty (60) days after the date this Decision and Order becomes final, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which that Respondent has complied and is complying with this order.
- B. One (1) year after the date this Decision and Order becomes final, annually for the next nine (9) years on the anniversary of the date this Decision and Order becomes final, and at other times as the Commission may require, Respondent shall file with the Commission: (1) a verified written report setting forth in detail the manner and form in which it has complied and is complying with this Decision and Order.
- C. Respondent shall file with the Commission, within thirty (30) days after its effective date: (1) a copy of each written agreement entered into by Respondent and FMC that relates to MCC or any Excipient, (2) a copy of each License or Joint Venture Agreement affecting commerce as “commerce” is defined in the Federal Trade Commission Act, and (3) a copy of each written agreement between Respondent and a Producer of MCC that is ancillary or related to a License or Joint Venture Agreement affecting commerce as “commerce” is defined in the Federal Trade Commission Act.

VIII.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents 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.

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IX.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this order, upon written request, 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 Decision and Order; and
- B. Upon five days' notice to Respondent and without restraint or interference from it, to interview officers, directors, or employees of Respondent.

X.

IT IS FURTHER ORDERED that Respondent shall:

- A. Within thirty (30) days after the date on which this Decision and Order becomes final, send by first class mail a copy of this Decision and Order and a Japanese translation thereof to all directors, Officers, and management employees with responsibility for the pricing, marketing or sale of MCC (hereinafter referred to as "Management Employees");
- B. Mail by first class mail a copy of this Decision and Order and a Japanese translation thereof to each person who becomes a director, Officer, or Management Employee, within thirty (30) days of the commencement of such person's employment or affiliation with Respondent; and
- C. Require each of its directors, Officers, and Management Employees to sign and submit to Respondent within thirty (30) days of the receipt thereof a statement that: (1) acknowledges receipt of the Decision and Order; (2) represents that the undersigned has read and understands the Decision and Order; and

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(3) acknowledges that the undersigned has been advised and understands that non-compliance with the order may subject Asahi Chemical Industry Co., Ltd. to penalties for violation of the order.

XI.

IT IS FURTHER ORDERED that this Decision and Order shall terminate on June 12, 2022, except as otherwise provided in this Decision and Order.

By the Commission, Chairman Muris not participating.

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Confidential Exhibits A and B

[Redacted From Public Record Version]

Analysis

Analysis of Proposed Consent Orders to Aid Public Comment

The Federal Trade Commission has accepted agreements to proposed consent orders from FMC Corporation (“FMC”) and from Asahi Chemical Industry Co. Ltd. (“Asahi Chemical”). FMC has its principal place of business in Chicago, Illinois. Asahi Chemical has its principal place of business in Tokyo, Japan.

The proposed consent orders have 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 agreements and the comments received, and decide whether it should withdraw from the agreements or make final the agreements' proposed orders.

The Commission's multi-count complaint charges that FMC and Asahi Chemical (collectively referred to as “respondents”) have violated Section 5 of the Federal Trade Commission Act by conspiring to monopolize the world market for microcrystalline cellulose, and by agreeing to divide territories for the sale of microcrystalline cellulose. In addition, FMC is charged with attempting to monopolize the relevant market and with inviting a competitor to collude.

According to the complaint, microcrystalline cellulose (“MCC”) is derived from purified wood cellulose and is used primarily as a binder in the manufacture of pharmaceutical tablets. MCC is a component of nearly all pharmaceutical tablets sold in the United States today. During the term of the conspiracy, FMC was the largest manufacturer and seller of MCC in the world. Asahi Chemical was the second largest seller of MCC in the world, and the dominant supplier of MCC in Japan.

The complaint alleges that, for over a decade, FMC engaged in a course of conduct designed to neutralize or eliminate competing sellers of MCC and to secure monopoly power. In or about 1984,

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FMC entered into a conspiracy with Asahi Chemical to divide territories. FMC agreed that it would not sell any MCC product to customers located in Japan or East Asia without the consent of Asahi Chemical. In return, Asahi Chemical agreed that it would not sell any MCC product to customers located in North America or Europe without the consent of FMC.

In addition, the complaint alleges that FMC invited three smaller producers of MCC to join with FMC in collusive and anticompetitive conduct. The three firms solicited by FMC were Ming Tai Chemical Co., Ltd. ("Ming Tai"), Wei Ming Pharmaceutical Mfg. Co., Ltd. ("Wei Ming"), and the Mendell division of Penwest, Ltd. ("Mendell").

