

Complaint

IN THE MATTER OF

BAYER AG, ET AL.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-4049; File No. 0110199
Complaint, May 30, 2002--Decision, July 24, 2002*

This consent order addresses the acquisition by Respondent Bayer AG of Aventis CropScience Holding S.A. (“ACS”) from Respondent Aventis S.A. The Consent Agreement is intended to resolve anticompetitive effects stemming from Bayer’s proposed acquisition of Aventis CropScience Holding S.A. (“ACS”) from Aventis. The order, among other things, requires the respondents to divest the ACS businesses that produce and market acetamiprid, fipronil, tribufos, and flucarbazonone – four of a new generation of chemical insecticide active ingredients that are used in products such as non-repellent termiticides; flea control for companion animals products; a number of crop, turf, and ornamental applications; and seed treatments – that are less harmful to human health and the environment, to an acquirer or acquirers approved by the Commission. An accompanying Order to Hold Separate and Maintain Assets requires the respondents to preserve the acetamiprid, fipronil and flucarbazonone operations as a viable, competitive and ongoing operation until the divestitures are completed.

Participants

For the Commission: *Wallace Easterling, Cecelia Waldeck, Susan Huber, Angelike Andrinopoulos, Kristina Martin, April Tabor, Juston Blankenship, Brian Burgess, Eric Sprauge, Linda Cunningham, Jordan Coyle, Richard Liebeskind, Jeffrey Dahnke, Naomi Licker, Daniel P. Ducore, Roger Boner, Michael Nicholson, Elizabeth Callison, and Mary T. Coleman.*

For the Respondents: *A. Douglas Melamed and Leon B. Greenfield, Wilmer, Cutler & Pickering, and Wayne D. Collins and Beau W. Buffier, Shearman & Sterling.*

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COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission (the "Commission"), having reason to believe that respondents Bayer AG ("Bayer"), a foreign corporation, and Aventis S.A. ("Aventis"), a foreign corporation, both subject to the jurisdiction of the Commission, have agreed to merge, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, 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. RESPONDENTS

1. Respondent Bayer AG is a German corporation organized, existing, and doing business under, and by virtue of, the laws of Germany, with its office and principal place of business located at Werk Leverkusen, 51368, Leverkusen, Germany. In the United States, Bayer operates its chemical and agricultural business through its subsidiary, Bayer Corporation ("Bayer Corp"), headquartered in Kansas City, Missouri. Bayer is a global chemical and technology company that develops, manufactures, and markets a portfolio of chemical and agricultural products and services that it distributes to customers throughout the world.

2. Respondent Aventis S.A. is a French corporation organized, existing, and doing business under, and by virtue of, the laws of France, with its office and principal place of business located at Avenue de l'Europe, Espace Europeen de l'Entreprise, Schiltigheim, France. In the United States, Aventis operates its chemical and agricultural business through Aventis CropScience ("ACS"), headquartered in Lyon, France. ACS is a joint venture among its sole shareholders, Aventis, Hoechst AG, and Schering AG. ACS is a global chemical and technology company that develops, manufactures, and markets a portfolio of chemical and

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agricultural products and services that it distributes to customers throughout the world.

II. JURISDICTION

3. Bayer and Aventis 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 PROPOSED TRANSACTION

4. Bayer and Aventis announced on October 2, 2001 that their respective boards of directors approved the sale of all outstanding shares of ACS stock to Bayer pursuant to the October 2, 2001, stock purchase agreements by and between Bayer, Aventis, Hoechst AG, Schering AG, and SCIC Holding, LLC.

IV. VIOLATIONS CHARGED

COUNT ONE: NEW GENERATION CHEMICAL
INSECTICIDE ACTIVE INGREDIENTS

5. Paragraphs 1–4 are incorporated by reference as if fully set forth herein.

6. Relevant lines of commerce in which to analyze the effects of the proposed merger are the research, development, manufacture, and sale of new generation chemical insecticide active ingredients and related technologies (“New Generation Chemical Insecticide Active Ingredients”) for specific end use applications, including the development, manufacture and sale of insecticides for use as non-repellent termiticides, flea control for companion animals, and for use on an array of crop applications such as corn, cotton, citrus, cole crops, grapes, vegetables, for turf and ornamental uses, and as protection for seeds and seedlings

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(“seed treatments”). New Generation Chemical Insecticide Active Ingredients are chemical insecticide ingredients that are designed to kill undesirable insects and, in contrast to older chemical insecticides, are less harmful to human health and the environment. Such insecticide active ingredients include imidacloprid, acetamiprid, thiamethoxam, and other chloronicotinyls (“CNIs”); and fipronil and other phenylpyrazoles (“Pyrazoles”). CNIs and Pyrazoles are primarily used in applications where their characteristics provide significant benefits to the consumer. Those benefits include: reductions in the amount of chemical insecticides used, reduced negative impacts on the environment and human health due to lower usage rates, reduced risk to humans and beneficial insects due to the use of safer chemicals in comparison to older chemical insecticides, and superior control of certain undesirable insects. New Generation Chemical Insecticide Active Ingredients are used to make insecticide products for use on crops, for termite control and for flea control for companion animals, among other applications, as alleged further herein.

7. The related New Generation Chemical Insecticide Active Ingredients technologies include, but are not limited to, patented techniques for the commercial synthesis of New Generation Chemical Insecticide Active Ingredients molecules, patented and proprietary process technology used to manufacture such molecules, and patented formulations for chemical insecticide products based on these technologies.

8. The relevant geographic market and section of the country within which to analyze the likely effects of the proposed transaction is the United States.

9. New Generation Chemical Insecticide Active Ingredients are of increasing importance as the U.S. Environmental Protection Agency (“EPA”) removes older chemical insecticides from the market due to their harmful effects on human health and the environment. The EPA is currently evaluating the use of older chemical pesticides, particularly insecticides. Through this

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process, the EPA plans to remove or limit the use of a significant number of older chemical pesticides and is encouraging firms to replace older harmful chemicals with less harmful products.

10. As EPA regulation limits or prohibits the use of older chemical insecticides, the demand for New Generation Chemical Insecticide Active Ingredients is increasing because of, among other things, their positive environmental and health benefits as compared to older chemical insecticides, and regulatory preferences for safer chemical insecticides.

11. Competition in research and development of New Generation Chemical Insecticide Active Ingredients has led to innovations including reductions in the cost of insecticides, reduced amounts of chemical insecticides used, development of chemicals with reduced risk of harmful environmental and health impacts due to insecticide exposure, and improved product properties and performance. Consequently, innovation relating to these active ingredients provides substantial benefits to consumers. Firms that discover New Generation Chemical Insecticide Active Ingredients, including respondents, buy and sell rights to develop those molecules into insecticide applications.

12. For these reasons, New Generation Chemical Insecticide Active Ingredients and related technologies constitute relevant product markets and “lines of commerce” within the meaning of the antitrust laws.

13. Bayer is a leading developer and producer of New Generation Chemical Insecticide Active Ingredients and a leading developer, producer, and seller of end-use products based on those insecticides. Bayer competes by, among other things, developing proprietary molecules and products, and has developed proprietary processes for the production of a wide array of active ingredients and chemical insecticide products.

14. ACS is also a leading developer and producer of New Generation Chemical Insecticide Active Ingredients and a leading

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developer, producer and seller of end-use products based on those ingredients. Like Bayer, ACS competes by developing proprietary molecules and products, and has developed proprietary processes for the production of a wide array of active ingredients and resulting chemical insecticides products.

15. Bayer and ACS are the two leading firms in the development and commercialization of New Generation Chemical Insecticide Active Ingredient technologies and downstream products, and own significant and important intellectual property estates and rights relating to New Generation Chemical Insecticide Active Ingredient technologies.

16. Bayer and ACS developed New Generation Chemical Insecticide Active Ingredients and related technologies after years of analytical work and study of molecules suitable for use in pesticide applications. That work led to the identification of important molecules, techniques for commercial synthesis of those molecules, and the development of insecticide product formulations incorporating New Generation Chemical Insecticide Active Ingredients such as CNIs and Pyrazoles. In this manner, Bayer and ACS competed by, among other things, innovating and developing technology (including patents, trade secrets, and know-how) for use in the production of New Generation Chemical Insecticide Products based on CNI and Pyrazole technologies.

17. The relevant markets for New Generation Chemical Insecticide Active Ingredients are highly concentrated, and would be significantly more concentrated as a result of the merger. Bayer leads the industry in development and production of New Generation Chemical Insecticide Active Ingredients. ACS has the bulk of the remaining development and production. Syngenta is the only other firm with significant development and production of New Generation Chemical Insecticide Active Ingredients.

18. Bayer, ACS, and Syngenta have successfully developed commercial products based on New Generation Chemical Insecticide Active Ingredients for themselves and for other sellers

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of insecticides. Other firms have discovered new molecules that might have efficacy as New Generation Chemical Insecticide Active Ingredients. However, Bayer and ACS are distinguished by their ability to, among other things, take new molecules from the discovery phase to the development of production processes for commercial scale synthesis (as opposed to lab scale) of the New Generation Chemical Insecticide Active Ingredients, insecticide formulation, development of insecticide products, and successful marketing of the resulting proprietary insecticide products. Consequently, Bayer and ACS have not only developed their own New Generation Chemical Insecticide Active Ingredients, but have also been licensed by competitors to develop New Generation Chemical Insecticide Active Ingredients based on molecules discovered by other firms, in recognition of Respondents' unique product development and commercialization skills and abilities relating to New Generation Chemical Insecticide Active Ingredients.

19. Entry into New Generation Chemical Insecticide Active Ingredients and related technologies through development and marketing of commercially viable New Generation Chemical Insecticide Active Ingredients is a lengthy process. Developing New Generation Chemical Insecticide Active Ingredients requires years of chemical synthesis; laboratory and greenhouse testing; formulation; process development; pilot production; pilot trials; field trials; testing for acute, subchronic, and chronic toxicity; testing for carcinogenic and genetic effects, and incidences of birth defects that may be associated with the product; environmental toxicology testing; measurement of plant, animal, soil, water, and air residues; testing for degradation of plant, animal, soil, and water environments; data collection; active ingredient registration and EPA review; construction of production facilities; and use optimization. The difficulty and cost associated with EPA registration of active ingredients is enhanced by the fact that a firm must separately register each application in which the active ingredient will be used.

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20. The effects of the merger, if consummated, may be to substantially lessen competition and tend to create a monopoly in the New Generation Chemical Insecticide Active Ingredients 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. Specifically, the merger would:

- a. eliminate actual, direct, and substantial competition between Bayer and ACS in the relevant markets;
- b. substantially reduce competition in the markets for New Generation Chemical Insecticide Active Ingredients by giving Respondents significant control of the relevant technology, thereby impeding the ability of other firms to compete with Respondents;
- c. eliminate potential competition between Bayer and ACS in the markets for New Generation Chemical Insecticide Active Ingredients and the technology used in their manufacture;
- d. increase barriers to entry into the relevant markets, including enhancing patent barriers in the relevant markets resulting in increased cost of production and increased prices for chemical insecticides;
- e. reduce innovation competition among developers of the relevant product, including the delay of, or redirection of, research and development projects in chemical insecticide technology, chemical insecticide process technology, and chemical insecticide applications;
- f. substantially increase the level of concentration in the relevant markets and enhance the probability of coordination; and
- g. increase Respondents' ability to exercise market power unilaterally in the relevant markets.

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21. The merger described in Paragraph 4, if consummated, would constitute a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

COUNT TWO: NEW GENERATION CHEMICAL
INSECTICIDE PRODUCTS

22. Paragraphs 1–21 are incorporated by reference as if fully set forth herein.

23. Additional relevant lines of commerce in which to analyze the effects of the proposed merger are insecticide products based on New Generation Chemical Insecticide Active Ingredients (“New Generation Chemical Insecticide Products”), including but not limited to (i) crop-specific end uses (including the crops identified in paragraphs 25 and 35 of this complaint); (ii) veterinary channel companion animal flea control products; and (iii) non-repellent liquid termiticides. New Generation Chemical Insecticide Products are essential and cost effective in these applications, among others, and there are no economical substitutes for them in these applications.

24. New Generation Chemical Insecticide Products are of increasing importance as the EPA removes older chemical insecticide products from the market due to their harmful effects on human health and the environment. The EPA is currently evaluating the use of older chemical pesticides, particularly insecticide products. Through this process, the EPA plans to remove or limit the use of a significant number of older chemical pesticide products and is encouraging firms to replace older harmful products with less harmful products.

25. CNIs and Pyrazoles are primarily used in insecticide products where their characteristics provide superior performance, such as non-repellent termiticides, flea control for companion animals, turf and ornamental uses, and an array of crop

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applications such as corn, cotton, citrus, cole crops, grapes, vegetables, and seed treatments. In such applications they provide benefits including reductions in the amount of chemical insecticides used, reduced negative impacts on the environment and human health due to lower usage rates, reduced risk to humans and beneficial insects due to the use of safer chemicals in comparison to older chemical insecticides, and superior control of certain undesirable insects. Annual U.S. sales of products with these technologies are approximately \$400 million.

26. Competition in research and development of New Generation Chemical Insecticide Products has led to innovations including reductions in the cost of insecticides, reduced amounts of chemical insecticides used, development of products with reduced risk of harmful environmental and health impacts due to insecticide exposure, and improved product properties and performance. Consequently, innovation relating to these products provides substantial benefits to consumers.

27. New Generation Chemical Insecticide Products include separate relevant product markets based on the specific applications in which the New Generation Chemical Insecticide Products are used. The EPA registration process requires that each New Generation Chemical Insecticide Product be registered separately for each application in which it is used. Therefore, only those New Generation Chemical Insecticide Products registered for a particular application can lawfully be used in that application. Suppliers of New Generation Chemical Insecticide Products price their products at different pricing levels dependent upon the specific application in which they are used. Consequently, New Generation Chemical Insecticide Products may constitute application-specific relevant product markets such as: termiticides, flea control for companion animals, specific crops, or for any application in which New Generation Chemical Insecticide Products are used.

28. For these reasons, New Generation Chemical Insecticide Products and specific applications including, but not limited to,

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crop protection insecticides, non-repellent termiticides, and veterinary channel companion animal flea control products, constitute relevant product markets and “lines of commerce” within the meaning of the antitrust laws.

29. The relevant geographic market and section of the country within which to analyze the likely effects of the proposed transaction is the United States.

30. Bayer is a leading developer and producer of New Generation Chemical Insecticide Products. Bayer competes by, among other things, developing proprietary products for a wide array of chemical insecticide applications.

31. ACS is also a leading developer and producer of New Generation Chemical Insecticide Products. Like Bayer, ACS competes by developing proprietary products for a wide array of chemical insecticide applications.

32. Bayer and ACS are the leading firms in the development and commercialization of New Generation Chemical Insecticide Products, and own significant and important intellectual property estates and rights relating to these products.

33. Bayer and ACS developed New Generation Chemical Insecticide Products after years of product development. That work led to the development of important product formulations incorporating New Generation Chemical Insecticide Active Ingredient technologies such as CNIs and Pyrazoles. In this manner, Bayer and ACS competed by, among other things, innovating and developing new and improved products based on CNI and Pyrazole technologies.

34. The relevant markets for New Generation Chemical Insecticide Products are highly concentrated, and would be significantly more concentrated as a result of the merger. Bayer leads the industry in development, production, and sale of New Generation Chemical Insecticide Products in agricultural and non-

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agricultural applications. Its products account for the majority of insecticide sales based on New Generation Chemical Insecticide Active Ingredients. ACS has the bulk of the remaining sales. Syngenta is the only other firm with significant sales of insecticides based on New Generation Chemical Insecticide Products with sales of less than 10 percent in the United States.

35. Bayer, ACS, and Syngenta are the only firms producing and selling a range of New Generation Chemical Insecticide Products for a range of agricultural applications, including corn, cotton, citrus, cole crops, grapes, vegetables, and seed treatments. Consequently, the number of competitors in these markets will be reduced from three to two. These markets are highly concentrated and will become more highly concentrated as a result of the merger.

36. Bayer and ACS are the only firms currently selling New Generation Chemical Insecticide Products for non-repellent liquid termiticides. The merger therefore would tend to create a monopoly in this line of commerce.

37. Bayer and ACS are the only firms that have developed and sold successful New Generation Chemical Insecticide Active Ingredients for use in veterinary channel companion animal flea control products. The merger therefore would tend to create a monopoly in this line of commerce.

38. Entry into New Generation Chemical Insecticide Products is a lengthy process. Developing a New Generation Chemical Insecticide Product requires access to a New Generation Chemical Insecticide Active Ingredient. Once a New Generation Chemical Insecticide Active Ingredient is developed or licensed, the entrant must develop products and complete EPA review with respect to those products. The difficulty and cost associated with EPA registration is enhanced by the fact that a firm must separately register each application in which the product will be used. Finally, after a product is introduced to the market, it may take several years to gain customer acceptance through demonstrated

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safety, performance, and reliability. Consequently, it would take substantial time and expense for firms to develop New Generation Chemical Insecticide Products that are closely competitive with those of the Respondents, particularly in light of the need to invent around patents controlled by the Respondents.

39. The effects of the merger, if consummated, may be to substantially lessen competition and tend to create a monopoly in each of the relevant markets for New Generation Chemical Insecticide Products 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. Specifically, the merger would:

- a. eliminate actual, direct, and substantial competition between Bayer and ACS in the relevant markets;
- b. eliminate potential competition between Bayer and ACS in the markets for New Generation Chemical Insecticide Products and the markets for specific crop applications;
- c. increase barriers to entry into the relevant markets, including enhancing patent barriers in the relevant markets resulting in increased cost of production and increased prices for chemical insecticides;
- d. reduce innovation competition among developers of the relevant products, including the delay of, or redirection of, research and development projects in chemical insecticide products and chemical insecticide applications;
- e. substantially increase the level of concentration in the relevant markets and enhance the probability of coordination;
- f. increase Respondents' ability to exercise market power unilaterally in the relevant markets.

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40. The merger described in Paragraph 4, if consummated, would constitute a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

COUNT THREE: POST-EMERGENT GRASS HERBICIDES
FOR SPRING WHEAT

41. Paragraphs 1–40 are incorporated by reference as if fully set forth herein.

42. Another relevant line of commerce in which to analyze the effects of the proposed merger is the research, development, manufacture, and sale of post-emergent grass herbicides for spring wheat (“Spring Wheat Herbicides”). Herbicides are chemicals designed to kill or control grasses or other weeds that interfere with crop production. Separate relevant markets exist distinguished by the types of weeds, *i.e.*, broadleaf or grass, against which the herbicide is economically effective, and the stage of growth of the wheat crop, *i.e.*, pre-emergent or post-emergent, at which the herbicide is both safe for use on the crop and economically effective against the weeds to be controlled. Spring Wheat Herbicides are essential to economic production of wheat, and there are no economic substitutes for Spring Wheat Herbicides. U.S. sales of Spring Wheat Herbicides totaled over \$73 million in 2001.

43. The relevant geographic market and section of the country within which to analyze the likely effects of the proposed transaction in the market for Spring Wheat Herbicides is the United States.

44. The market for Spring Wheat Herbicides is highly concentrated. ACS’s Puma brand, which contains the active ingredient fenoxaprop, has the highest sales dollars among Spring Wheat Herbicides sold within the United States. In 2001, Puma and ACS’s other herbicides accounted for almost 70 percent of the total sales of Spring Wheat Herbicides. In 2001, Bayer introduced

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Everest, which contains the active ingredient flucarbazone. In its first year, Everest accounted for approximately 7 percent of Spring Wheat Herbicide sales.

45. Entry into the Spring Wheat Herbicide market can take seven to ten years. A substantial portion of this time is spent researching active molecules, developing promising molecules and product formulations, and implementing the studies required by the EPA to register the formulated products. The research and development activities include greenhouse and field testing of new active ingredients; developing product formulations of active ingredients; and developing production processes. The studies and resulting data required by the EPA for registration include human toxicology studies and environmental toxicology studies, including the measurement of product residues in plants, animals, soil, water, and air. Once a product is introduced to the market, it may take several years to gain customer acceptance through demonstrated safety, performance, and reliability, over a variety of weather conditions.

46. The effects of the merger, if consummated, may be to substantially lessen competition or 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. Specifically, the merger would:

- a. eliminate the potential for increased actual, direct, and substantial price competition and cause consumers to pay higher prices for Spring Wheat Herbicides;
- b. increase the merged firm's ability to unilaterally exercise market power in the market for Spring Wheat Herbicides for post-emergent control of grasses, by combining two of the three available substitute products in the market;
- c. increase the likelihood and degree of coordinated interaction between or among competitors in the market for Spring Wheat Herbicides for post-emergent control of grasses.

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47. The merger described in Paragraph 4, if consummated, would constitute a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

COUNT FOUR: COOL WEATHER COTTON DEFOLIANTS

48. Paragraphs 1–47 are incorporated by reference as if fully set forth herein.

49. Another relevant line of commerce in which to assess the effects of the acquisition is Cool Weather Cotton Defoliants. Cotton defoliants are chemical harvest aids designed to remove leaves from cotton plants without drying them, preparing the crop for harvest. Separate markets for cotton harvest aids may be distinguished by method of action, *i.e.*, defoliation versus desiccation, and product efficacy in varying environmental conditions, *i.e.*, cool weather versus warm weather. Cool Weather Cotton Defoliants are essential to economic production of premium grades of cotton and there are no economic substitutes for Cool Weather Cotton Defoliants.

50. The relevant geographic market in which to analyze the effects of the proposed acquisition in the market for Cool Weather Cotton Defoliants is the United States.

51. The relevant market is highly concentrated. Bayer and ACS are the only two suppliers of Cool Weather Cotton Defoliants: Bayer markets DEF and ACS markets Folex. Both products contain the active ingredient Tribufos.

52. Entry into the Cool Weather Cotton Defoliant market would not be likely, timely, and sufficient to prevent anticompetitive effects in the relevant market. Despite the expiration of United States patents for Tribufos, distribution agreements, purchase and supply contracts, and EPA concerns

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relating to the safety of Tribufos have discouraged entry of generic competition.

53. The effect of the merger, if consummated, may be to lessen substantially competition and tend to create a monopoly in the relevant market 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. Specifically, the merger would:

- a. eliminate actual, direct, and substantial competition between Bayer and ACS in the market for Cool Weather Cotton Defoliants in the United States;
- b. substantially increase the level of concentration;
- c. increase the likelihood that Respondents will unilaterally exercise market power in the market for Cool Weather Cotton Defoliants;
- d. increase barriers to entry; and
- e. increase the likelihood that customers of Cool Weather Cotton Defoliants in the United States will be forced to pay higher prices.

54. The merger agreement described in Paragraph 4 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

55. The merger described in Paragraph 4, if consummated, would constitute a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

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WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this thirtieth day of May, 2002, issues its Complaint against said Respondents.

By the Commission.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition by Respondent Bayer AG of the stock of Aventis CropScience Holding S.A. (“ACS”) from Respondent Aventis S.A. and Respondents having been furnished thereafter with a copy of the draft of the Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and that, if issued by the Commission, would charge Respondents 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

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of the Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, 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 Respondents have violated the said Acts and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and its Order to Hold Separate and Maintain Assets 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, and having determined to modify the Decision and Order in certain respects, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

Decision and Order

1. Respondent Bayer AG is a German Aktiengesellschaft organized, existing, and doing business under, and by virtue of, the laws of Germany, with its office and principal place of business located at Werk Leverkusen, 51368, Leverkusen, Germany.

2. Respondent Aventis S.A. is a French société anonyme organized, existing, and doing business under, and by virtue of, the laws of France, with its office and principal place of business located at Avenue de l'Europe, Espace Européen de l'Entreprise, Schiltigheim, France.

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

ORDER

I.

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

- A. "Bayer" means Bayer AG, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Bayer AG, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. "Aventis" means Aventis S.A., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Aventis S.A., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. "ACS" means Aventis CropScience Holding S.A., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Aventis CropScience Holding S.A., and the

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respective directors, officers, employees, agents, representatives, successors, and assigns of each.

- D. “Commission” means the Federal Trade Commission.
- E. “Acetamiprid” means the chemical compound (E)-N¹-[(6-chloro-3-pyridyl) methyl]-N²-cyano-N¹-methylacetamidine.
- F. “Acetamiprid Assets” means Aventis’s right, title, and interest in and to all assets, tangible or intangible, relating to the Acetamiprid Business, including, but not limited to:
1. All real property (together with appurtenances, licenses, and permits) owned, leased or otherwise held by Aventis;
 2. All personal property owned, leased, or otherwise held by Aventis;
 3. All inventories, stores, and supplies held by, or under the control of Aventis;
 4. All Intellectual Property relating primarily to the Acetamiprid Business owned by or licensed to Aventis, including, but not limited to, that identified in Confidential Appendix A;
 5. All rights of Aventis under any contract (other than multi-product contracts), including but not limited to licenses, leases, customer contracts, supply agreements, and procurement contracts;

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6. All pending and issued governmental approvals, registrations, consents, licenses, permits, waivers, or other authorizations held by Aventis, including foreign equivalents;
7. All rights of Aventis under any warranty and guarantee, express or implied;
8. All items of prepaid expense owned by Aventis; and
9. All separately maintained, and all relevant portions of not separately maintained, books, records, and files held by, or under the control of Aventis.

Provided, however, that the Acetamiprid Assets shall not include Aventis's right, title, and interest in and to (i) any real property (together with appurtenances, licenses, and permits) owned, leased, or otherwise held by Respondents; (ii) office space, fixtures, production equipment, vehicles, storage equipment, handling equipment, packaging equipment, office equipment, inventory equipment or systems, or furniture; (iii) personal property related exclusively to the administration, sales, and distribution operations of Aventis; (iv) management information systems, computer systems, or software that does not relate exclusively to the Acetamiprid Business; and (v) any of the Excepted Acetamiprid Assets that Respondents retain as permitted in Paragraph II.B. of this Order.

- G. "Acetamiprid Business" means Respondent Aventis's business of researching, developing, registering, formulating, manufacturing, licensing, distributing, marketing, and selling all products containing Acetamiprid, including products in development, in any market anywhere in the world, prior to the Acquisition Date (and such business as conducted by Bayer after the Acquisition Date

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pursuant to this Order and the Order to Hold Separate); provided, however, that if Respondents retain any of the Excepted Acetamiprid Assets as permitted in Paragraph II.B. of this Order, the Acetamiprid Business shall not include the business described in this Paragraph I.G. relating exclusively to any market in Mexico, South America, Central America, or Africa.

- H. “Acetamiprid Agreements” means all agreements between Nippon Soda and Aventis relating to the Acetamiprid Business.
- I. “Acetamiprid Licensed Intellectual Property” means all Intellectual Property relating (but not relating primarily) to the Acetamiprid Business as of the date of divestiture of the Acetamiprid Assets.
- J. “Acquirer” means any Person that acquires any of the Pesticide Assets pursuant to this Order.
- K. “Acquisition” means the proposed acquisition described in (i) the Stock Purchase Agreement dated as of October 2, 2001, among Aventis Agriculture, Hoechst Aktiengesellschaft, and Bayer AG, and (ii) the Stock Purchase Agreement dated as of October 2, 2001, among Schering Aktiengesellschaft, SCIC Holdings LLC, and Bayer AG.
- L. “Acquisition Date” means the date of consummation of the Acquisition.
- M. “Additional Flucarbazone Assets” means Bayer’s right, title, and interest in and to all assets, tangible or intangible, relating to the Olympus Business, including, but not limited to:

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1. All real property (together with appurtenances, licenses, and permits) owned, leased, or otherwise held by Bayer;
2. All personal property owned, leased, or otherwise held by Bayer;
3. The Kansas City Production Assets;
4. All inventories, stores, and supplies held by, or under the control of Bayer;
5. All Intellectual Property owned by or licensed to Bayer;
6. All rights of Bayer under any contract (other than multi-product contracts), including, but not limited to, licenses, leases, customer contracts, supply agreements, and procurement contracts;
7. All pending and issued governmental approvals, registrations, consents, licenses, permits, waivers, or other authorizations held by Bayer, including foreign equivalents;
8. All rights of Bayer under any warranty and guarantee, express or implied;
9. All items of prepaid expense owned by Bayer; and

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10. All separately maintained, and all relevant portions of not separately maintained, books, records, and files held by, or under the control of Bayer.

Provided, however, that the Additional Flucarbazone Assets shall not include Bayer's right, title, and interest in and to (i) any real property (together with appurtenances, licenses, and permits) owned, leased, or otherwise held by Respondents other than the Kansas City Production Assets; (ii) office space, fixtures, vehicles, storage equipment, handling equipment, packaging equipment, office equipment, inventory equipment or systems, or furniture other than that included in the Kansas City Production Assets; (iii) personal property related exclusively to the administration, sales, and distribution operations of Bayer; and (iv) management information systems, computer systems, or software that does not relate exclusively to the Olympus Business and Flucarbazone Business (collectively).

- N. "Amvac Acquisition Agreement" means the Asset Purchase Agreement (including all related agreements, schedules, exhibits, and appendices) between Bayer and Amvac Chemical Corporation, dated April 18, 2002, as amended.
- O. "Amvac Corporation" means Amvac Chemical Corporation, a corporation organized, existing, and doing business under and by virtue of the laws of California, with its office and principal place of business located at 4695 MacArthur Court, Suite 1250, Newport Beach, California.
- P. "Animal Health Uses" means all uses of pharmaceutical, biological, and medicinal products, including in-feed products, intended to enhance the health or performance of any and all species of animals, including livestock and companion animals, excluding humans, but excluding (i) any product with a different intended utility, (ii) nutritional additives, (iii) chemical intermediates, and (iv) the inhalational anaesthetics

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Isoflurane, Halothene, Sevoflurane, and Desoflurane, as defined in the Merial Agreements.

- Q. “Consent Agreement” means the Agreement Containing Consent Orders executed by Respondents and the Commission in this matter.
- R. "Direct Cost" means (i) if in connection with Paragraph IV.E. of this Order, the actual cost of raw materials, direct labor, and reasonably allocated factory overhead in manufacturing an item, or (ii) if in connection with Paragraphs II.F., III.G., IV.F., and V.F. of this Order, the cost of direct material and labor used to provide the relevant service.
- S. “Divestiture Agreement” means any of the acquisition agreements referenced in Paragraphs II.A., III.A., IV.A., and V.A. (or V.C.) of this Order, or any acquisition agreement entered into by the Divestiture Trustee pursuant to Paragraph X of this Order.
- T. “Divestiture Trustee” means the Divestiture Trustee appointed pursuant to Paragraph X of this Order.
- U. “Elbeuf Production Facility” means the Fipronil active ingredient-related production assets located at Elbeuf, France, including, but not limited to, Building 111 and all fixtures, machinery, and equipment located in that building, and all fixtures, machinery, and equipment located in Building 121 dedicated to the production of Fipronil, and rights to shared services (such as utilities, water, and security) necessary for the production of Fipronil.
- V. “Excepted Acetamiprid Assets” means that part of the Acetamiprid Assets relating exclusively to Respondent Aventis’s business of researching, developing, registering, formulating, manufacturing, licensing, distributing, marketing, and selling all products containing Acetamiprid, including products in development, in any market in

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Mexico, South America, Central America, or Africa, prior to the Acquisition Date (and such business activities as conducted by Bayer after the Acquisition Date pursuant to this Order and the Order to Hold Separate).

- W. “Europe” means the geographical area comprising all EU Member States and Norway, Iceland, Liechtenstein, Cyprus, the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Malta, Poland, Slovakia, and Slovenia.
- X. “Fipronil” means the chemical compound ($\pm$)-5-amino-1-(2,6-dichloro- α , α , α -trifluoro-p-tolyl)-4-trifluoro-methyl sulfinylpyrazole-3-carbonitrile.
- Y. “Fipronil Acquirer” means the Person that acquires the Fipronil Assets pursuant to this Order.
- Z. “Fipronil Assets” means Aventis’s right, title, and interest in and to all assets, tangible or intangible, relating to the Fipronil Business, including, but not limited to:
 - 1. All real property (together with appurtenances, licenses, and permits) owned, leased, or otherwise held by Aventis;
 - 2. All personal property owned, leased, or otherwise held by Aventis;
 - 3. The Elbeuf Production Facility;
 - 4. All inventories, stores, and supplies held by, or under the control of Aventis;

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5. All Intellectual Property relating primarily to the Fipronil Business owned by or licensed to Aventis, including, but not limited to, that identified in Confidential Appendix B;
6. All rights of Aventis under any contract (other than multi-product contracts), including, but not limited to, licenses, leases, customer contracts, supply agreements, and procurement contracts;
7. All governmental approvals, registrations, consents, licenses, permits, waivers, or other authorizations held by Aventis, including foreign equivalents (except for a co-ownership right of Bayer in the Fipronil technical registration and the underlying data packages to the extent necessary to satisfy Bayer's obligations under the Merial Agreements);
8. All rights of Aventis under any warranty and guarantee, express or implied;
9. All items of prepaid expense owned by Aventis; and
10. All separately maintained, and all relevant portions of not separately maintained, books, records, and files held by, or under the control of, Aventis.

Provided, however, that the Fipronil Assets shall not include Aventis's right, title, and interest in and to (i) any real property (together with appurtenances, licenses, and permits) owned, leased, or otherwise held by Respondents other than the Elbeuf Production Facility; (ii) office space, fixtures, formulation equipment, vehicles, storage equipment, handling equipment, packaging equipment, office equipment, inventory equipment

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or systems, or furniture other than that included in the Elbeuf Production Facility; (iii) personal property related exclusively to the administration, sales, and distribution operations of Aventis; (iv) management information systems, computer systems, or software that does not relate exclusively to the Fipronil Business; (v) the participation of Aventis in the Hangzhou Fipronil Production Joint Venture; (vi) the trademarks Chipco Choice, TopChoice, and, at the option of the Fipronil Acquirer, Firestar; (vii) the Maxforce business, including the trademark Maxforce.

- AA. “Fipronil Business” means Respondent Aventis’s business of researching, developing, registering, formulating, manufacturing, licensing, distributing, marketing, and selling all products containing Fipronil, including products in development, in any market anywhere in the world, prior to the Acquisition Date (and such business as conducted by Bayer after the Acquisition Date pursuant to this Order and the Order to Hold Separate), subject to Merial's rights relating to Animal Health Uses under the Merial Agreements.
- BB. “Fipronil Licensed Intellectual Property” means all Intellectual Property relating (but not relating primarily) to the Fipronil Business as of the date of divestiture of the Fipronil Assets.
- CC. “Flucarbazone” means the chemical compound 4, 5-dihydro-3-methoxy-4-methyl- 5-oxo-N-[2-(trifluoromethoxy)phenylsulfonyl]-1H-1, 2, 4-triazole-1-carboxamide.
- DD. “Flucarbazone Acquirer” means the Person that acquires the Flucarbazone Assets (and Additional Flucarbazone Assets, if divested) pursuant to this Order.

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- EE. “Flucarbazone Assets” means Bayer’s right, title, and interest in and to all assets, tangible or intangible, relating to the Flucarbazone Business, including, but not limited to:
1. All real property (together with appurtenances, licenses, and permits) owned, leased, or otherwise held by Bayer;
 2. All personal property owned, leased, or otherwise held by Bayer;
 3. All inventories, stores, and supplies held by, or under the control of Bayer;
 4. All Intellectual Property relating primarily to the Flucarbazone Business owned by or licensed to Bayer, including, but not limited to, that described in Confidential Appendix C;
 5. All rights of Bayer under any contract (other than multi-product contracts), including but not limited to licenses, leases, customer contracts, supply agreements, and procurement contracts;
 6. All pending and issued governmental approvals, registrations, consents, licenses, permits, waivers, or other authorizations held by Bayer, including foreign equivalents;
 7. All rights of Bayer under any warranty and guarantee, express or implied;

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8. All items of prepaid expense owned by Bayer; and
9. All separately maintained, and all relevant portions of not separately maintained, books, records, and files held by, or under the control of Bayer.

Provided, however, that the Flucarbazone Assets shall not include Bayer's right, title, and interest in and to (i) any real property (together with appurtenances, licenses, and permits) owned, leased, or otherwise held by Respondents; (ii) office space, fixtures, production equipment, vehicles, storage equipment, handling equipment, packaging equipment, office equipment, inventory equipment or systems, or furniture; (iii) personal property related exclusively to the administration, sales, and distribution operations of Bayer; and (iv) management information systems, computer systems, or software that does not relate exclusively to the Flucarbazone Business.

- FF. "Flucarbazone Business" means Respondent Bayer's business of researching, developing, registering, formulating, manufacturing, licensing, distributing, marketing, and selling all products containing Flucarbazone, including products in development, in any market anywhere in the world.
- GG. "Flucarbazone Licensed Intellectual Property" means all Intellectual Property relating (but not relating primarily) to the Flucarbazone Business as of the date of divestiture of the Flucarbazone Assets.
- HH. "Folex Acquirer" means the Person that acquires the Folex Assets pursuant to this Order.
- II. "Folex Assets" means Aventis's right, title, and interest in and to all assets, tangible or intangible, relating to the Folex Business, including, but not limited to:

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1. All real property (together with appurtenances, licenses, and permits) owned, leased, or otherwise held by Aventis;
2. All personal property owned, leased, or otherwise held by Aventis;
3. All inventories, stores, and supplies held by, or under the control of Aventis;
4. All Intellectual Property relating primarily to the Folex Business owned by or licensed to Aventis, including, but not limited to, that described in Confidential Appendix D;
5. All rights of Aventis under any contract (other than multi-product contracts), including, but not limited to, licenses, leases, customer contracts, supply agreements, and procurement contracts;
6. All pending and issued governmental approvals, registrations, consents, licenses, permits, waivers, or other authorizations held by Aventis, including foreign equivalents;
7. All rights of Aventis under any warranty and guarantee, express or implied;
8. All items of prepaid expense owned by Aventis; and

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9. All separately maintained, and all relevant portions of not separately maintained, books, records, and files held by, or under the control of Aventis.

Provided, however, that the Folex Assets shall not include Aventis's right, title, and interest to (i) any real property (together with appurtenances, licenses, and permits) owned, leased, or otherwise held by Respondents; (ii) office space, fixtures, production equipment, vehicles, storage equipment, handling equipment, packaging equipment, office equipment, inventory equipment or systems, or furniture; (iii) personal property related exclusively to the administration, sales, and distribution operations of Aventis; and (iv) management information systems, computer systems, or software that does not relate exclusively to the Folex Business.

- JJ. "Folex Business" means Respondent Aventis's business of researching, developing, registering, formulating, manufacturing, licensing, distributing, marketing, and selling all products containing Tribufos, including products in development, in any market in the United States, prior to the Acquisition Date (and such business as conducted by Bayer after the Acquisition Date pursuant to this Order and the Order to Hold Separate).
- KK. "Folex Licensed Intellectual Property" means all Intellectual Property relating (but not relating primarily) to the Folex Business as of the date of divestiture of the Folex Assets.
- LL. "Intellectual Property" means, worldwide as of the date of the divestiture of the applicable Pesticide Assets without limitation, (i) all trade names, registered and unregistered trademarks, service marks and applications, domain names, trade dress, copyrights, copyright registrations and applications, in both published works and unpublished works; (ii) all patents, patent applications, and inventions and discoveries that may be patentable; and (iii) all know-how, trade secrets, confidential information, customer lists,

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software, technical information, data, registrations, applications for governmental approvals, processes and inventions, formulae, recipes, methods, and product and packaging specifications. For purposes of Paragraphs II.E., III.D.1., III.D.2., IV.D., and V.E. of this Order, “Intellectual Property” shall not include any trade names, registered and unregistered trademarks, service marks and applications, domain names, and trade dress.

- MM. “Kansas City Production Assets” means the Flucarbazone and Propoxycarbazone active ingredient-related production assets located at Kansas City, including but not limited to, the building housing the Bayer MKH plant, and all fixtures, machinery, and equipment located in that building, dedicated to the production of Flucarbazone and Propoxycarbazone, and rights to all shared services (such as utilities, water, and security) necessary for the production of Flucarbazone and Propoxycarbazone.
- NN. “Merial” means Merial, Limited, a corporation organized, existing, and doing business under and by virtue of the laws of England and Wales, with its office and principal place of business located at Merial Ltd., Harlow Business Park, Harlow Essex CM 195 TG, England.
- OO. “Merial Agreements” means, as amended, (i) the Fipronil and Existing Products License Agreement between ACS and Merial dated 23 May, 1997; (ii) the Fipronil Supply Agreement between ACS and Merial dated 23 May, 1997; and (iii) the Research and License Agreement for Future Products between ACS SA and Merial dated 23 May, 1997.
- PP. “Monitor” means the Monitor appointed pursuant to Paragraph IX of this Order.
- QQ. “Nippon Soda” means Nippon Soda Co. Ltd., a company organized and existing under the laws of Japan and having

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its principal place of business at 2-1, Ohtemachi 2 chome, Chiyoda-ku, Tokyo, Japan.

- RR. “Non-Agricultural Use” means the use of a product that is represented, sold, used, or intended to be used to prevent, destroy, repel, or mitigate a pest on structures, structural materials, or the environment (other than land used for professional agriculture) including, but not limited to, use in turf and ornamental, home and garden, professional pest control, vector control, locust control, forestry, public health, and industrial vegetation management.
- SS. “Non-Public Pesticide Information” means any information relating to the Pesticide Assets or the Pesticide Businesses obtained in any manner by Respondents, except for any information that Respondents demonstrate (i) was or becomes generally available to the public other than as a result of a disclosure by Respondents or (ii) was available, or becomes available, to Respondents on a non-confidential basis, but only if, to the knowledge of Respondents, the source of such information is not in breach of a contractual, legal, fiduciary, or other obligation to maintain the confidentiality of the information.
- TT. “Olympus Business” means Respondent Bayer’s business of researching, developing, registering, formulating, manufacturing, licensing, distributing, marketing, and selling all products containing Propoxycarbazone, including products in development, in any market anywhere in the world, except for Europe.
- UU. “Olympus Licensed Intellectual Property” means all Intellectual Property relating (but not relating primarily) to the Olympus Business as of the date of divestiture of the Additional Flucarbazone Assets.

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- VV. “Order to Hold Separate” means the Order to Hold Separate and Maintain Assets issued by the Commission in this matter.
- WW. “Person” means any individual, partnership, firm, corporation, association, trust, unincorporated organization or other entity.
- XX. “Pesticide Assets” means the Acetamiprid Assets, Fipronil Assets, Flucarbazono Assets, and Folex Assets, and if divested by the Divestiture Trustee pursuant to Paragraphs X, XI, or XII of this Order, the Thiacloprid Assets and Additional Flucarbazono Assets.
- YY. “Pesticide Businesses” means the Acetamiprid Business, Fipronil Business, Flucarbazono Business, and Folex Business, and if divested by the Divestiture Trustee pursuant to Paragraphs X, XI, or XII of this Order, the Thiacloprid Business and Olympus Business.
- ZZ. “Pesticide Licensed Intellectual Property” means the Acetamiprid Licensed Intellectual Property, Fipronil Licensed Intellectual Property, Flucarbazono Licensed Intellectual Property, and Folex Licensed Intellectual Property, and if divested by the Divestiture Trustee pursuant to Paragraphs X, XI, or XII of this Order, the Thiacloprid Licensed Intellectual Property and the Olympus Licensed Intellectual Property.
- AAA. “Propoxycarbazono” means the chemical compound 2-[[[(4, 5-dihydro-4-methyl-5-oxo-3-propoxy-1H-1, 2, 4-triazol-1-yl)methylcarbonyl]amino]sulfonyl]-benzoate].
- BBB. “Respondents” means Bayer and Aventis, individually and collectively.
- CCC. “Technical Assistance” means providing expert advice, assistance, and training relating to operation of any of the

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Pesticide Businesses, including, but not limited to, providing administrative services, reasonable and timely access to Respondents' manufacturing facilities for the purpose of inspecting manufacturing operations, and reasonable access to the Pesticide Licensed Intellectual Property and to personnel familiar with such intellectual property.

DDD. "Thiacloprid" means the chemical compound [3-[6-chloro-3-pyridinyl)methyl]2-thiazolidinylidene]-cyanamide.

EEE. "Thiacloprid Acquirer" means the Person that acquires the Thiacloprid Assets pursuant to this Order.

FFF. "Thiacloprid Assets" means Bayer's right, title, and interest in and to all assets, tangible or intangible, relating to the Thiacloprid Business, including, but not limited to:

1. All real property (together with appurtenances, licenses, and permits) owned, leased, or otherwise held by Bayer;
2. All personal property owned, leased, or otherwise held by Bayer;
3. All inventories, stores, and supplies held by, or under the control of Bayer;
4. All Intellectual Property relating primarily to the Thiacloprid Business owned by or licensed to Bayer;
5. All rights of Bayer under any contract (other than multi-product contracts), including, but not limited to, licenses,

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leases, customer contracts, supply agreements, and procurement contracts;

6. All pending and issued governmental approvals, registrations, consents, licenses, permits, waivers, or other authorizations held by Bayer, including foreign equivalents (except for a co-ownership right of Bayer in the Thiachloprid technical registration);
7. All rights of Bayer under any warranty and guarantee, express or implied;
8. All items of prepaid expense owned by Bayer; and
9. All separately maintained, and all relevant portions of not separately maintained, books, records, and files held by, or under the control of Bayer.

Provided, however, that the Thiachloprid Assets shall not include Bayer's right, title, and interest to (i) any assets that the Thiachloprid Acquirer does not want to acquire, provided that the Commission approves the divestiture and the manner of divestiture without such assets; (ii) personal property related exclusively to the administration, sales, and distribution operations of Bayer; and (iii) management information systems, computer systems, or software that does not relate exclusively to the Thiachloprid Business.

- GGG. "Thiachloprid Business" means Respondent Bayer's business of researching, developing, registering, formulating, manufacturing, licensing, distributing, marketing, and selling all products containing Thiachloprid, including products in development, in any market anywhere in the world.

HHH. “Tribufos” means the chemical compound S,S,S-Tributyl phosphorotrithioate.

II.

IT IS FURTHER ORDERED that:

- A. Bayer shall divest the Acetamiprid Assets at no minimum price, absolutely and in good faith, no later than 180 days from the date the Commission accepts the Consent Agreement for public comment, to a Person that receives the prior approval of the Commission and in a manner, and pursuant to an acquisition agreement, that receives the prior approval of the Commission.
- B. Respondents shall use their best efforts to obtain the consent of Nippon Soda to the assignment of the Acetamiprid Agreements. If Nippon Soda does not consent to the assignment of the Acetamiprid Agreements relating exclusively to the Acetamiprid Business in Mexico, South America, Central America, and Africa, Bayer shall not be required to divest the Excepted Acetamiprid Assets; provided, however, that nothing in this Paragraph II.B. shall relieve Bayer of the obligation to divest the Acetamiprid Assets (with or without the Excepted Acetamiprid Assets as permitted by this Paragraph II.B.) pursuant to this Paragraph II no later than 180 days from the date the Commission accepts the Consent Agreement for public comment.
- C. Bayer shall comply with all terms of the acquisition agreement described in Paragraph II.A. of this Order, and any breach by Bayer of any term of the acquisition agreement shall constitute a violation of this Order. In the event any term of the acquisition agreement varies from or contradicts any term in Paragraphs I through XIX of this Order (“Order Term”) to the extent Bayer cannot fully comply with both terms, the Order Term shall determine Bayer’s obligations under this Order.

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- D. No later than the date Bayer divests the Acetamiprid Assets, Bayer shall grant to the Acetamiprid Acquirer (pursuant to one or more agreements that receive the prior approval of the Commission):
1. A worldwide, royalty-free, perpetual, irrevocable, sublicenseable, transferable license to Bayer's rights to the Acetamiprid Licensed Intellectual Property to invent, develop, patent, make, have made, use, sell, offer for sale and import any product (except for products containing an existing patented molecule of Respondents retained by Bayer or any patented molecule invented or acquired by Bayer after the Acquisition Date) anywhere in the world. Such license shall be (i) exclusive (even as to Bayer) for any product containing an existing patented molecule included in the Acetamiprid Assets or any patented molecule invented or acquired by the Acetamiprid Acquirer after the Acquisition Date and (ii) non-exclusive for any other product.
 2. An irrevocable, worldwide, perpetual immunity from suit by Bayer based on claims of infringement under all of Respondents' Intellectual Property for the developing, making, having made, using, having used, selling, offering for sale, having sold and importing of any products containing Acetamiprid for any use anywhere in the world (except for products containing an existing patented molecule of Respondents retained by Bayer or any patented molecule invented or acquired by Bayer after the Acquisition Date). Such immunity shall extend to any person deriving its authority from the Acetamiprid Acquirer.
- E. Nothing in this Order shall prevent Bayer from entering into an agreement with the Acetamiprid Acquirer in which the Acetamiprid Acquirer shall grant to Bayer a worldwide,

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royalty-free, perpetual, irrevocable, sublicenseable, transferable license to the Acetamiprid Acquirer's rights to any Intellectual Property included in the Acetamiprid Assets that does not relate exclusively to the Acetamiprid Business to develop, patent, make, have made, use, sell, offer for sale and import any product (except for products containing (x) an existing patented molecule included in the Acetamiprid Assets, or (y) any patented molecule invented or acquired by the Acetamiprid Acquirer after the Acquisition Date, without the consent of the Acetamiprid Acquirer) anywhere in the world. Such license (i) may be exclusive (even as to the Acetamiprid Acquirer) for any product containing an existing patented molecule of Respondents retained by Bayer or any patented molecule invented or acquired by Bayer after the Acquisition Date and (ii) shall be non-exclusive for any other product.

- F. Upon the request of the Acetamiprid Acquirer made at the time of divestiture of the Acetamiprid Assets, pursuant to an agreement that receives the prior approval of the Commission, Bayer shall provide Technical Assistance to the Acetamiprid Acquirer, for a period not to exceed 12 months from the date Bayer divests the Acetamiprid Assets, sufficient to enable the Acetamiprid Acquirer to operate the Acetamiprid Business in substantially the same manner as that employed by Respondents; provided, however, that Bayer shall not (i) require the Acetamiprid Acquirer to pay compensation for Technical Assistance that exceeds the Direct Cost of providing such goods and services, (ii) terminate its obligation to provide Technical Assistance because of a material breach by the Acetamiprid Acquirer of any agreement to provide such assistance, in the absence of a final order of a court of competent jurisdiction, or (iii) seek to limit the damages (such as indirect, special, and consequential damages) which the Acetamiprid Acquirer would be entitled to receive in the event of Bayer's breach of any agreement to provide Technical Assistance.

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- G. The purpose of the divestiture of the Acetamiprid Assets and of the related obligations is to ensure the continued use of the assets in the same business in which the Acetamiprid Assets were engaged by Respondents at the time of the announcement of the proposed Acquisition, including the development of new chemical insecticides and applications and the pursuit of registrations and approvals for new products and to remedy the lessening of competition alleged in the Commission's complaint.

III.

IT IS FURTHER ORDERED that:

- A. Bayer shall divest the Fipronil Assets at no minimum price, absolutely and in good faith, no later than 180 days from the date the Commission accepts the Consent Agreement for public comment, to a Person that receives the prior approval of the Commission and in a manner, and pursuant to an acquisition agreement, that receives the prior approval of the Commission.
- B. Bayer shall comply with all terms of the acquisition agreement described in Paragraph III.A. of this Order, and any breach by Bayer of any term of the acquisition agreement shall constitute a violation of this Order. In the event any term of the acquisition agreement varies from or contradicts any term in Paragraphs I through XIX of this Order ("Order Term") to the extent Bayer cannot fully comply with both terms, the Order Term shall determine Bayer's obligations under this Order.
- C. No later than the date Bayer divests the Fipronil Assets, Bayer shall grant to the Fipronil Acquirer (pursuant to one or more agreements that receive the prior approval of the Commission):
1. A worldwide, royalty-free, perpetual, sublicenseable, irrevocable, transferable license to Bayer's rights to the

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Fipronil Licensed Intellectual Property to invent, develop, patent, make, have made, use, sell, offer for sale, and import any product (except for products containing an existing patented molecule of Respondents retained by Bayer or any patented molecule invented or acquired by Bayer after the Acquisition Date) anywhere in the world. Such license shall be (i) exclusive (even as to Bayer) for any product containing an existing patented molecule included in the Fipronil Assets or any patented molecule invented or acquired by the Fipronil Acquirer after the Acquisition Date and (ii) non-exclusive for any other product.

2. An irrevocable, worldwide, perpetual immunity from suit by Bayer based on claims of infringement under all of Respondents' Intellectual Property for the developing, making, having made, using, having used, selling, offering for sale, having sold, and importing of any product containing Fipronil for any use anywhere in the world (except for products containing an existing patented molecule of Respondents retained by Bayer or any patented molecule invented or acquired by Bayer after the Acquisition Date). Such immunity shall extend to any person deriving its authority from the Fipronil Acquirer.

- D. Nothing in this Order shall prevent Bayer from entering into an agreement with the Fipronil Acquirer in which the Fipronil Acquirer shall grant to Bayer:

1. A worldwide, royalty-free, perpetual, irrevocable, sublicenseable, transferable license to the Fipronil Acquirer's rights to any Intellectual Property included in the Fipronil Assets that does not relate exclusively to the Fipronil Business to develop, patent, make, have made, use, sell, offer for sale, and import any product (except for products containing (x) an existing patented molecule included in the Fipronil Assets, subject to Paragraph III.D.2.

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of this Order, or (y) any patented molecule invented or acquired by the Fipronil Acquirer after the Acquisition Date, without the consent of the Fipronil Acquirer) anywhere in the world. Such license (i) may be exclusive (even as to the Fipronil Acquirer) for any product containing an existing patented molecule of Respondents retained by Bayer or any patented molecule invented or acquired by Bayer after the Acquisition Date and (ii) shall be non-exclusive for any other product.

2. A worldwide, royalty-free, exclusive (except as to the Fipronil Acquirer), perpetual, irrevocable, sublicenseable, transferable license to the Fipronil Acquirer's rights to any Intellectual Property included in the Fipronil Assets to develop, patent, make, have made, use, sell, offer for sale, and import any product containing Fipronil for Non-Agricultural Use anywhere in the world; provided, however, that Bayer may obtain such license only if it would not impair the viability of the Fipronil Acquirer, and the Commission approves the divestiture of the Fipronil Assets with such a license.
- E. Nothing in this Order shall prevent Bayer from entering into a supply agreement with the Fipronil Acquirer (i) to supply Fipronil to Bayer on cost-plus terms in amounts necessary to cover Bayer's needs for Fipronil for Non-Agricultural Use for up to two years, which term may be extended, subject to Commission approval, and (ii) to supply Fipronil intermediates to Bayer on cost-plus terms in amounts necessary to cover Bayer's needs until expiration of any and all patents covering such intermediates.
- F. Respondents shall use their best efforts to obtain the necessary consents to assign to the Fipronil Acquirer their rights and obligations in (i) the Merial Agreements; (ii) the Scotts Fipronil Supply Agreement dated September 30, 1998, and the Scotts Research Agreement (at least to the extent relating to

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Fipronil-related research), (iii) the Amended and Restated Fipronil License Agreement with Clorox dated January 31, 2002, (iv) the U.S. Licence Agreement with TechPac dated December 13, 1999 and related agreements, and (v) the Sumitomo Fipronil Supply Agreement dated April 7, 1998; provided, however, that if Respondents are unable to obtain such consents, Bayer may enter into an agreement, subject to prior approval of the Commission, with the Fipronil Acquirer to obtain a supply of Fipronil to enable Bayer to fulfill its obligations under the supply agreements described in this Paragraph III.F.

- G. Upon the request of the Fipronil Acquirer made at the time of divestiture of the Fipronil Assets, pursuant to an agreement that receives the prior approval of the Commission, Bayer shall provide Technical Assistance to the Fipronil Acquirer, for a period not to exceed 12 months from the date Bayer divests the Fipronil Assets, sufficient to enable the Fipronil Acquirer to operate the Fipronil Business in substantially the same manner as that employed by Respondents; provided, however, that Bayer shall not (i) require the Fipronil Acquirer to pay compensation for Technical Assistance that exceeds the Direct Cost of providing such goods and services, (ii) terminate its obligation to provide Technical Assistance because of a material breach by the Fipronil Acquirer of any agreement to provide such assistance, in the absence of a final order of a court of competent jurisdiction, or (iii) seek to limit the damages (such as indirect, special, and consequential damages) which the Fipronil Acquirer would be entitled to receive in the event of Bayer's breach of any agreement to provide Technical Assistance.
- H. The purpose of the divestiture of the Fipronil Assets and of the related obligations is to ensure the continued use of the assets in the same business in which the Fipronil Assets were engaged by Respondents at the time of the announcement of the proposed Acquisition, including the

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development of new chemical insecticides and applications and the pursuit of registrations and approvals for new products and to remedy the lessening of competition alleged in the Commission's complaint.

IV.

IT IS FURTHER ORDERED that:

- A. Bayer shall divest the Flucarbazone Assets at no minimum price, absolutely and in good faith, no later than 180 days from the date the Commission accepts the Consent Agreement for public comment, to a Person that receives the prior approval of the Commission and in a manner, and pursuant to an acquisition agreement, that receives the prior approval of the Commission.
- B. Bayer shall comply with all terms of the acquisition agreement described in Paragraph IV.A. of this Order, and any breach by Respondents of any term of the acquisition agreement shall constitute a violation of this Order. In the event any term of the acquisition agreement varies from or contradicts any term in Paragraphs I through XIX of this Order ("Order Term") to the extent Bayer cannot fully comply with both terms, the Order Term shall determine Bayer's obligations under this Order.
- C. No later than the date Bayer divests the Flucarbazone Assets, Bayer shall grant to the Flucarbazone Acquirer (pursuant to one or more agreements that receive the prior approval of the Commission):
 - 1. A worldwide, royalty-free, perpetual, sublicenseable, irrevocable, transferable license to Bayer's rights to the Flucarbazone Licensed Intellectual Property to invent, develop, patent, make, have made, use, sell, offer for sale and import any product (except for products containing an

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existing patented molecule of Respondents retained by Bayer or any patented molecule invented or acquired by Bayer after the Acquisition Date) anywhere in the world. Such license shall be (i) exclusive (even as to Bayer) for any product containing an existing patented molecule included in the Flucarbazon Assets or any patented molecule invented or acquired by the Flucarbazon Acquirer and (ii) non-exclusive for any other product.

2. An irrevocable, worldwide, perpetual immunity from suit by Bayer based on claims of infringement under all of Respondents' Intellectual Property for the developing, making, having made, using, having used, selling, offering for sale, having sold, and importing of any product containing Flucarbazon for any use anywhere in the world (except for products containing an existing patented molecule of Respondents retained by Bayer or any patented molecule invented or acquired by Bayer after the Acquisition Date). Such immunity shall extend to any person deriving its authority from the Flucarbazon Acquirer.

- D. Nothing in this Order shall prevent Bayer from entering into an agreement with the Flucarbazon Acquirer in which the Flucarbazon Acquirer shall grant to Bayer a worldwide, royalty-free, perpetual, irrevocable, sublicenseable, transferable license to the Flucarbazon Acquirer's rights to any Intellectual Property included in the Flucarbazon Assets that does not relate exclusively to the Flucarbazon Business to develop, patent, make, have made, use, sell, offer for sale, and import any product (except for products containing (x) an existing patented molecule included in the Flucarbazon Assets, or (y) any patented molecule invented or acquired by the Flucarbazon Acquirer after the Acquisition Date, without the consent of the Flucarbazon Acquirer) anywhere in the world. Such license (i) may be exclusive (even as to the Flucarbazon Acquirer) for any

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product containing an existing patented molecule of Respondents retained by Bayer or any patented molecule invented or acquired by Bayer after the Acquisition Date and (ii) shall be non-exclusive for any other product.

E. Upon the request of the Flucarbazone Acquirer made at the time of divestiture of the Flucarbazone Assets, pursuant to an agreement that receives the prior approval of the Commission, Bayer shall, for a period not to exceed 30 months from the date Bayer divests the Flucarbazone Assets, provide a supply of products containing Flucarbazone, including any such products to be developed (hereinafter “Flucarbazone Products”) to the Flucarbazone Acquirer:

1. Bayer shall provide quantities of Flucarbazone Products sufficient to enable the Flucarbazone Acquirer (i) to satisfy customer demand at substantially the same levels as Bayer prior to the Acquisition Date, (ii) to satisfy changes in customer demand that occur in the ordinary course of business, (iii) to meet customer delivery dates, and (iv) to manage the transition to an alternative means of supply upon termination of Bayer’s obligations under Paragraph IV.E. of this Order.
2. Bayer shall (i) manufacture Flucarbazone Products that are of substantially the same quality as that achieved by Bayer prior to the Acquisition Date, (ii) manufacture the Flucarbazone Products in substantially the same manner as employed by Bayer prior to the Acquisition Date, and (iii) use its best efforts to implement any improvement in the manufacturing process of the Flucarbazone Products developed in the ordinary course of business or as a result of the Acquisition.

Provided, however, that Bayer shall not (i) require the Flucarbazone Acquirer to pay compensation for supplying

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Flucarbazone Products that exceeds the Direct Cost of providing goods and services, (ii) terminate its obligation to supply Flucarbazone Products because of a material breach by the Flucarbazone Acquirer of any agreement to provide Flucarbazone Products, in the absence of a final order of a court of competent jurisdiction, or (iii) seek to limit the damages (such as indirect, special, and consequential damages) which the Flucarbazone Acquirer would be entitled to receive in the event of Bayer's breach of any agreement to supply Flucarbazone Products.

- F. Upon the request of the Flucarbazone Acquirer at the time of divestiture of the Flucarbazone Assets, pursuant to an agreement that receives the prior approval of the Commission, Bayer shall provide Technical Assistance to the Flucarbazone Acquirer, for a period not to exceed 30 months from the date Bayer divests the Flucarbazone Assets, sufficient to enable the Flucarbazone Acquirer to operate the Flucarbazone Business in substantially the same manner as that employed by Bayer; provided, however, that Bayer shall not (i) require the Flucarbazone Acquirer to pay compensation for Technical Assistance that exceeds the Direct Cost of providing such goods and services, (ii) terminate its obligation to provide Technical Assistance because of a material breach by the Flucarbazone Acquirer of any agreement to provide such assistance, in the absence of a final order of a court of competent jurisdiction, or (iii) seek to limit the damages (such as indirect, special, and consequential damages) which the Flucarbazone Acquirer would be entitled to receive in the event of Bayer's breach of any agreement to provide Technical Assistance.
- G. The purpose of the divestiture of the Flucarbazone Assets and of the related obligations is to ensure the continued use of the assets in the same businesses in which the Flucarbazone Assets were engaged by Respondents at the time of the announcement of the proposed Acquisition, including the development of new chemical herbicides and

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applications and the pursuit of registrations and approvals for new products and to remedy the lessening of competition alleged in the Commission's complaint.

V.

IT IS FURTHER ORDERED that:

- A. Bayer shall divest the Folex Assets, absolutely and in good faith, to Amvac Corporation pursuant to the Amvac Acquisition Agreement, no later than twenty days from the date the Commission accepts the Consent Agreement for public comment.
- B. The Amvac Acquisition Agreement is incorporated by reference and made a part of this Order as Confidential Appendix E. Bayer shall comply with all terms of the Amvac Acquisition Agreement, and any breach by Bayer of any term of the Amvac Acquisition Agreement shall constitute a violation of this Order. In the event any term of the Amvac Acquisition Agreement varies from or contradicts any term in Paragraphs I through XIX of this Order ("Order Term") to the extent that Bayer cannot fully comply with both terms, the Order Term shall determine Bayer's obligations under this Order.
- C. If, at the time the Commission determines to make this Order final, the Commission determines that Amvac Corporation is not acceptable as the Folex Acquirer, or that the Amvac Acquisition Agreement is not an acceptable manner of divestiture, and so notifies Bayer, Bayer shall immediately terminate or rescind the Amvac Acquisition Agreement and divest the Folex Assets:
 - 1. At no minimum price, absolutely and in good faith, no later than 180 days from the date this Order becomes final, to a Person that receives the prior approval of the Commission

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and in a manner, and pursuant to an acquisition agreement, that receives the prior approval of the Commission.

2. Bayer shall comply with all terms of the acquisition agreement described in Paragraph V.C.1. of this Order, and any breach by Bayer of any term of the acquisition agreement shall constitute a violation of this Order. In the event any term of the acquisition agreement varies from or contradicts any term in Paragraphs I through XIX of this Order (“Order Term”) to the extent Bayer cannot fully comply with both terms, the Order Term shall govern Bayer’s obligations under this Order.
- D. No later than the date Bayer divests the Folex Assets, Bayer shall grant to the Folex Acquirer (pursuant to one or more agreements that receive the prior approval of the Commission):
1. A worldwide, royalty-free, non-exclusive, perpetual, sublicenseable, irrevocable, transferable license to Bayer’s rights to the Folex Licensed Intellectual Property to invent, develop, patent, make, have made, use, sell, offer for sale, and import any product (except for products containing an existing patented molecule of Respondents retained by Bayer or any patented molecule invented or acquired by Bayer after the Acquisition Date) anywhere in the world. Such license shall be (i) exclusive (even as to Bayer) for any product containing an existing patented molecule included in the Folex Assets or any patented molecule invented or acquired by the Folex Acquirer and (ii) non-exclusive for any other product.
 2. An irrevocable, worldwide, perpetual immunity from suit by Bayer based on claims of infringement under all of Respondents’ Intellectual Property for the developing,

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making, having made, using, having used, selling, offering for sale, having sold, and importing of any product containing Tribufos for any use anywhere in the world (except for products containing an existing patented molecule of Respondents retained by Bayer or any patented molecule invented or acquired by Bayer after the Acquisition Date). Such immunity shall extend to any person deriving its authority from the Folex Acquirer.

- E. Nothing in this Order shall prevent Bayer from entering into an agreement with the Folex Acquirer in which the Folex Acquirer shall grant to Bayer a worldwide, royalty-free, non-exclusive, perpetual, irrevocable, sublicenseable, transferable license to the Folex Acquirer's rights to any Intellectual Property included in the Folex Assets that does not relate exclusively to the Folex Business to develop, patent, make, have made, use, sell, offer for sale, and import any product (except for products containing (x) an existing patented molecule included in the Folex Assets, or (y) any patented molecule invented or acquired by the Folex Acquirer after the Acquisition Date, without the consent of the Folex Acquirer) anywhere in the world. Such license (i) may be exclusive (even as to the Folex Acquirer) for any product containing an existing patented molecule of Respondents retained by Bayer or any patented molecule invented or acquired by Bayer after the Acquisition Date and (ii) shall be non-exclusive for any other product.
- F. Upon the request of the Folex Acquirer made at the time of divestiture of the Folex Assets, pursuant to an agreement that receives the prior approval of the Commission, Respondents shall provide Technical Assistance to the Folex Acquirer, for a period not to exceed 6 months from the date Bayer divests the Folex Assets, sufficient to enable the Folex Acquirer to operate the Folex Business in substantially the same manner as that employed by Aventis; provided, however, that Bayer shall not (i) require the Folex Acquirer to pay compensation for Technical Assistance that exceeds the Direct Cost of providing

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such goods and services, (ii) terminate its obligation to provide Technical Assistance because of a material breach by the Folex Acquirer of any agreement to provide such assistance, in the absence of a final order of a court of competent jurisdiction, or (iii) seek to limit the damages (such as indirect, special, and consequential damages) which the Folex Acquirer would be entitled to receive in the event of Bayer's breach of any agreement to provide Technical Assistance.

- G. Bayer shall not enter into any agreement with the Folex Acquirer that prohibits the Folex Acquirer from manufacturing any unmixed or mixed tribufos product, including any such product to be developed, or from arranging for a third-party to manufacture such tribufos product.
- H. The purpose of the divestiture of the Folex Assets and of the related obligations is to ensure the continued use of the assets in the same businesses in which the Folex Assets were engaged by Respondents at the time of the announcement of the proposed Acquisition, including the development of new defoliant and applications and the pursuit of registrations and approvals for new products and to remedy the lessening of competition alleged in the Commission's complaint.

VI.

IT IS FURTHER ORDERED that Bayer shall allow each Acquirer an opportunity to enter into an employment contract with any employees of Respondents identified by agreement between Respondents and the Acquirer and made a part of the relevant Divestiture Agreement (hereinafter "Pesticide Employees"):

- A. No later than thirty days before the date the applicable Pesticide Assets are divested, Respondents shall (i) provide to the Acquirer a list of all applicable Pesticide Employees, (ii) allow the Acquirer an opportunity to interview such

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Pesticide Employees, and (iii) allow the Acquirer to inspect the personnel files and other documentation relating to such Pesticide Employees, to the extent permissible under applicable laws.

- B. Respondents shall (i) not offer any incentive to any Pesticide Employee to decline employment with any Acquirer, (ii) remove any contractual impediments with Respondents that may deter any Pesticide Employee from accepting employment with any Acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Respondents that would affect the ability of the Pesticide Employee to be employed by the Acquirer, and (iii) not interfere with the employment by any Acquirer of any Pesticide Employee.
- C. Respondents shall (i) vest all current and accrued pension benefits as of the date of transition of employment with any Acquirer for any Pesticide Employees who accept an offer of employment from the Acquirer no later than thirty days from the date Respondents divest the applicable Pesticide Assets and (ii) pay a bonus to any Key Employee (hereinafter defined) who accepts an offer of employment from any Acquirer no later than thirty days from the date Respondents divest the applicable Pesticide Assets, pursuant to the terms set forth in Confidential Appendix F attached to this Order.
- D. For a period of one year from the date this Order becomes final, Respondents shall not, directly or indirectly, hire or enter into any arrangement for the services of any Pesticide Employee employed by any Acquirer, unless such Pesticide Employee's employment has been terminated by the Acquirer without the consent of the Pesticide Employee.

For purposes of this Paragraph VI and Confidential Appendix F, "Key Employee" means any Pesticide Employee identified by agreement between Respondents and any Acquirer and made a part of the relevant Divestiture Agreement.

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

- A. Except in the course of performing their obligations under any Divestiture Agreement or this Order, Respondents shall not (i) provide, disclose, or otherwise make available any Non-Public Pesticide Information to any Person or (ii) use any Non-Public Pesticide Information for any reason or purpose.
- B. Respondents shall disclose Non-Public Pesticide Information (i) only to those Persons who require such information for the purposes permitted under Paragraph VII.A. of this Order, (ii) only to the extent such part of the Non-Public Pesticide Information is so required, and (iii) only to those Persons who agree in writing to maintain the confidentiality of such information.
- C. Respondents shall enforce the terms of this Paragraph VII as to any Person and take such action as is necessary to cause each such Person to comply with the terms of this Paragraph VII, including training and all other actions that Respondents would take to protect their own trade secrets and proprietary information.

VIII.

IT IS FURTHER ORDERED that Bayer shall take such actions as are necessary to maintain the viability of the Pesticide Licensed Intellectual Property, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Pesticide Licensed Intellectual Property.

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

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- A. RICHARD GILMORE (“Monitor”) is hereby appointed to monitor Respondents’ compliance with Paragraphs I through XIX of this Order.
- B. Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:
 - 1. The Monitor shall have the power and authority to monitor Respondents’ compliance with the terms of this Order and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor pursuant to the terms of this Order and in a manner consistent with the purposes of this Order.
 - 2. Within ten days after it signs the Consent Agreement, Respondent shall execute an agreement that, subject to the approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondent’s compliance with the terms of this Order in a manner consistent with the purposes of this Order. If requested by Respondents, the Monitor shall sign a confidentiality agreement prohibiting the use, or disclosure to anyone other than the Commission, of any competitively sensitive or proprietary information gained as a result of his or her role as Monitor.
 - 3. The Monitor’s power and duties under this Paragraph IX shall terminate sixty days after the Monitor has completed his or her final report pursuant to Paragraph IX.B.8.(ii), or at such other time as directed by the Commission.
 - 4. The Monitor shall have full and complete access to Respondents’ books, records, documents, personnel,

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facilities, and technical information relating to compliance with this Order, and to any other relevant information, as the Monitor may reasonably request. Respondents shall cooperate with any reasonable request of the Monitor. Respondents shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with this Order.

5. The Monitor shall serve, without bond or other security, at the expense of Respondent, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondent, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission.
6. Respondents shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor'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 the Monitor's gross negligence or wilful misconduct. For purposes of this Paragraph IX.B.6., the term "Monitor" shall include all Persons retained by the Monitor pursuant to Paragraph IX.B.5. of this Order.
7. If at any time the Commission determines that the Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may appoint a

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substitute to serve as Monitor. The Commission shall select a substitute Monitor subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Monitor within ten days after notice from the staff of the Commission to Respondent of the identity of any proposed substitute Monitor, Respondent shall be deemed to have consented to the selection of the proposed substitute. Respondent shall execute the agreement required by Paragraph IX.B.2. of this Order within ten days after the Commission appoints a substitute Monitor. The substitute Monitor shall serve according to the terms and conditions of this Paragraph IX.

8. The Monitor shall report in writing to the Commission (i) every sixty days from the date this Order becomes final, (ii) no later than thirty days from the date Respondents have completed all obligations required by Paragraphs II through V of this Order, and (iii) at any other time as requested by the staff of the Commission, concerning Respondents' compliance with this Order.

- C. The Commission may on its own initiative or at the request of the Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.

X.

IT IS FURTHER ORDERED that:

- A. If Bayer has not divested, absolutely and in good faith any of the Acetamiprid Assets, Fipronil Assets, Flucarbazone Assets, or Folex Assets within the time and in the manner required by Paragraphs II through V of this Order, the Commission may at any time appoint one or more Persons

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as Divestiture Trustee to divest such assets to an acquirer and to execute a Divestiture Agreement that satisfies the requirements and purposes of this Order; provided, however, that if Bayer fails to divest (i) the Flucarbazone Assets, within the time and in the manner required by Paragraph IV of this Order, the Divestiture Trustee shall divest the Flucarbazone Assets and the Additional Flucarbazone Assets (to a single Acquirer) or (ii) the Acetamiprid Assets, within the time and in the manner required by Paragraph II of this Order, the Divestiture Trustee may divest either the Thiacloprid Assets or the Acetamiprid Assets.

- B. 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, Respondents shall consent to the appointment of a Divestiture Trustee in such action. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph X shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.
- C. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph X, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
 - 1. The Commission shall select the Divestiture Trustee, subject to the consent of the Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures and may be the same Person as

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the Monitor appointed pursuant to Paragraph IX of this Order. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten business days after receipt of written notice from the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

2. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to accomplish the divestiture for which he or she has been appointed pursuant to the terms of this Order and in a manner consistent with the purposes of this Order and to enter into a Divestiture Agreement with any Acquirer.
3. Within ten days after appointment of the Divestiture Trustee, Respondents shall execute an agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed Divestiture Trustee, of the court, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to accomplish the divestiture for which he or she has been appointed.
4. The Divestiture Trustee shall have twelve months from the date the Commission approves the agreement described in Paragraph X.C.3. of this Order 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 Divestiture 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 Divestiture Trustee, by the court; provided,

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however, the Commission may extend this period only two times.

5. The Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the assets to be divested, and any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may reasonably request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents 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 Divestiture Trustee, by the court.
6. The Divestiture 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, but shall divest expeditiously at no minimum price. The divestiture shall be made only to an Acquirer that receives the prior approval of the Commission, and the divestiture shall be accomplished only in a manner that receives the prior approval of the Commission; provided, however, if the Divestiture Trustee receives bona fide offers, for a particular asset, from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity or entities selected by Respondents from among those approved by the Commission; provided, further, that Respondents shall select such entity within five business days of receiving written notification of the Commission's approval.

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7. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture 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 Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the Respondents, and the Divestiture Trustee's power shall be terminated. The Divestiture Trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the Divestiture Trustee's divesting the assets.
8. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture 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 liabilities, losses, damages, claims, or expenses result from gross negligence or willful misconduct by the Divestiture Trustee. For purposes of this Paragraph X.C.8., the term "Divestiture Trustee" shall include all Persons retained by the Divestiture Trustee pursuant to Paragraph X.C.7. of this Order.

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9. If the Divestiture Trustee ceases to act or fails to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph X for appointment of the initial Divestiture Trustee.
 10. The Divestiture Trustee shall have no obligation or authority to operate or maintain the assets to be divested.
 11. The Divestiture Trustee shall report in writing to the Commission every sixty days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
- D. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

XI.

IT IS FURTHER ORDERED that if the Divestiture Trustee divests the Thiacloprid Assets pursuant to Paragraph X of this Order, the following additional requirements shall apply:

- A. No later than the date the Divestiture Trustee divests the Thiacloprid Assets, Bayer shall grant to the Thiacloprid Acquirer (pursuant to one or more agreements that receive the prior approval of the Commission):
1. A worldwide, royalty-free, perpetual, sublicenseable, irrevocable, transferable license to Bayer's rights to the Thiacloprid Licensed Intellectual Property to invent, develop, patent, make, have made, use, sell, offer for sale, and import any product (except for products containing an existing patented molecule of Respondents retained by

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Bayer or any patented molecule invented or acquired by Bayer after the Acquisition Date) anywhere in the world. Such license shall be (i) exclusive (even as to Bayer) for any product containing an existing patented molecule included in the Thiachloprid Assets or any patented molecule invented or acquired by the Thiachloprid Acquirer and (ii) non-exclusive for any other product.

2. An irrevocable, worldwide, perpetual immunity from suit by Bayer based on claims of infringement under all of Respondents' Intellectual Property for the developing, making, having made, using, having used, selling, offering for sale, having sold, and importing of any product containing Thiachloprid for any use anywhere in the world (except for products containing an existing patented molecule of Respondents retained by Bayer or any patented molecule invented or acquired by Bayer after the Acquisition Date). Such immunity shall extend to any person deriving its authority from the Thiachloprid Acquirer.
- B. Nothing in this Order shall prevent the Divestiture Trustee from obtaining agreement with the Thiachloprid Acquirer in which the Thiachloprid Acquirer shall grant to Bayer:
1. A worldwide, royalty-free, perpetual, irrevocable, sublicenseable, transferable license to the Thiachloprid Acquirer's rights to any Intellectual Property included in the Thiachloprid Assets that does not relate exclusively to the Thiachloprid Business to develop, patent, make, have made, use, sell, offer for sale, and import any product (except for products containing (x) an existing patented molecule included in the Thiachloprid Assets, subject to Paragraph XI.B.2. of this Order, or (y) any patented molecule invented or acquired by the Thiachloprid Acquirer after the Acquisition Date, without the consent of the Thiachloprid Acquirer) anywhere in the world. Such license (i) may be exclusive (even as to the Thiachloprid Acquirer) for any product containing an existing patented molecule of Respondents retained by Bayer or any patented molecule

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invented or acquired by Bayer after the Acquisition Date and (ii) shall be non-exclusive for any other product.

2. A worldwide, royalty-free, exclusive (except as to the Thiacloprid Acquirer), perpetual, irrevocable, sublicenseable, transferable license to the Thiacloprid Acquirer's rights to any Intellectual Property included in the Thiacloprid Assets to develop, patent, make, have made, use, sell, offer for sale, and import any product containing Thiacloprid anywhere in the world (except for the United States, Canada, and Europe); provided, however, that Bayer may obtain such license only if it would not impair the viability of the Thiacloprid Acquirer, and the Commission approves the divestiture of the Thiacloprid Assets with such a license.

- C. Bayer may propose an agreement to allow the Thiacloprid Acquirer to supply to Bayer Thiacloprid (if Bayer obtains a license pursuant to Paragraph XI.B.2. of this Order) and Clothianidin manufactured by the Thiacloprid Acquirer; provided, however, that such agreement shall provide sufficient Thiacloprid to the Thiacloprid Acquirer to support the Thiacloprid Acquirer's good faith plans, decisions, or efforts to meet the production goals and targets in the Thiacloprid Acquirer's business plans and to expand production of Thiacloprid in a manner consistent with the purposes of this Order. If such agreement is proposed by Bayer, the Divestiture Trustee shall include such agreements among the terms offered to prospective Acquirers, and may submit a divestiture containing such agreement for the approval of the Commission. If the Divestiture Trustee is unable to enter into such agreement, or if the Commission does not approve such agreement, or does not approve a divestiture subject to such agreement, then the Commission may approve, and the Divestiture Trustee may divest, a divestiture of the Thiacloprid Assets without such agreement.

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XII.

IT IS FURTHER ORDERED that if the Divestiture Trustee divests the Additional Flucarbazone Assets pursuant to Paragraph X of this Order, the following additional requirements shall apply:

- A. No later than the date the Divestiture Trustee divests the Additional Flucarbazone Assets, Bayer shall grant to the Flucarbazone Acquirer (pursuant to one or more agreements that receive the prior approval of the Commission):
 - 1. A worldwide, royalty-free, perpetual, sublicenseable, irrevocable, transferable license to Bayer's rights to the Olympus Licensed Intellectual Property to invent, develop, patent, make, have made, use, sell, offer for sale, and import any product (except for products containing an existing patented molecule of Respondents retained by Bayer or any patented molecule invented or acquired by Bayer after the Acquisition Date) anywhere in the world. Such license shall be (i) exclusive (even as to Bayer) for any product containing an existing patented molecule included in the Additional Flucarbazone Assets or any patented molecule invented or acquired by the Flucarbazone Acquirer and (ii) non-exclusive for any other product.
 - 2. An irrevocable, worldwide, perpetual immunity from suit by Bayer based on claims of infringement under all of Respondents' Intellectual Property for the developing, making, having made, using, having used, selling, offering for sale, having sold and importing any product containing Propoxycarbazone for any use anywhere in the world (except for products containing an existing patented molecule of Respondents retained by Bayer or any patented molecule invented or acquired by Bayer after the Acquisition Date). Such immunity shall extend to any person deriving its authority from the Flucarbazone Acquirer.

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- B. Nothing in this Order shall prevent the Divestiture Trustee from obtaining agreement with the Flucarbazone Acquirer in which the Flucarbazone Acquirer shall grant to Bayer a worldwide, royalty-free, perpetual, irrevocable, sublicenseable, transferable license to the Flucarbazone Acquirer's rights to any Intellectual Property included in the Additional Flucarbazone Assets that does not relate exclusively to the Olympus Business to develop, patent, make, have made, use, sell, offer for sale, and import any product (except for products containing (x) an existing patented molecule included in the Additional Flucarbazone Assets, or (y) any patented molecule invented or acquired by the Flucarbazone Acquirer after the Acquisition Date, without the consent of the Flucarbazone Acquirer) anywhere in the world. Such license (i) may be exclusive (even as to the Flucarbazone Acquirer) for any product containing an existing patented molecule of Respondents retained by Bayer or any patented molecule invented or acquired by Bayer after the Acquisition Date and (ii) shall be non-exclusive for any other product.

XIII.

IT IS FURTHER ORDERED that Respondents shall provide a copy of this Order to each of Respondents' officers, employees, or agents having managerial responsibility for any obligations under this Order, no later than ten days from the date this Order becomes final.

XIV.

IT IS FURTHER ORDERED that:

- A. Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order:

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1. No later than sixty days from the date this Order becomes final, and every sixty days thereafter (measured from the due date of the first report under this Order) until one year from the date this Order becomes final (for a total of six reports during the first year).
2. No later than ninety days from the due date of Respondents' sixth report as required by Paragraph XIV.A. of this Order and every ninety days thereafter (measured from the due date of the seventh report) until thirty months from the date this Order becomes final (for a total of twelve reports during the first thirty months).
3. No later than six months from the due date of Respondents' twelfth report as required by Paragraph XIV.A. of this Order, and annually thereafter for the next seven years, on the anniversary of the date this Order becomes final.

Provided, however, that Aventis shall be required to file the reports required by this Paragraph XIV only until the Acquisition Date; provided, further, that Respondents shall also file the report required by this Paragraph XIV at any other time as the Commission may require.

- B. For any time period during which Respondents have compliance reporting obligations pursuant to the Order to Hold Separate, Respondents shall comply with Paragraph XIV.A. of this Order by complying with the reporting requirements imposed by the Order to Hold Separate until such reporting obligations terminate. Thereafter, Respondents shall assume the reporting schedule set forth in Paragraph XIV.A. of this Order and file subsequent reports in accordance therewith.

XV.

IT IS FURTHER ORDERED that Bayer shall not acquire, directly or indirectly, through subsidiaries, partnerships, or

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otherwise, any interest in, or all or any part of, the Pesticide Assets without the prior approval of the Commission.

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

- A. Bayer shall not, without providing advance written notification to the Commission, acquire, directly or indirectly, through subsidiaries or otherwise, any ownership, leasehold, or other interest, in whole or in part, or enter into any kind of joint venture with Merial.
- B. Bayer shall provide the prior notification required by Paragraph XVI.A. on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as “the Notification”), which shall be prepared and transmitted in accordance with the requirements of that part, except that (i) no filing fee will be required for any such notification, (ii) notification shall be filed with the Secretary of the Commission, (iii) notification need not be made to the United States Department of Justice, and (iv) notification is required only of Respondents and not of any other party to the transaction.
- C. Bayer shall provide the Notification to the Commission at least thirty days prior to consummating any such transaction (hereinafter referred to as the “first waiting period”). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Bayer shall not consummate the transaction until thirty days after submitting such additional information or documentary material. Early termination of the waiting periods in this Paragraph XVI.C. may be requested and, where appropriate, granted by letter from the Bureau of Competition.

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Provided, however, that prior notification shall not be required by this Paragraph XVI for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

XVII.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty 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 this Order.

XVIII.

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, Respondents 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 non-privileged books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Respondents relating to any matter contained in this Order; and
- B. Upon five days' notice to Respondents and without restraint or interference from them, to interview their officers, directors, or employees, who may have counsel present, regarding any such matters.

Decision and Order

XIX.

IT IS FURTHER ORDERED that this Order shall terminate on July 24, 2012.

CONFIDENTIAL APPENDICES A-F**[Redacted From Public Record Version]**

Order

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS

The Federal Trade Commission having initiated an investigation of the proposed acquisition by Respondent Bayer AG of the stock of Aventis CropScience Holding S.A. from Respondent Aventis S.A. and Respondents having been furnished thereafter with a copy of the draft of the Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and that, if issued by the Commission, would charge Respondents with violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of the Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, 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 Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having determined to accept the executed Consent Agreement and to place 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 this Order to Hold Separate and Maintain Assets (“Hold Separate Order”):

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1. Respondent Bayer AG is an Aktiengesellschaft organized, existing, and doing business under, and by virtue of, the laws of Germany with its office and principal place of business located at Werk Leverkusen, 51368, Leverkusen, Germany.
2. Respondent Aventis S.A. is a societe anonyme organized, existing, and doing business under, and by virtue of, the laws of France, with its office and principal place of business located at Avenue de l'Europe, Espace Europeen de l'Entreprise, Schiltigheim, France.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in this Hold Separate Order, the following definitions and provisions shall apply (to the extent any capitalized term appearing in this Hold Separate Order is not defined below, the term shall be defined as that same term is defined in the Decision and Order contained in the Consent Agreement):

- A. "Bayer" means Bayer AG, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Bayer AG, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. "Aventis" means Aventis, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Aventis and the respective

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directors, officers, employees, agents, representatives, successors, and assigns of each.

- C. “ACS Global Hold Separate Manager” means Vincent Turriès, the manager to whom the various ACS Product Hold Separate Business Managers shall report during the Hold Separate Period and who, in turn, shall report to the Hold Separate Trustee.
- D. “ACS Product Hold Separate Business Managers” means Monty Christian, the Product Hold Separate Business Manager responsible for the Acetamiprid Business and Brian Ahrens (Agriculture) and Karl Kisner (Environmental Science), the Product Hold Separate Business Managers responsible for the Fipronil Business.
- E. “Acetamiprid Assets” means the Acetamiprid Assets as defined in Paragraph I of the Decision and Order.
- F. “Acetamiprid Business” means Respondent Aventis’ business of researching, developing, registering, formulating, manufacturing, licensing, distributing, marketing, and selling all products containing Acetamiprid, as that term is defined in the Decision and Order, including products in development, in any market anywhere in the world, prior to the Acquisition Date (and such business as conducted by Bayer after the Acquisition Date pursuant to this Order and the Order to Hold Separate), and includes the Acetamiprid Assets.
- G. “Acquisition” means the proposed acquisition described in (i) the Stock Purchase Agreement dated as of October 2, 2001, among Aventis Agriculture, Hoechst Aktiengesellschaft, and Bayer AG, and (ii) the Stock Purchase Agreement dated as of October 2, 2001, among Schering Aktiengesellschaft, SCIC Holdings LLC, and Bayer AG.

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- H. “Acquisition Date” means the date of consummation of the Acquisition.
- I. “Alternative Assets” means the Additional Flucarbazone Assets, the Thiacloprid Assets, Olympus Business, the Acetamiprid Licensed Intellectual Property, the Fipronil Licensed Intellectual Property, and the Flucarbazone Licensed Intellectual Property as those terms are defined in the Decision and Order
- J. “Aventis Hold Separate Businesses” means the Acetamiprid Business and the Fipronil Business.
- K. “Bayer Global Hold Separate Manager” means Wolfgang Bieber, the manager to whom the Bayer Product Hold Separate Business Managers shall report during the Hold Separate Period and who, in turn, shall report to the Hold Separate Trustee.
- L. “Bayer Product Hold Separate Business Managers” means Gary Aagesen and Scott Fleetwood, the Product Hold Separate Business Managers responsible for the Flucarbazone Business.
- M. “Bayer Hold Separate Business” means the Flucarbazone Business.
- N. “Commission” means the Federal Trade Commission.
- O. “Consent Agreement” means the Agreement Containing Consent Orders executed by Respondents and the Commission in this matter.
- P. “Decision and Order” means:
 - 1. until the issuance of a final Decision and Order by the Commission in this matter, the proposed Decision and

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Order incorporated into and made a part of the Consent Agreement; or

2. following the issuance of a final Decision and Order by the Commission, the Decision and Order issued by the Commission.
- Q. “Effective Date of Divestiture” means the earliest date on which each and every of the divestitures required by Paragraphs II, III, IV, and V (or X, XI, and XII, if applicable) of the Decision and Order have been consummated.
- R. “Fipronil Assets” means the Fipronil Assets as defined in Paragraph I of the Decision and Order.
- S. “Fipronil Business” means Respondent Aventis’ business of researching, developing, registering, formulating, manufacturing, licensing, distributing, marketing, and selling all products containing Fipronil, including products in development, in any market anywhere in the world, prior to the Acquisition Date (and such business as conducted by Bayer after the Acquisition Date pursuant to this Hold Separate Order and the Decision and Order), and includes the Fipronil Assets.
- T. “Flucarbazonone Assets” means the Flucarbazonone Assets as defined in Paragraph I of the Decision and Order.
- U. “Flucarbazonone Business” means Respondent Bayer’s business of researching, developing, registering, formulating, manufacturing, licensing, distributing, marketing, and selling all products containing Flucarbazonone, including products in development, in any market anywhere in the world, and includes the Flucarbazonone Assets.

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- V. “Hold Separate Businesses” means the Acetamiprid Business, the Fipronil Business, and the Flucarbazone Business.
- W. “Hold Separate Business Assets” means the Acetamiprid Assets, Fipronil Assets, and Flucarbazone Assets.
- X. “Hold Separate Order” means this Order to Hold Separate and Maintain Assets.
- Y. “Hold Separate Period” means the time period during which the Hold Separate is in effect, which shall begin no later than ten (10) days after the date the Hold Separate Order becomes final and terminate pursuant to Paragraph V. hereof.
- Z. “Hold Separate Trustee” means Richard Gilmore, the individual appointed pursuant to Paragraph II.D.1 of this Hold Separate Order.
- AA. “Material Confidential Information” means competitively sensitive or proprietary information not independently known to an entity from sources other than the entity to which the information pertains, and includes, but is not limited to, all customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets.
- BB. “Product Development Managers” means the individuals appointed to manage the development of the respective products within the Hold Separate Businesses during the Hold Separate Period.
- CC. “Product Hold Separate Business Manager” means each of the three individuals, responsible for managing a different business line within the Hold Separate Businesses during the Hold Separate Period. Identified separately, the individual managers are as follows:

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Monty Christian, the Product Hold Separate Business Manager responsible for the Acetamiprid Business; Brian Ahrens (Agriculture) and Karl Kissner (Environmental Science), the Product Hold Separate Business Managers responsible for the Fipronil Business; and Gary Aagesen and Scott Fleetwood, the Product Hold Separate Business Managers responsible for the Flucarbazonone Business.

DD. “Respondents” means Bayer and Aventis.

II.

IT IS FURTHER ORDERED that:

- A. During the Hold Separate Period, Respondents shall hold the Hold Separate Businesses separate, apart, and independent from Respondents as required by this Hold Separate and shall vest the Hold Separate Businesses, and the ACS Global Hold Separate Manager, the Bayer Global Hold Separate Manager, and each of the Product Hold Separate Business Managers with all rights, powers, and authority necessary to conduct their respective businesses. Respondents shall not exercise direction or control over, or influence directly or indirectly, the Hold Separate Businesses, the Hold Separate Trustee, the ACS Global Hold Separate Manager, the Bayer Global Hold Separate Manager, the Product Hold Separate Business Managers or the Hold Separate Business Assets except to the extent that Respondents must exercise direction and control over the Hold Separate Businesses as is necessary to assure compliance with this Hold Separate Order, the Consent Agreement, the Decision and Order, and with all applicable laws, including, in consultation with the Hold Separate Trustee, continued oversight of the Hold Separate Businesses’ compliance with policies and standards concerning the safety, health, and environmental aspects of their operations and the integrity of their financial controls. Respondents shall also have the right to defend any legal

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claims, investigations or enforcement actions threatened or brought against any of the Hold Separate Businesses.

- B. Until the Effective Date of Divestiture, Respondents shall take such actions as are necessary to maintain the viability and marketability of the Hold Separate Businesses to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Hold Separate Businesses, including the Hold Separate Business Assets, except for ordinary wear and tear, including, but not limited to, continuing in effect and maintaining product registrations, proprietary trademarks, trade name, logos, trade dress, identification signs, levels of inventory appropriate for the next business cycle, and information and documents relating to formulations, field testing, research, studies, and production.
- C. The purpose of this Hold Separate Order is to:
1. preserve the Hold Separate Businesses as viable, competitive, and ongoing businesses independent of Respondents until the Effective Date of Divestiture of the Hold Separate Business Assets;
 2. assure that no Material Confidential Information is exchanged between Respondents and the Hold Separate Businesses, except in accordance with the provisions of this Hold Separate Order;
 3. prevent interim harm to competition pending the relevant divestitures and other relief; and
 4. help remedy any anticompetitive effects of the proposed Acquisition.
- D. Respondents shall hold the Hold Separate Businesses separate, apart, and independent in the following manner:

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1. Richard Gilmore shall serve as Hold Separate Trustee, pursuant to the agreement executed by the Hold Separate Trustee and Respondents and attached as Confidential Appendix A (“trustee agreement”).
 - a. The trustee agreement shall require that, no later than ten (10) days after this Hold Separate Order becomes final, Respondents transfer to the Hold Separate Trustee all rights, powers, and authorities necessary to permit the Hold Separate Trustee to perform his/her duties and responsibilities, pursuant to this Hold Separate Order and consistent with the purposes of the Decision and Order.
 - b. No later than ten (10) days after this Hold Separate Order becomes final, Respondents shall, pursuant to the trustee agreement, transfer to the Hold Separate Trustee all rights, powers, and authorities necessary to permit the Hold Separate Trustee to perform his/her duties and responsibilities, pursuant to this Hold Separate Order and consistent with the purposes of the Decision and Order.
 - c. The Hold Separate Trustee shall have the responsibility, consistent with the terms of this Hold Separate Order and the Decision and Order, for monitoring the organization of the Hold Separate Businesses; for maintaining the independence of the Hold Separate Businesses; and for monitoring Respondents’ compliance with their obligations pursuant to this Hold Separate Order and the Decision and Order.
 - d. The Hold Separate Trustee shall have full and complete access to all personnel, books, records, documents and facilities of the Hold Separate Businesses or to any other relevant information as the Hold Separate Trustee may reasonably request,

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including, but not limited to, all documents and records kept by Respondents in the ordinary course of business that relate to the Hold Separate Businesses. Respondents shall develop such financial or other information as the Hold Separate Trustee may request and shall cooperate with the Hold Separate Trustee. Respondents shall take no action to interfere with or impede the Hold Separate Trustee's ability to monitor Respondents' compliance with this Hold Separate Order and the Decision and Order or otherwise to perform his/her duties and responsibilities consistent with the terms of this Hold Separate Order.

- e. The Hold Separate Trustee shall have the authority to employ, at the cost and expense of Bayer, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Hold Separate Trustee's duties and responsibilities.
- f. The Commission may require the Hold Separate Trustee to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with performance of the Hold Separate Trustee's duties.
- g. Respondents may require the Hold Separate Trustee to sign a confidentiality agreement prohibiting the disclosure of any Material Confidential Information gained as a result of his or her role as Hold Separate Trustee to anyone other than the Commission.
- h. Thirty (30) days after the Hold Separate Order becomes final, and every thirty (30) days thereafter until the Hold Separate terminates, the Hold Separate Trustee shall report in writing to the Commission concerning the efforts to accomplish the purposes of this Hold Separate Order and the Decision and Order

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and Respondents' compliance with its obligations under the Hold Separate Order and the Decision and Order. Included within that report shall be the Hold Separate Trustee's assessment of the extent to which the Hold Separate Businesses are meeting (or exceeding) their projected goals as are reflected in operating plans, budgets, projections or any other regularly prepared financial statements.

- i. If the Hold Separate Trustee ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate Order, the Commission may appoint a substitute Hold Separate Trustee consistent with the terms of this paragraph, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of the substitute Hold Separate Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any substitute Hold Separate Trustee, Respondents shall be deemed to have consented to the selection of the proposed substitute trustee. Respondents and the substitute Hold Separate Trustee shall execute a trustee agreement, subject to the approval of the Commission, consistent with this paragraph.
2. No later than five (5) days after this Hold Separate Order becomes final, Respondents shall, subject to the approval of the Commission, enter into separate agreements with the ACS Global Hold Separate Manager, the Bayer Global Hold Separate Manager, and each of the Product Hold Separate Business Managers (collectively "Global Hold Separate Management Agreements"). No later than ten (10) days after this Hold Separate Order becomes final, and consistent with the terms of the Global Hold Separate Management Agreements, Respondents shall transfer to the ACS Global Hold Separate Manager and

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the Bayer Global Hold Separate Manager, all rights, powers, and authorities necessary to permit them to perform their duties and responsibilities, pursuant to the Hold Separate Order and consistent with the purposes of the Hold Separate Order and the Decision and Order.

- a. The ACS Global Hold Separate Manager shall be responsible for the Aventis Hold Separate Businesses and shall report directly to the Hold Separate Trustee. The ACS Global Hold Separate Manager shall have the responsibility, consistent with the terms of this Hold Separate Order and the Decision and Order, to manage the Aventis Hold Separate Businesses. The ACS Global Hold Separate Manager shall not have any access to Material Confidential Information of Bayer other than Material Confidential Information relating to the Aventis Hold Separate Businesses. During the term of this Hold Separate, the ACS Global Hold Separate Manager shall not be involved, in any way, in the operations of the other businesses of Respondents.
- b. The Bayer Global Hold Separate Manager shall be responsible for the Bayer Hold Separate Business and shall report directly to the Hold Separate Trustee. The Bayer Global Hold Separate Manager shall have the responsibility, consistent with the terms of this Hold Separate Order and the Decision and Order, to manage the Bayer Hold Separate Business. The Bayer Global Hold Separate Manager shall not have any access to Material Confidential Information of Bayer other than Material Confidential Information relating to the Bayer Hold Separate Business. During the term of this Hold Separate, the Bayer Global Hold Separate Manager shall not be involved, in any way, in the operations of the other businesses of Respondents.

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- c. The Product Hold Separate Business Managers responsible for the Acetamiprid Business and for the Fipronil Business shall report directly and exclusively to the ACS Global Hold Separate Manager; the Product Hold Separate Business Managers responsible for the Flucarbazonone Business shall report directly and exclusively to the Bayer Global Hold Separate Manager. Each of the Product Hold Separate Business Managers shall manage his or her part of the Hold Separate Businesses independently of the management of Respondents. During the term of this Hold Separate, the Product Hold Separate Business Managers shall not be involved, in any way, in the operations of the other businesses of Respondents.
- d. In the event the ACS Global Hold Separate Manager, the Bayer Global Hold Separate Manager, or any of the Product Hold Separate Business Managers cease to act as the ACS Global Hold Separate Manager, the Bayer Global Hold Separate Manager, or the Product Hold Separate Business Manager, the Hold Separate Trustee shall select a substitute manager, after consultation with the staff of the Commission, and transfer to the substitute manager all rights, powers and authorities necessary to permit the substitute manager to perform his/her duties and responsibilities, pursuant to this Hold Separate Order.
- e. The ACS Global Hold Separate Manager and the Bayer Hold Separate Manager shall have no financial interests affected by Respondents' revenues, profits or profit margins, except that the individual manager's compensation for managing the respective Hold Separate Businesses may include economic incentives dependent on the financial performance of their respective businesses if there are also sufficient incentives for the ACS Global Hold Separate Manager and the Bayer Hold Separate Manager to operate the

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business at no less than current rates of operation (including, but not limited to, current rates of production and sales) and to achieve the objectives of this Hold Separate Order.

- f. The Product Hold Separate Business Managers shall have no financial interests affected by Respondents' revenues, profits or profit margins, except that the individual Product Hold Separate Business Manager's compensation for managing his/her part of the Hold Separate Businesses may include economic incentives dependent on the financial performance of their respective business line if there are also sufficient incentives for the Product Hold Separate Business Managers to operate the business at no less than current rates of operation (including, but not limited to, current rates of production and sales) and to achieve the objectives of this Hold Separate Order.
- g. The ACS Global Hold Separate Manager and the Bayer Global Hold Separate Manager shall make no material changes in the present operation of the Hold Separate Businesses except with the approval of the Hold Separate Trustee.
- h. The ACS Global Hold Separate Manager and the Bayer Global Hold Separate Manager shall have the authority, with the approval of the Hold Separate Trustee, to remove employees and replace them with others of similar experience or skills. If any person ceases to act or fails to act diligently and consistent with the purposes of the Hold Separate Order, the ACS Global Hold Separate Manager and the Bayer Global Hold Separate Manager, in consultation with the Hold Separate Trustee, may request Respondents to, and Respondents shall, appoint a substitute person, which person the respective manager and the Hold

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Separate Trustee shall have the right to approve or disapprove.

- i. The ACS Global Hold Separate Manager and the Bayer Global Hold Separate Manager may employ, in addition to those employees within the Hold Separate Businesses, such employees as are reasonably necessary to assist them in managing and operating the Hold Separate Businesses, including, without limitation, those providing administrative services, such as finance personnel, information technology personnel, employee relations personnel, legal services personnel, public relations personnel, regulatory personnel, supply personnel, earnings consolidation and analysis personnel, business performance personnel, and customer relations personnel.
- j. Each Product Hold Separate Business Manager shall have the responsibility and resources to implement existing sales, marketing, research and development, product registration, and product development plans relating to their products or to modify, with the concurrence of the respective ACS Global Hold Separate Manager or the Bayer Global Hold Separate Manager, and the approval of the Hold Separate Trustee, existing plans consistent with previously approved goals and objectives. The managers shall not have access to any other of Respondents' confidential marketing materials, including without limitation, Bayer CropScience confidential marketing materials, during the Hold Separate Period.
- k. Each Product Hold Separate Business Manager, with the concurrence of the respective ACS Global Hold Separate Manager or Bayer Global Hold Separate Manager, shall appoint the relevant Product Development Managers for each of the Hold Separate

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Businesses as identified in Confidential Appendix B. In all instances, the manager appointed shall be an individual with the necessary experience and expertise in the particular product. This individual shall have the responsibility to oversee development of products within the individual Hold Separate Businesses during the Hold Separate Period. This person shall not have access to the ongoing research and development operations of Bayer that are not related to the Hold Separate Businesses during the Hold Separate Period.

- l. During the Hold Separate Period, the Bayer and Aventis sales forces will continue to operate in substantially the same manner as they were prior to closing of the Acquisition. Provided, however, that Respondents may integrate their crop protection sales forces after August 1, 2002; provided further, however, that: (1) the individual Product Hold Separate Business Managers will be responsible for overseeing sales of the products in the Hold Separate Businesses; (2) sales representatives responsible for sales in the Aventis Hold Separate Businesses shall have no access to Material Confidential Information relating to the Bayer Hold Separate Business; and (3) sales representatives responsible for sales in the Bayer Hold Separate Business shall have no access to Material Confidential Information relating to the Aventis Hold Separate Businesses. For crop protection and Non-Agricultural Use products, however, Respondents may initiate cross-training for their sales forces starting at the time of closing of the Acquisition; provided, however, that no training will be provided on the products of the Hold Separate Businesses or their competing products.
- m. The Hold Separate Trustee shall be permitted, in consultation with the Commission staff, to remove any of the managers for cause. Within fifteen (15)

Order

days after such removal, Respondents shall appoint a replacement manager, subject to the approval of the Hold Separate Trustee, on the same terms and conditions as provided in paragraph II.D.1. of this Hold Separate.

3. The Hold Separate Businesses shall be staffed with sufficient employees to maintain the viability and competitiveness of the Hold Separate Businesses. Employees of the Hold Separate Businesses shall include (i) all personnel performing responsibilities primarily in connection with any of the Hold Separate Businesses as of the date Respondents executed the Consent Agreement, and (ii) any persons hired from other sources. To the extent that any employees of the Hold Separate Businesses leave or have left the Hold Separate Businesses prior to the Effective Date of Divestiture, the ACS Global Hold Separate Manager, the Bayer Global Hold Separate Manager, or Product Hold Separate Business Managers, as applicable, with the approval of the Hold Separate Trustee, may replace departing or departed employees with persons who have similar experience and expertise or may determine not to replace such departing or departed employees.
4. In connection with support services or products not included within the Hold Separate Businesses, Respondents shall continue to provide, or offer to provide, the same support services to the Hold Separate Businesses as are being provided to such businesses by Respondents as of the date the Consent Agreement is signed by Respondents. For services that Bayer or Aventis previously provided to the Hold Separate Businesses, Respondents shall not charge more than the same fees, if any, charged by Respondents for such services as of the date this Consent Agreement is signed by Respondents. For any other services or products that Respondents may provide the Hold Separate Businesses,

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Respondents shall not charge more than the same price they charge others for the same services or products. Respondents' personnel providing such services or products must retain and maintain all Material Confidential Information of the Hold Separate Businesses on a confidential basis, and, except as is permitted by this Hold Separate Order, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any person whose employment involves any of Respondents' businesses, other than the Hold Separate Businesses. Such personnel shall also execute confidentiality agreements prohibiting the disclosure of any Material Confidential Information of Hold Separate Businesses.

- a. Respondents shall offer and the Hold Separate Businesses shall obtain the following services and products solely from Respondents:
 - (1) National brand advertising and promotion programs;
 - (2) Federal and state regulatory policy development and compliance;
 - (3) Human resources administrative services, including but not limited to labor relations support;
 - (4) Environmental health and safety services, which develops corporate policies and ensures compliance with federal and state regulations and corporate policies;
 - (5) Security services;
 - (6) Preparation of tax returns; and
 - (7) Audit services.
- b. Respondents shall offer to the Hold Separate Businesses any services and products that Respondents provide to their other businesses directly or through third-party contracts, or that they have

Order

provided directly or through third-party contracts to the businesses constituting the Hold Separate Businesses at any time since January 1, 2002. The Hold Separate Businesses may, at the option of the respective Global or Product Hold Separate Business Managers, with the approval of the Hold Separate Trustee, obtain such services and products from Respondents. The services and products that Respondents shall offer the Hold Separate Businesses shall include, but shall not be limited to, the following:

- (1) Information systems, which constructs, maintains, and supports all SAP and other computer systems;
 - (2) Public affairs, which provides media and community relations services;
 - (3) Processing of accounts payable;
 - (4) Technical support;
 - (5) Financial accounting services;
 - (6) Procurement of goods and services utilized in the ordinary course of business by the Hold Separate Business;
 - (7) Legal services; and
 - (8) Real estate services.
- c. In connection with services and products other than those listed in a. above, and including but not limited to those listed in b. above, the Hold Separate Businesses shall have, at the option of the ACS Global Hold Separate Manager or the Bayer Global Hold Separate Manager, as applicable, with the approval of the Hold Separate Trustee, the ability to acquire services and products from third parties unaffiliated with Respondents.
5. Bayer shall cause the Hold Separate Trustee, the ACS Global Hold Separate Manager, the Bayer Global Hold Separate Manager, the Product Hold Separate Business

Order

Managers, and each employee of the Hold Separate Businesses having access to Material Confidential Information to submit to the Commission a signed statement that the individual will maintain the confidentiality required by the terms and conditions of this Hold Separate. These individuals must retain and maintain all Material Confidential Information relating to the Hold Separate Businesses on a confidential basis and, except as is permitted by this Hold Separate Order, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any of Respondents' businesses other than the Hold Separate Business. These persons shall not be involved in any way in the management, production, distribution, sales, marketing, and financial operations of the competing products of Respondents.

6. No later than ten (10) days after the date this Hold Separate becomes final, Bayer shall establish written procedures, subject to the approval of the Hold Separate Trustee, covering the management, maintenance, and independence of the Hold Separate Businesses consistent with the provisions of this Hold Separate Order.
7. No later than five (5) days after the date this Hold Separate Order becomes final, Bayer shall circulate to employees of the Hold Separate Businesses a notice of this Hold Separate Order and Decision and Order, and shall circulate to its employees a notice in the form attached as Attachment A.
8. The Hold Separate Trustee, the ACS Global Hold Separate Manager, the Bayer Global Hold Separate Manager, and the Product Hold Separate Business Managers shall serve, without bond or other security, at the cost and expense of Bayer, on reasonable and

Order

customary terms commensurate with the person's experience and responsibilities.

9. Bayer shall indemnify the Hold Separate Trustee, the ACS Global Hold Separate Manager, the Bayer Global Hold Separate Manager, and the Product Hold Separate Business Managers and hold each harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Hold Separate Trustee's, the ACS Global Hold Separate Manager, the Bayer Global Hold Separate Manager, or the Product Hold Separate Business Managers' 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 liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Hold Separate Trustee, the ACS Global Hold Separate Manager, the Bayer Global Hold Separate Manager, or the Product Hold Separate Business Managers.
10. Bayer shall provide the Hold Separate Businesses with sufficient financial resources:
 - a. as are appropriate in the judgment of the ACS Global Hold Separate Manager and the Bayer Global Hold Separate Manager (in connection with the respective Hold Separate Businesses), with the concurrence of the Hold Separate Trustee, to operate the Hold Separate Businesses at least at current rates of operation to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities found in the Hold Separate Businesses most recent budget; provided that failure to achieve production or sales goals projected in the Hold

Order

Separate Businesses respective budgets shall not be deemed to be a violation of this Hold Separate;

- b. to continue, at least at their scheduled pace, any additional expenditures for the Hold Separate Businesses authorized prior to the date the Consent Agreement was signed by Respondents;
 - c. to perform all maintenance to, and replacements of, the assets of the Hold Separate Businesses; and
 - d. to maintain the viability, competitive vigor, and marketability of the Hold Separate Businesses.
 - e. Such financial resources to be provided to the Hold Separate Businesses shall include, but shall not be limited to, (i) general funds, (ii) capital, (iii) working capital, and (iv) reimbursement for any operating losses, capital losses, or other losses; provided, however, that, consistent with the purposes of the Decision and Order, the ACS Global Hold Separate Manager or the Bayer Global Hold Separate Manager, as appropriate, may reduce in scale or pace any capital or research and development project, or substitute any capital or research and development project for another of the same cost.
11. Except for the ACS Global Hold Separate Manager, the Bayer Global Hold Separate Manager, the Product Hold Separate Business Managers, employees of the Hold Separate Businesses, and support services employees involved in providing services to the Hold Separate Businesses pursuant to Paragraph II.D.4., and except to the extent provided in Paragraph II.A., Respondents shall not permit any other of its employees, officers, or directors to be involved in the operations of the Hold Separate Businesses.

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12. Respondents shall not, during the Hold Separate Period, offer employees of any of the Hold Separate Businesses positions with Respondents. The acquirer approved by the Commission pursuant to the Decision and Order shall have the option of offering employment to any employees of any of the Hold Separate Businesses. Respondents shall not interfere with the employment, by the Commission-approved acquirer, of such employees; shall not offer any incentive to such employees to decline employment with the Commission-approved acquirer or to accept other employment with the Respondents; and shall remove any impediments that may deter such employees from accepting employment with the Commission-approved acquirer including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts that would affect the ability of such employees to be employed by the Commission-approved acquirer, and the payment, or the transfer for the account of the employee, of all current and accrued bonuses, pensions and other current and accrued benefits to which such employees would otherwise have been entitled had they remained in the employment of the Respondents.
13. For a period of one (1) year commencing on the Effective Date of Divestiture, Respondents shall not employ or make offers of employment to employees of any of the Hold Separate Businesses who have accepted offers of employment with the Commission-approved acquirer unless the individual employee has been terminated by the acquirer.
14. Notwithstanding the requirements of Paragraph II.D.12., Respondents shall offer a bonus or severance to employees included in the Hold Separate Businesses that continue their employment with the

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Hold Separate Businesses until termination of the Hold Separate Period (in addition to any other bonus or severance to which the employees would otherwise be entitled).

15. Bayer shall assure that employees of the Hold Separate Businesses receive, during the Hold Separate Period, their salaries, all current and accrued bonuses, pensions and other current and accrued benefits to which those employees would otherwise have been entitled.
16. Except as required by law, and except to the extent that necessary information is exchanged in the course of consummating the Acquisition, negotiating agreements to divest assets pursuant to the Decision and Order and engaging in related due diligence; complying with this Hold Separate Order or the Decision and Order; overseeing compliance with policies and standards concerning the safety, health and environmental aspects of the operations of the Hold Separate Businesses and the integrity of the Hold Separate Businesses' financial controls; defending legal claims, investigations or enforcement actions threatened or brought against the Hold Separate Businesses; or obtaining legal advice, Respondents' employees (excluding support services employees involved in providing support to the Hold Separate Businesses pursuant to Paragraph II.D.4.) shall not receive, or have access to, or use or continue to use any Material Confidential Information, not in the public domain, of the Hold Separate Businesses. Nor shall the ACS Global Hold Separate Manager, the Bayer Global Hold Separate Manager, the Product Hold Separate Business Managers, or employees of the Hold Separate Businesses receive or have access to, or use or continue to use, any Material Confidential Information not in the public domain

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about Respondents and relating to Respondents' businesses, except such information as is related to the Hold Separate Businesses. Respondents may receive aggregate financial and operational information relating to the Hold Separate Businesses only to the extent necessary to allow Respondents to prepare consolidated financial reports, tax returns, reports required by securities laws, and personnel reports, or otherwise meet reporting obligations imposed by law. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph.

17. Respondents and the Hold Separate Businesses shall jointly implement, and at all times during the Hold Separate Period maintain in operation, a system, as approved by the Hold Separate Trustee, of access and data controls to prevent unauthorized access to or dissemination of Material Confidential Information of the Hold Separate Businesses, including, but not limited to, the opportunity by the Hold Separate Trustee, on terms and conditions agreed to with Respondents, to audit Respondents' networks and systems to verify compliance with this Hold Separate Order.

III.

IT IS FURTHER ORDERED that from the date this Hold Separate Order becomes final, Respondents shall take such actions as are necessary to maintain the viability and marketability of the Alternative Assets to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Alternative Assets, except for ordinary wear and tear, including, but not limited to, continuing in effect and maintaining product registrations, proprietary trademarks, trade names, logos, trade dress, identification signs, levels of inventory appropriate for the next

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business cycle, and information and documents relating to formulations, field testing, research, studies, and production.

IV.

IT IS FURTHER ORDERED that Bayer shall notify the Commission at least thirty (30) days prior to any proposed change in Bayer 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 this Hold Separate Order.

V.

IT IS FURTHER ORDERED that

- A. Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Hold Separate Order and the Decision and Order, no later than thirty days from the date this Hold Separate Order becomes final and every thirty days thereafter (measured from the due date of the first report) until the date this Hold Separate Order terminates.
- B. Respondents shall also include in their compliance reports a full description of the efforts being made to comply with Paragraphs II. through V. of the Decision and Order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, all reports and recommendations concerning divestiture, the date of divestiture, and a statement that the divestiture has been accomplished in the manner approved by the Commission.

Order

VI.

IT IS FURTHER ORDERED that for the purposes of determining or securing compliance with the Hold Separate Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents, Respondents shall permit any duly authorized representatives of the Commission:

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

VII.

IT IS FURTHER ORDERED that this Hold Separate shall terminate at the earlier of:

- A. three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. the day after the Effective Date of Divestiture; provided, however, that Respondents' obligations in this Hold Separate Order as to any of the individual Hold Separate Businesses and the respective Hold Separate Business Assets contained therein will terminate the day after Respondents comply with their obligation to divest the particular Hold Separate Business Assets contained within

Order

the individual Hold Separate Business consistent with their obligations in the Decision and Order.

By the Commission.

Order

ATTACHMENT A

**NOTICE OF DIVESTITURE AND REQUIREMENT FOR
CONFIDENTIALITY**

Bayer AG intends to acquire certain assets of Respondent Aventis S.A. Bayer and Aventis have entered into an Agreement Containing Consent Orders (“Consent Agreement”) with the Federal Trade Commission relating to the divestiture of certain assets and other relief.

As used herein, the term “Held Separate Business” means the businesses defined in Paragraph I.V. of the Order to Hold Separate and Maintain Assets (the “Hold Separate Order”) contained in the Consent Agreement. Under the terms of the Decision and Order contained in the Consent Agreement, Respondents must divest certain assets, which are included within the Held Separate Business, 180 days from the date the Commission accepts the Consent Agreement for public comment.

During the Hold Separate Period (which begins after the Hold Separate Order becomes final and ends after Respondents have completed the required divestitures), the Held Separate Business shall be held separate, apart, and independent of Respondents’ businesses. The Held Separate Business must be managed and maintained as a separate, ongoing business, independent of all other businesses of Respondents until Respondents have completed the required divestitures. All competitive information relating to the Held Separate Business must be retained and maintained by the persons involved in the operation of the Held Separate Business on a confidential basis, and such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any other of Respondents’ businesses, except as otherwise provided in the Hold Separate Order. These persons involved in the operation of the Held Separate Business shall not be involved in any way in the management, production, distribution, sales, marketing, or

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financial operations of Respondents relating to competing products. Similarly, persons involved in similar activities in Respondents' businesses shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any similar information to or with any other person whose employment involves the Held Separate Business, except as otherwise provided in the Hold Separate Order.

Any violation of the Consent Agreement may subject Respondents to civil penalties and other relief as provided by law.

Order

Confidential Appendix A

TRUSTEE AGREEMENT

[Redacted From Public Record Version]

Confidential Appendix B

[Redacted From Public Record Version]

Analysis

**Analysis of the Complaint and Proposed Consent Order to
Aid Public Comment****I. Introduction**

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from Bayer AG (“Bayer”) and Aventis S.A. (“Aventis”) (collectively “Respondents”). The Consent Agreement is intended to resolve anticompetitive effects stemming from Bayer’s proposed acquisition of Aventis CropScience Holding S.A. (“ACS”) from Aventis. The Consent Agreement includes a proposed Decision and Order (the “Order”), which would require Respondents to divest ACS’s acetamiprid, fipronil and tribufos businesses, including its fipronil production facility in Elbeuf, France, and Bayer’s flucarbazone business, to an acquirer or acquirers approved by the Commission and in a manner approved by the Commission. The Consent Agreement also includes an Order to Hold Separate and Maintain Assets, which requires Respondents to preserve the acetamiprid, fipronil and flucarbazone operations as a viable, competitive and ongoing operation until the divestitures are completed.

The Consent Agreement, if finally accepted by the Commission, would settle charges that Bayer’s proposed acquisition of ACS may have substantially lessened competition in the markets for New Generation Chemical Insecticide Active Ingredients; New Generation Chemical Insecticide Products (including but not limited to (i) crop specific end uses, (ii) veterinary channel companion animal flea and tick control products and (iii) non-repellent liquid termiticides); Post-Emergent Grass Herbicides for Spring Wheat; and Cool Weather Cotton Defoliants. The Commission has reason to believe that Bayer’s proposed acquisition of ACS would have violated Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, as alleged in the Commission’s proposed complaint.

Analysis

II. The Proposed Complaint

According to the Commission's proposed complaint, there are several relevant lines of commerce in which to analyze the effects of Bayer's proposed acquisition of ACS, including: 1) New Generation Chemical Insecticide Active Ingredients; 2) New Generation Chemical Insecticide Products; 3) Post-Emergent Grass Herbicides for Spring Wheat; and 4) Cool Weather Cotton Defoliants.

The proposed complaint alleges that the United States is the relevant geographic market and section of the country within which to analyze the likely effects the combination of Bayer and ACS.

New Generation Chemical Insecticide Active Ingredients

The proposed complaint alleges that relevant lines of commerce in which to analyze the effects of the proposed merger are new generation chemical insecticide active ingredients and related technologies ("New Generation Chemical Insecticide Active Ingredients") for specific end use applications, including the development, manufacture and sale of insecticides for use as non-repellent termiticides, flea control for companion animals, and for use on an array of crop applications such as corn, cotton, citrus, cole crops, grapes, vegetables, for turf and ornamental uses, and as protection for seeds and seedlings ("seed treatments"). New Generation Chemical Insecticide Active Ingredients are chemicals that are designed to kill undesirable insects but that, unlike older insecticide active ingredients, are less harmful to human health and the environment. These New Generation Chemical Insecticide Active Ingredients include imidacloprid, acetamiprid, thiamethoxam, and other chloronicotyls; and fipronil and other phenylpyrazoles.

According to the Commission's proposed complaint, New Generation Chemical Insecticide Active Ingredients are used in applications where their characteristics provide superior

Analysis

performance and where they offer advantages as compared to older chemical insecticides. These advantages include reductions in the amount of chemical insecticides used (resulting in reduced negative impacts on the environment and human health), reduced risk to humans and beneficial insects due to the use of safer chemicals in comparison to older chemical insecticides, and superior control of certain undesirable pests. The proposed complaint alleges that many of these advantages are a result of competition in research and development. The proposed complaint also alleges that New Generation Chemical Insecticide Active Ingredients are of increasing importance as the EPA removes older insecticides from the market because of harmful effects on human health and the environment.

The proposed complaint alleges that Bayer and Aventis are the firms that have been significant competitors in developing and commercializing New Generation Chemical Insecticide Active Ingredients; Syngenta Corporation is the only other firm with significant development and production of New Chemical Insecticide Active Ingredients.

According to the Commission's proposed complaint, Bayer and Aventis are distinguished by their unique product development and commercialization skills relating to New Generation Chemical Insecticide Active Ingredients. The proposed complaint alleges that these unique skills have prompted competitors, through licensing, to allow Bayer and Aventis to develop products based on molecules other firms have discovered.

The proposed complaint alleges that the acquisition would reduce actual, direct, and substantial competition, eliminate potential competition, increase barriers to entry, reduce innovation competition, increase Respondents' ability to exercise unilateral market power and substantially increase the level of concentration and enhance the probability of coordination in the relevant markets.

Analysis

A. New Generation Chemical Insecticide Products

The proposed complaint alleges that insecticide products based on New Generation Chemical Insecticide Active Ingredients (“New Generation Chemical Insecticide Products”) constitute relevant lines of commerce in which to analyze the effects of the proposed merger. New Generation Chemical Insecticide Products include, but are not limited to, (i) crop specific end uses, such as corn, cotton, citrus, cole crops, grapes, vegetables and seed treatments; (ii) veterinary channel companion animal flea control products; and (iii) non-repellent liquid termiticides.

The proposed complaint alleges that New Generation Chemical Insecticide Active Ingredients provide New Generation Chemical Insecticide Products with advantages over older chemical insecticide products. The proposed complaint alleges that New Generation Chemical Insecticide Products are displacing older insecticide products as the EPA removes or limits the use of a significant number of these older harmful products.

The proposed complaint alleges that New Generation Chemical Insecticide Products include separate relevant markets based on the specific applications in which the relevant products are used because the EPA requires a separate registration for each application in which the products will be used and suppliers price their products at different levels depending on the specific end use application. The proposed complaint further alleges that New Generation Chemical Insecticide Products may constitute application specific relevant product markets such as: termiticides, flea control for companion animals, specific crops or any application in which New Generation Chemical Insecticide Products are used.

According to the proposed complaint, Bayer and Aventis are the leading firms in the development and commercialization of New Generation Chemical Insecticide Products and own significant intellectual property estates relating to these products. The proposed complaint alleges that Syngenta is the only other

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firm with significant sales of New Generation Chemical Insecticide Products.

According to the Commission's proposed complaint, the proposed transaction would reduce the number of firms – from two to one in two relevant markets, and from three to two in other relevant markets. The proposed complaint alleges that Bayer and Aventis are the only firms currently selling New Generation Chemical Insecticide Products for non-repellent liquid termiticides. The proposed complaint also alleges that Bayer and Aventis are the only firms that have developed and sold successful New Generation Chemical Insecticide Products for use in the veterinary channel companion animal flea control application. The proposed complaint further alleges that Bayer, Aventis and Syngenta are the only firms producing and selling a range of New Generation Chemical Insecticide Products for a range of crop specific end uses.

According to the proposed complaint, the acquisition would eliminate competition (including potential competition), increase barriers to entry, reduce innovation competition among developers of relevant products, increase Respondents' ability to exercise unilateral market power and substantially increase the level of concentration and enhance the probability of coordination in the relevant markets.

B. Post-Emergent Grass Herbicides for Spring Wheat

According to the proposed complaint, herbicides are chemicals designed to kill or control grasses that interfere with crop production. The proposed complaint alleges that separate markets for herbicides may be distinguished by the type of weed controlled (grassy weed versus broadleaf weed) and the growth stage at which the herbicide is applied (pre-emergent versus post-emergent). The proposed complaint further alleges that post-emergent grass herbicides for spring wheat ("Spring Wheat Herbicides") is a relevant product market in which to analyze the effects of Bayer's proposed acquisition of ACS.

Analysis

According to the Commission's proposed complaint, Aventis is the largest supplier of Spring Wheat Herbicides, accounting for almost 70 percent of sales in 2001. The proposed complaint alleges that Aventis' leading product for post-emergent grass control for spring wheat is Puma, which contains the active ingredient fenoxaprop. The proposed complaint also alleges that in 2001, Bayer introduced Everest, which contains the active ingredient flucarbazone, and that Everest accounted for approximately 7 percent of sales in the market in that year.

The Complaint alleges that the acquisition would eliminate price competition, increase the Respondents' ability to unilaterally raise price and increase the likelihood and degree of coordinated interaction among competitors in the market for Spring Wheat Herbicides.

C. Cool Weather Cotton Defoliants

According to the Commission's proposed complaint, cotton defoliant is a chemical harvest aid designed to remove leaves from cotton plants without drying them. The proposed complaint alleges that separate markets for cotton defoliant may be distinguished by method of action (defoliation versus desiccation) and by product efficacy in varying environmental conditions (cool weather versus warm weather). The Commission's proposed complaint further alleges that Cool Weather Cotton Defoliant is necessary for economical harvesting of premium grade cotton and constitutes a relevant product market in which to analyze the effects of the proposed acquisition.

The proposed complaint alleges that Bayer and Aventis are the only two suppliers of Cool Weather Cotton Defoliant. The proposed complaint also alleges that both Bayer and Aventis offer products containing the active ingredient tribufos for cool weather cotton defoliation; Bayer offers the DEF product and Aventis offers the Folex product.

Analysis

The Commission's proposed complaint alleges that Bayer's proposed acquisition of ACS would eliminate competition between Bayer and Aventis in the market for Cool Weather Cotton Defoliants in the U.S., substantially increase the level of concentration, increase the likelihood that Respondents will unilaterally exercise market power and increase barriers to entry. The proposed complaint also alleges that the proposed acquisition would increase the likelihood that customers of Cool Weather Cotton Defoliants in the U.S. would be forced to pay higher prices.

D. Barriers to Entry Into the Relevant Product Markets

The proposed complaint alleges that entry into the relevant markets for New Generation Chemical Insecticide Active Ingredients would require years of research, development, testing, registration and commercial scale production synthesis. The proposed complaint alleges that entry into the New Generation Chemical Insecticide Products market is an expensive and lengthy process that requires access to a New Generation Chemical Insecticide Active Ingredient, product development and EPA review, among other things. The proposed complaint further alleges that entry into the Spring Wheat Herbicides market can take seven to ten years, in part because a potential entrant would spend substantial time researching active molecules, developing promising molecules, and implementing the studies required by the EPA. The proposed complaint alleges that barriers to entry into the Cool Weather Cotton Defoliant market include distribution barriers, existing purchase and supply contracts and EPA regulations.

III. Terms of the Proposed Order

The proposed Order is designed to remedy the alleged anti-competitive effects of the proposed acquisition by requiring the divestiture of assets relating to four businesses: 1) acetamiprid; 2) fipronil; 3) flucarbazone; and 4) Folex (tribufos). The proposed Order requires Respondents to divest the acetamiprid, fipronil,

Analysis

and flucarbazone businesses to acquirer(s) approved by the Commission, at no minimum price, not later than 180 days from the date that the Commission accepts the proposed Order for public comment. If this divestiture does not occur by that date, the proposed Order allows the Commission to appoint a trustee to sell the divestiture assets or additional assets, to acquirer(s) approved by the Commission.

A. Acetamiprid

Section II. of the proposed Order requires Respondents to divest ACS's worldwide assets relating to the acetamiprid business. However, the proposed Order does not require Bayer to divest the acetamiprid business in Mexico, South America, Central America or Africa in the event that Nippon Soda, the acetamiprid licensor, does not consent to the assignment of the acetamiprid agreements relating exclusively to these regions.

Paragraph II.E. of the proposed Order permits the Commission-approved acquirer, at its discretion, to license back to Bayer any intellectual property that is not related primarily to the acetamiprid business. This provision ensures that the Order will not prevent Bayer from obtaining exclusive rights to develop, make, sell or import any new insecticide products that are in the same chemical family as acetamiprid. Thus, both the acquirer and Bayer will have the right to invent, patent, and develop new compounds in the chemical family to which acetamiprid belongs.

The proposed Order also provides that if Bayer fails to divest its assets relating to the acetamiprid business within the time and manner described above, the Commission may appoint a divestiture trustee to divest those assets in a manner acceptable to the Commission, or may require divestiture of Bayer's assets relating to the thiacloprid business at no minimum price. The proposed Order provides that while Bayer may obtain a cross-license to any intellectual property included in the thiacloprid business (provided that Bayer's license does not impair the viability of the thiacloprid business), this provision creates an

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additional thiacloprid supplier to compete directly with Bayer. The proposed Order provides that if Bayer obtains this cross-license, Bayer can obtain a supply agreement of thiacloprid from the acquirer. Bayer may also obtain a supply of clothianidin from the acquirer because this chemical is produced in the same plant that produces thiacloprid. The Commission must approve all such supply agreements, licenses, and divestitures.

B. Fipronil

Section III. of the proposed Order requires Respondents to divest all assets relating to ACS's fipronil business, including intellectual property, ACS's production facility in Elbeuf, France, and other assets.

Paragraph III.D.2. of the proposed Order allows Bayer to license back any intellectual property included in the fipronil assets for non-agricultural use, as described in Definition RR. This license back increases competition in the non-repellant liquid termiticide market as it enables both Bayer and the fipronil acquirer to bring products containing fipronil to the market.

Paragraph III.E. of the proposed Order permits Bayer to enter into a supply agreement with the Commission-approved acquirer. The supply agreement allows the acquirer to supply fipronil to Bayer for non-agricultural use for a term of two years, which may be extended subject to Commission approval. This supply arrangement may be necessary because of current supply contracts that obligate ACS to supply fipronil to third parties. The supply agreement may also allow the acquirer to supply intermediates to Bayer until the expiration of patents covering such intermediates. This may be necessary because Bayer may require the use of those intermediates in the production of its own chemicals.

C. Flucarbazon

The proposed Order provides that Respondents will divest the flucarbazon assets, including tangible and intangible assets

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relating to the business of developing, manufacturing and selling all products containing the active ingredient flucarbazone worldwide. The divested assets exclude the manufacturing facility in Kansas City where flucarbazone is manufactured. This facility is also used to manufacture other Bayer herbicides that are not sold in the Spring Wheat Herbicide market.

So long as Bayer divests the Everest assets to a Commission-approved acquirer by the deadline described above, the proposed Order permits Bayer to exclusively retain its intellectual property rights that relate primarily to its Olympus (propoxycarbazone) business. Under the license grant in Paragraph IV.C. of the proposed Order, both the Commission-approved acquirer and Bayer will have the right to invent, patent, and develop new compounds in the chemical family to which Everest (flucarbazone) and Olympus (propoxycarbazone) belong.

In order to guarantee that Bayer will not block the Commission-approved acquirer from operating the Everest (flucarbazone) business, Paragraph IV.C.2. of the proposed Order prohibits Bayer from suing the acquirer for patent infringement relating to the acquirer's actions in developing, making, selling or importing any product containing flucarbazone, except for those products containing propoxycarbazone (i.e. Bayer's Olympus business).

Paragraph IV.E. of the proposed Order permits Bayer to supply the Commission-approved acquirer with flucarbazone products for an interim period of 30 months from the date Bayer divests the Everest (flucarbazone) business. This supply arrangement may be necessary because the acquirer is unlikely to have sufficient time to set-up an independent capability for manufacturing flucarbazone and formulating flucarbazone-based products in time for the 2003 spring wheat crop. The proposed Order sets up parameters for the supply relationship between Bayer and the acquirer, including requiring Bayer to supply the acquirer with sufficient quantities of flucarbazone in a timely manner and requiring Bayer to charge a reasonable price that is based on its

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direct costs of providing the acquirer with flucarbazone and other related services.

Finally, in the event Bayer does not divest its Everest (flucarbazone) business by the deadline described above, Sections X. and XII. of the proposed Order require Bayer to additionally divest its Olympus (propoxycarbazone) business, and the plant in Kansas City where it manufactures flucarbazone and propoxycarbazone, to a Commission-approved acquirer that may not license the business back to Bayer. Additionally, Paragraph XII.A.2. of the proposed order prohibits Bayer from suing the acquirer for patent infringement relating to the acquirer's actions in developing, making, selling or importing any product containing propoxycarbazone.

D. Folex

The provisions in Section V. of the proposed Order requires Respondent to divest assets relating to Folex, which contains the active ingredient tribufos, and to assign ACS's rights under the tribufos supply agreement to Amvac Corporation ("Amvac") no later than twenty days from the date the Commission accepts the Consent for public comment. Amvac is a manufacturer that purchases proprietary molecules from discovery firms and commercializes these molecules. Under the supply agreement, Amvac may purchase tribufos from Bayer. Amvac also has the capability to manufacture its own tribufos.

If the Commission, at the time that it makes the Order final, notifies Bayer that it does not approve of the proposed divestiture to Amvac, or of the manner of the divestiture, the proposed Order provides that Bayer would terminate or rescind the sale to Amvac and divest the Folex business within 180 days, at no minimum price, to a Commission-approved acquirer.

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E. Other Elements of the Order

According to the proposed Order, Bayer shall provide technical assistance to the acquirer(s) of the assets relating to the acetamiprid, fipronil, flucarbazon and Folex businesses upon their request. Because Respondents' employees have likely developed expertise in the manufacture of these chemicals and other operations of the businesses, this technical assistance provision ensures that the acquirer(s) can obtain the capability to operate the businesses as efficiently as Respondents.

Section VI. of the proposed Order contains various provisions which aid the Commission-approved acquirers in hiring Respondents' employees with experience in the divested businesses. Respondents must provide the acquirers with the names of these employees and access to personnel files and other documents relating to the employees' performance. Moreover, for a subset of employees considered to have a "key" role in the divested businesses, Respondents must pay such employees a bonus if they accept an employment offer from the acquirers within the first thirty days after the relevant divestiture.

The proposed Order also provides for the Commission to appoint a monitor trustee to oversee Bayer's compliance with the terms of the proposed Order and the divestiture agreements that Bayer enters pursuant to the proposed Order.

The proposed Order requires Respondents to provide the Commission, within sixty days from the date the Order becomes final, a verified written report setting forth in detail the manner and form in which the Respondents intend to comply, is complying, and has complied with the provisions relating to the proposed Order and the Order to Hold Separate and Maintain Assets. The proposed Order further requires Respondent to provide the Commission with a report of compliance with the Order every sixty days after the date when the Order becomes final until the divestitures have been completed.

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According to the proposed Order, Bayer shall provide the Commission with advance written notice prior to acquiring any interest of or entering into a joint venture with Merial unless such transaction requires notification pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a. Merial is a joint venture between Aventis S.A. and Merck. Prior to the proposed transaction, ACS supplied fipronil to Merial for use in its Frontline flea and tick control product. ACS also provided a crop protection pipeline of new insecticide molecules that may have application in animal health. Following the proposed transaction, Merial may wish to reform the existing research and development agreement, or form a research and development technology venture with Bayer. Prior notification will allow the Commission to investigate whether such a partnership would have appropriate safeguards to obtain the benefits of joint development without negatively impacting competition in downstream animal health products.

F. The Order to Hold Separate and Maintain Assets

The proposed Order to Hold Separate and Maintain Assets that is also included in the Consent Agreement requires that Respondent hold separate and maintain the viability of the acetamiprid, fipronil, and flucarbazone businesses.

IV. Opportunity for Public Comment

The proposed Order has been placed on the public record for thirty days to receive comments from interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will review the Consent Agreement and comments received and will decide whether to withdraw its agreement or make final the Consent Agreement's proposed Order and Order to Hold Separate and Maintain Assets.

The purpose of this analysis is to facilitate public comment on the proposed Order. This analysis is not intend to constitute an official interpretation of the Consent Agreement, the proposed

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Order, or the Order to Hold Separate and Maintain Asset or in any way to modify the terms of the Consent Agreement, the proposed Order, or the Order to Hold Separate and Maintain Assets.

Statement

**STATEMENT OF COMMISSIONER MOZELLE W.
THOMPSON****In the Matter of Bayer/Aventis AG, File No. 011 0199**

Today, I have joined in the Commission's vote to accept for public comment a proposed consent agreement and order resolving competitive issues stemming from Bayer AG's proposed acquisition of Aventis CropScience Holding S.A. Although I believe that in this matter the proposed consent agreement and order adequately address the Commission's concerns, I write separately to underscore that consent order divestiture provisions for which a buyer has not yet been identified will continue to be closely scrutinized in order to ensure that the asset package is sufficient and that a qualified buyer will likely be found.

The value of having "up front" buyers is explained in the Commission's 1999 Divestiture Study,¹ which reviews Commission divestiture orders issued between 1990 and 1994. This value has only increased as we review more complex

¹ *A Study of the Commission's Divestiture Process*, Staff of the Bureau of Competition (1999), available at <http://www.ftc.gov/os/1999/9908/divestiture.pdf>. "The 'up front' divestiture not only reduces the opportunity for interim competitive harm by expediting the divestiture process, but it assures at the outset that there will be an acceptable buyer for the to-be-divested assets." *Id.* at 39.

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transactions in interconnected markets. In cases where there are questions about asset sufficiency or buyer qualifications, or where the Commission determines that there are other risks to the proposed divestiture, I believe that presentation of an up front buyer will be required.²

² Indeed, it is the Commission's prerogative to require an up front buyer in any merger warranting divestiture(s), and it will do so when it has less than complete confidence that all risks to the efficacy of the proposed relief have been minimized. For more information regarding "up front" buyers, please see "Frequently Asked Questions About Merger Consent Order Provisions," available at <http://www.ftc.gov/bc/mergerfaq.htm>.

Complaint

IN THE MATTER OF

BIOVAIL CORPORATION, ET AL.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-4057; File No. 0110132*
Complaint, August 15, 2002--Decision, August 15, 2002

This consent order addresses practices used by Respondents Biovail Corporation and Elan Corporation – respectively Canadian and Irish manufacturers of branded and generic pharmaceutical products – which were the first firms to file Abbreviated New Drug Applications (“ANDAs”) to market generic versions (in different dosage levels) of Adalat CC, a once-a-day anti-hypertension medication. The order, among other things, requires the respondents to terminate an agreement executed in 1999 – involving all four of the respondents’ generic Adalat products – under which Elan appointed Biovail as the exclusive distributor of Elan’s two generic Adalat products. The order also prohibits the respondents from entering into certain price, output, or distribution agreements with other generic drug companies concerning any generic drug for which both parties to the agreement have filed for FDA approval of an ANDA referencing the same pioneer drug product. In addition, the order prohibits Elan from distributing its generic Adalat products – with certain exceptions – through Teva Pharmaceuticals, Inc., which distributes some of Biovail’s products under a long-standing commercial relationship. The order also requires the respondents to use best efforts to market their respective 30 mg and 60 mg versions of generic Adalat products through separate distributors. In addition, the order requires the respondents to give the Commission notice of two prescribed types of agreements with other pharmaceutical manufacturers.

Participants

For the Commission: *Randall David Marks, Garry R. Gibbs, Ellen Connelly, Dara J. Diomande, Emily Jones, Timothy Abbott, Michael Kades, David R. Pender, Jeffrey W. Brennan, Rendell A. Davis, Jr., Roberta S. Baruch, and David J. Balan.*

For the Respondents: *Steven Newborn, Clifford Chance Rogers & Wells LLP, Ken Cancellara, Biovail, Charles Gilman, Larry Sorkin and Kristen Emigholz, Cahill, Gordon & Reindel, Marc Schildkraut, Howrey Simon Arnold & White LLP, and Libby Murphy, Elan.*