According to the complaint, in 1994 Ming Tai and Wei Ming emerged as significant suppliers of MCC to portions of the Asian MCC market. FMC was concerned that these Taiwan-based manufacturers would next compete for FMC's MCC accounts in North America and Europe. In or about January 1995, FMC proposed to Ming Tai that it grant FMC the exclusive right to distribute all MCC exported from Taiwan by Ming Tai. Also in or about January 1995, FMC proposed to Wei Ming that it sell MCC to FMC on an exclusive basis. In seeking these arrangements, FMC's intent was to exclude competition from the Taiwanese manufacturers and thereby secure monopoly power. Neither Ming Tai nor Wei Ming accepted FMC's invitation.

The complaint further alleges that, in 1995, Mendell posed a competitive threat to FMC's position as the dominant seller of MCC to pharmaceutical manufacturers in North America and Europe. Mendell had recently opened an MCC manufacturing facility in the United States, and was actively seeking to expand its sales. In April 1995, FMC proposed to Mendell that the two

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firms enter into a market division agreement. Mendell did not accept FMC's invitation.¹

Finally, the complaint alleges that the conduct engaged in by FMC and Asahi Chemical had the purpose and effect, or the tendency and capacity, to restrain competition in the manufacture and sale of MCC and to injure consumers in the United States and worldwide.

FMC and Asahi Chemical have signed consent agreements containing the proposed consent orders. The proposed consent orders would prohibit FMC and Asahi Chemical from:

- (i) agreeing with competitors to divide or allocate markets, customers, contracts, or geographic territories in connection with the sale of MCC, or
- (ii) agreeing with competitors to refrain in whole or in part from producing, selling, or marketing MCC.

The respondents would also be barred from inviting or soliciting such agreements not to compete.

Further, in order to eradicate the anticompetitive effects of the alleged conspiracy, FMC is barred from serving as the U.S. distributor for any competing manufacturer of MCC (including Asahi Chemical) for a period of ten years. Further, for a period of five years, FMC may not distribute in the United States any other excipient manufactured by Asahi Chemical.²

¹ FMC's efforts to recruit Ming Tai, Wei Ming, and Mendell to enter into anticompetitive arrangements, as alleged in the complaint, support the attempted monopolization claim. *See* Complaint ¶ 22. FMC's invitation to Mendell was the most patently anticompetitive of the three, and is the basis for an independent cause of action. *See* Complaint ¶ 23.

² An excipient is an inactive ingredient used in the manufacture of pharmaceutical products.

Analysis

The proposed consent orders contain several limited exemptions to the above-described provisions intended to permit FMC and Asahi Chemical to engage in certain lawful and pro-competitive conduct. For example, notwithstanding the broad prohibition on agreeing to divide markets, each respondent would be permitted to enter into exclusive trademark license agreements, to enforce its intellectual property rights, and to abide by reasonable restraints ancillary to lawful joint venture agreements. In any action by the Commission alleging violations of the consent order, each respondent would bear the burden of proof in demonstrating that its conduct satisfied the conditions of the exemption.

The proposed consent orders contain provisions to assist the Commission in monitoring the respondents' compliance with the orders. FMC would be required to retain copies of written communications with competing MCC manufacturers, and upon request, to make such documents available to the Commission. Asahi Chemical would be required to produce to the Commission all documents reasonably necessary for the purpose of determining or securing compliance with the consent order, without regard to whether the documents are located in the United States or in another jurisdiction.

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

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IN THE MATTER OF

KRYTON COATINGS INTERNATIONAL, INC.

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

Docket C-4052; File No. 0123060

Complaint, June 14, 2002--Decision, June 14, 2002

This consent order addresses advertising representations made about “Multi-Gard” – a residential coating product also known as Liquid Siding, Liquid Vinyl, or Multi-Gard R-20 – by Respondents Kryton Coatings International, Inc. and Procraft, Inc. The order, among other things, prohibits the respondents from making any representation about the benefits, performance or efficacy of any liquid siding or coating product – including (1) that such product reduces energy loss, energy costs, energy consumption, or utility bills; (2) any R-value associated with such product; or (3) such product’s insulation qualities as compared to any other materials, including insulation materials – unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation. The order also requires the respondents to notify Multi-Gard distributors and wholesalers about this action, and to send them a copy of the order.

Participants

For the Commission: *Hampton Newsome, Robert M. Frisby, Joni Lupovitz, Elaine D. Kolish and Janis K. Pappalardo.*

For the Respondent: *Edward A. Geltman, Squire, Sanders & Dempsey, L.L.P.*

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The Federal Trade Commission, having reason to believe that Procraft, Inc. and Kryton Coatings International, Inc., corporations, ("respondents") have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges: