

Complaint

IN THE MATTER OF

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

*Docket No. C-4253, File No. 081 0265
Complaint, April 1, 2009 – Decision, May 14, 2009*

This consent order addresses the \$5.1 billion acquisition by BASF of the outstanding stock of Ciba Holding, Inc. The complaint alleges that the acquisition would lessen competition in the world markets for the research, development, manufacture and sale of bismuth vanadate and indanthrone blue pigments. The complaint further alleges that these markets are highly concentrated and that that entry by another competitor is unlikely. The order requires BASF to either: (1) divest the Ciba bismuth vanadate production facility, (2) lease the production facility to the acquirer, or (3) enter into a tolling agreement that provides sufficient time for the acquirer to begin production at its own facilities and to qualify that production with customers. The order also provides ancillary relief and allows the Commission to appoint an interim monitor and a divestiture trustee as needed.

Participants

For the *Commission*: Wallace W. Easterling, Victoria E. Luxardo, Eric D. Rohlck, and Steven L. Wilensky.

For the *Respondent*: Kenneth S. Prince, Shearman & Sterling LLP; and Robert Schlossberg, Freshfields Bruckhaus Deringer US LLP.

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 respondent BASF SE (“BASF”), a corporation, and Ciba Holding Inc. (“Ciba”), a corporation, both subject to the jurisdiction of the Commission, have agreed to an

Complaint

acquisition by BASF of Ciba 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 (“FTC Act”), as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent BASF is a corporation organized and existing under the laws of the Federal Republic of Germany, with its principal place of business at D-67056, Ludwigshafen, Germany. BASF’s principal subsidiary in the United States, BASF Corporation, is located at 100 Campus Drive, Florham Park, New Jersey 07932.

2. BASF is a global company engaged in a wide variety of chemical businesses, including the research, development, manufacture, and sale of pigments.

II. JURISDICTION

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

4. Ciba is a corporation organized and existing under the laws of the Swiss Confederation, with its principal place of business at Klybeckstrasse 141, 4057 Basel, Switzerland. Ciba’s principal subsidiary in the United States, Ciba Corporation, is located at 540 White Plains Road, Tarrytown, New York 10591-9005.

5. Ciba is, and at all times relevant herein has been, engaged in commerce as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is

Complaint

in or affects commerce as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. THE PROPOSED TRANSACTION

6. Pursuant to an Agreement and Plan of Merger (the “Merger Agreement”) dated September 15, 2008, BASF proposes to purchase all of the outstanding shares of Ciba in a transaction valued at approximately \$5.1 billion. BASF and Ciba are two of the most significant firms involved in the research, development, manufacture, and sale of high performance pigments.

IV. THE RELEVANT PRODUCT MARKETS

7. For the purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the acquisition are the research, development, manufacture and sale of the following two pigments: (a) bismuth vanadate, and (b) indanthrone blue. There are no practical substitutes for the relevant products. Due to their unique characteristics, properties and cost-effectiveness, customers would not switch away from the relevant products in response to a small but significant and non-transitory increase in their price. In addition, there may be additional narrower product markets based on specific end-use applications.

8. Bismuth vanadate pigment is a high performance pigment that imparts a brilliant yellow color with a green tint. It is particularly favored for high heat applications because of its excellent performance in high temperature environments. Worldwide sales of bismuth vanadate in 2008 were approximately \$111 million.

9. Indanthrone blue is a high performance pigment that imparts a unique blue color with a tinge of red. Like bismuth vanadate, indanthrone blue is used primarily in automotive coating applications. Because of its unique properties, customers would not shift to alternative products in response to a small but significant and

Complaint

non-transitory increase in the price of indanthrone blue. Worldwide sales of indanthrone blue in 2008 were approximately \$29 million.

V. THE RELEVANT GEOGRAPHIC MARKET

10. The relevant geographic market is worldwide. Because shipping costs are low relative to the overall value of the product, producers of high performance pigments are able to ship product worldwide from one plant. For example, BASF produces the relevant products in Germany, while Ciba produces them in France and the Netherlands. There are also no differences in technical standards in Europe, North America, South America, Africa, the Middle East, and Asia for these products.

VI. CONCENTRATION IN THE RELEVANT MARKETS

11. Each of the relevant markets is highly concentrated. In the market for bismuth vanadate, the proposed merger would reduce the number of significant competitors from four to three, with BASF having a 60 percent post-merger market share based on sales. The market for indanthrone blue is similarly highly concentrated with the proposed merger resulting in a reduction in the number of significant competitors from three to two, with BASF having 55 percent post-merger market share based on sales. These market shares confirm that many customers strongly prefer BASF and Ciba to the other producers of these products.

VII. CONDITIONS OF ENTRY

12. Entry into either relevant market would not be timely, likely, and sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the acquisition. A potential entrant would first need to develop the technological capability to produce the relevant pigment which would be difficult and time-consuming. Once an entrant has developed the product and has the capability to manufacture it, an entrant must then undergo a qualification process at each customer which can take anywhere from two to five years. Additional time is added to the start up

Complaint

process for producers of indanthrone blue because producers must qualify raw materials to make certain it is adequate to make a product that will meet customer specifications. Entry is also unlikely because the costs to enter are high, the available market opportunities are limited, and there are significant sunk costs that would be incurred in any attempt to enter. Expansion by fringe competitors would also be costly and is unlikely to occur in a timely fashion or at all.

VIII. EFFECTS OF THE ACQUISITION

13. The effects of the acquisition, if consummated, may be to substantially lessen competition and 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 acquisition would:

- a. eliminate actual, direct, and substantial competition between BASF and Ciba in the relevant markets;
- b. increase the likelihood that the combined firm will exercise market power unilaterally in the relevant markets;
- c. further consolidate an already concentrated market, thereby substantially increasing the likelihood of coordinated interaction in the relevant markets;
- d. reduce existing incentives to improve service or product quality or to pursue further innovation in the relevant market; and
- e. increase the likelihood that customers of the relevant products would be forced to pay higher prices.

IX. VIOLATIONS CHARGED

14. The Merger Agreement described in Paragraph 6 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

Order to Maintain Assets

15. The transaction described in Paragraph 6, 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.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this first day of April, 2009, issues its Complaint against said Respondent.

By the Commission.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition of Ciba Holding Inc. by BASF SE (“Respondent BASF”), and Respondent BASF having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent BASF with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent BASF, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondent BASF of all the jurisdictional facts set forth in the aforesaid draft Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent BASF that the law has been violated as alleged in such Complaint, or that the facts as alleged in

Order to Maintain Assets

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 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 Maintain Assets:

1. Respondent BASF SE is a 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 D-67056, Ludwigshafen, Germany.

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

ORDER**I.**

IT IS ORDERED that, as used in this Order to Maintain Assets, the following definitions and the definitions used in the Consent Agreement and the proposed Decision and Order (and when made final, the Decision and Order), which are incorporated herein by reference and made a part hereof, shall apply:

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

Order to Maintain Assets

- B. “Ciba” means Ciba Holding Inc., a corporation organized, existing and doing business under and by virtue of the laws of Switzerland, with its office and principal place of business located at Klybeckstrasse 141, 4057 Basel, Switzerland.
- C. “Commission” means the Federal Trade Commission.
- D. “BV Business” means the Ciba BV Pigments, the Maastricht Plant BV Leased Area, the Maastricht Plant BV Operational Areas, Ciba BV Business (including Ciba BV Inventory, Ciba BV Information, Ciba BV Intellectual Property, Ciba BV Packaging and Labeling Assets), Ciba BV Contracts, and the manufacture, sale, and distribution of the Ciba BV Pigments.
- E. “Decision and Order” means the:
 - 1. Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance of a final Decision and Order by the Commission; and
 - 2. Final Decision and Order issued by the Commission following the issuance and service of a final Decision and Order by the Commission.
- F. “IB Business” means the Ciba IB Pigments, Huningue Plant, Ciba IB Business (including Ciba IB Inventory, Ciba IB Intellectual Property, Ciba IB Information, and Ciba IB Packaging and Labeling Assets), Ciba IB Contracts, BASF Blue RS-OPT Intellectual Property, Ciba IB Intermediate Supply Contract, and the manufacture, sale, and distribution of the Ciba IB Pigments.
- G. “Monitor” means any monitor appointed pursuant to Paragraph IV of this Order to Maintain Assets or Paragraph V of the Decision and Order.

Order to Maintain Assets

- H. "Orders" means the Decision and Order and this Order to Maintain Assets.

II.

IT IS FURTHER ORDERED that from the Acquisition Date:

- A. Until the IB Effective Date, Respondent BASF shall take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of the IB Business to minimize any risk of loss of competitive potential for the IB Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the IB Business, except for ordinary wear and tear. Respondent BASF shall not sell, transfer, encumber or otherwise impair the IB Business (other than in the manner prescribed in the Decision and Order) nor take any action that lessens the full economic viability, marketability or competitiveness of the IB Business.
- B. Respondent BASF shall retain all of Respondent BASF's rights, title, and interest in the IB Business, until the IB Effective Date.
- C. Until the IB Effective Date, Respondent BASF shall maintain the operations of the IB Business in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets, as necessary) and/or as may be necessary to preserve the marketability, viability, and competitiveness of the IB Business and shall use its best efforts to preserve the existing relationships with the following: suppliers, vendors, distributors, customers, governmental agencies, employees, and others having business relations with the IB Business. Respondent BASF's responsibilities shall include, but are not limited to, the following:

Order to Maintain Assets

1. Respondent BASF shall provide the IB Business with sufficient working capital to operate at least at current rates of operation, to meet all capital calls with respect to such business and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities for the IB Business;
2. Respondent BASF shall continue, at least at their scheduled pace, any additional expenditures for the IB Business authorized prior to the date the Consent Agreement was signed by Respondent BASF including, but not limited to, all research, Development, manufacture, distribution, marketing and sales expenditures;
3. Respondent BASF shall provide such resources as may be necessary to respond to competition against the IB Business and/or to prevent any diminution in sales of the IB Business after the Acquisition Date and prior to the IB Effective Date;
4. Respondent BASF shall provide such resources as may be necessary to maintain the competitive strength and positioning of the IB Business;
5. Respondent BASF shall make available for use by the IB Business funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, the assets related to such business;
6. Respondent BASF shall provide the IB Business with such funds as are necessary to maintain the full economic viability, marketability and competitiveness of the IB Business; and
7. Respondent BASF shall provide such support services to the IB Business as were being provided to the IB

Order to Maintain Assets

Business by Ciba as of the date the Consent Agreement was signed by Respondent BASF.

- D. Until the IB Effective Date, Respondent BASF shall maintain a work force at the equivalent or larger size, and with equivalent or better training and expertise, to what has been associated with the IB Business as of the Acquisition Date.
- E. Until the IB Effective Date, Respondent BASF shall provide all the Designated IB Employees with reasonable financial incentives to continue in their positions and to research, Develop, and manufacture the Ciba IB Pigments consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of the Ciba IB Pigments pending divestiture. Such incentives shall include a continuation of all employee benefits offered by Respondent BASF, and previously by Ciba, until the IB Effective Date has occurred, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by law), and additional incentives as may be necessary to prevent any diminution of the relevant IB Business' competitiveness.
- F. Respondent BASF shall not interfere with the hiring or employing of the Designated IB Employees as described in Paragraph VII of the proposed Decision and Order, and shall remove any impediments within the control of Respondent BASF that may deter these employees from accepting employment with the IB Acquirer including, but not limited to, any noncompete provisions of employment or other contracts with Respondent BASF that would affect the ability or incentive of those individuals to be employed by the IB Acquirer. In addition, Respondent BASF shall not make any counteroffer to a Designated IB Employee who receives a written offer of employment from the IB Acquirer;

Order to Maintain Assets

Provided, however, subject to the conditions of continued employment prescribed in this Order to Maintain Assets, this Paragraph II.F. shall not prohibit Respondent BASF from continuing to employ any Designated IB Employee under the terms of such employee's employment with Respondent BASF prior to the date of the written offer of employment from the IB Acquirer to such employee.

G. Pending the IB Effective Date:

1. Respondent BASF shall not use, directly or indirectly, any Confidential Business Information Related To the research, Development, manufacturing, marketing, or sale of the Ciba IB Pigments other than as necessary to comply with the following:
 - a. the requirements of the Orders;
 - b. applicable law;
2. Respondent BASF shall not disclose or convey any such Confidential Business Information, directly or indirectly, to any person except the IB Acquirer or other persons specifically authorized by the IB Acquirer to receive such information;
3. Respondent BASF shall not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information related to the marketing or sales of the Ciba IB Pigments to Respondent BASF's employees associated with Respondent BASF's IB Pigments; and
4. Respondent BASF shall institute procedures and requirements to ensure that:
 - a. Respondent BASF employees with access to Confidential Information Relating To the Ciba IB

Order to Maintain Assets

Pigments do not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information in contravention of this Order to Maintain Assets; and

- b. Respondent BASF employees associated with Respondent BASF's IB Pigments do not solicit, access or use any Confidential Business Information that they are prohibited under this Order to Maintain Assets from receiving for any reason or purpose.
- H. Respondent BASF shall require any Persons with access to Confidential Business Information Relating To the Ciba IB Pigments to enter into agreements, within ten (10) days after the date this Order to Maintain Assets becomes final, not to disclose any Confidential Business Information Relating To the Ciba IB Pigments to Respondent BASF or to any third party except as otherwise permitted by this Order to Maintain Assets. Copies of such agreements shall be retained by Respondent BASF, and provided to the Commission and the Monitor.
- I. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the IB Business until the IB Effective Date, to minimize any risk of loss of competitive potential for the IB Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the IB Business, except for ordinary wear and tear.

Order to Maintain Assets

III.

IT IS FURTHER ORDERED that from the Acquisition Date:

- A. Until the BV Effective Date, Respondent BASF shall take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of the BV Business to minimize any risk of loss of competitive potential for the BV Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the BV Business, except for ordinary wear and tear. Respondent BASF shall not sell, transfer, encumber or otherwise impair the BV Business (other than in the manner prescribed in the Decision and Order) nor take any action that lessens the full economic viability, marketability or competitiveness of the BV Business.
- B. Respondent BASF shall retain all of Respondent BASF's rights, title, and interest in the BV Business, until the BV Effective Date.
- C. Until the BV Effective Date, Respondent BASF shall maintain the operations of the BV Business in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets, as necessary) and/or as may be necessary to preserve the marketability, viability, and competitiveness of the BV Business and shall use its best efforts to preserve the existing relationships with the following: suppliers, vendors, distributors, customers, governmental agencies, employees, and others having business relations with the BV Business. Respondent BASF's responsibilities shall include, but are not limited to, the following:
 - 1. Respondent BASF shall provide the BV Business with sufficient working capital to operate at least at current rates of operation, to meet all capital calls with respect to such business and to carry on, at least at their scheduled

Order to Maintain Assets

pace, all capital projects, business plans and promotional activities for the BV Business;

2. Respondent BASF shall continue, at least at their scheduled pace, any additional expenditures for the BV Business authorized prior to the date the Consent Agreement was signed by Respondent BASF including, but not limited to, all research, Development, manufacture, distribution, marketing and sales expenditures;
3. Respondent BASF shall provide such resources as may be necessary to respond to competition against the BV Business and/or to prevent any diminution in sales of the BV Business after the Acquisition Date and prior to the BV Effective Date;
4. Respondent BASF shall provide such resources as may be necessary to maintain the competitive strength and positioning of the BV Business;
5. Respondent BASF shall make available for use by the BV Business funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, the assets related to such business;
6. Respondent BASF shall provide the BV Business with such funds as are necessary to maintain the full economic viability, marketability and competitiveness of the BV Business; and
7. Respondent BASF shall provide such support services to the BV Business as were being provided to the BV Business by Ciba as of the date the Consent Agreement was signed by Respondent BASF.

Order to Maintain Assets

- D. Until the BV Effective Date, Respondent BASF shall maintain a work force at the equivalent or larger size, and with equivalent or better training and expertise to what has been associated with the BV Business as of the Acquisition Date.
- E. Until the BV Effective Date, Respondent BASF shall provide all the Designated BV Employees with reasonable financial incentives to continue in their positions and to research, Develop, and manufacture the Ciba BV Pigments consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of the Ciba BV Pigments pending divestiture. Such incentives shall include a continuation of all employee benefits offered by Respondent BASF, and previously by Ciba, until the BV Effective Date has occurred, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by law), and additional incentives as may be necessary to prevent any diminution of the relevant BV Business' competitiveness.
- F. Respondent BASF shall not interfere with the hiring or employing of the Designated BV Employees as described in Paragraph VII of the proposed Decision and Order, and shall remove any impediments within the control of Respondent BASF that may deter these employees from accepting employment with the BV Acquirer including, but not limited to, any noncompete provisions of employment or other contracts with Respondent BASF that would affect the ability or incentive of those individuals to be employed by the BV Acquirer. In addition, Respondent BASF shall not make any counteroffer to a Designated BV Employee who receives a written offer of employment from the BV Acquirer;

Provided, however, subject to the conditions of continued employment prescribed in this Order to Maintain Assets, this Paragraph III.F. shall not prohibit Respondent BASF from

Order to Maintain Assets

continuing to employ any Designated BV Employee under the terms of such employee's employment with Respondent BASF prior to the date of the written offer of employment from the BV Acquirer to such employee.

G. Pending the BV Effective Date:

1. Respondent BASF shall not use, directly or indirectly, any Confidential Business Information Related To the research, Development, manufacturing, marketing, or sale of the Ciba BV Pigments other than as necessary to comply with the following:
 - a. the requirements of the Orders;
 - b. applicable law;
2. Respondent BASF shall not disclose or convey any such Confidential Business Information, directly or indirectly, to any person except the BV Acquirer or other persons specifically authorized by the BV Acquirer to receive such information;
3. Respondent BASF shall not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information related to the marketing or sales of the Ciba BV Pigments to Respondent BASF's employees associated with Respondent BASF's BV Pigments; and
4. Respondent BASF shall institute procedures and requirements to ensure that:
 - a. Respondent BASF employees with access to Confidential Information Relating To the Ciba BV Pigments do not provide, disclose or otherwise make available, directly or indirectly, any Confidential

Order to Maintain Assets

Business Information in contravention of this Order to Maintain Assets; and

- b. Respondent BASF employees associated with Respondent BASF's BV Pigments do not solicit, access or use any Confidential Business Information that they are prohibited under this Order to Maintain Assets from receiving for any reason or purpose.
- H. Respondent BASF shall require any Persons with access to Confidential Business Information Relating To the Ciba BV Pigments to enter into agreements, within ten (10) days after the date this Order to Maintain Assets becomes final, not to disclose any Confidential Business Information Relating To the Ciba BV Pigments to Respondent BASF or to any third party except as otherwise permitted by this Order to Maintain Assets. Copies of such agreements shall be retained by Respondent BASF, and provided to the Commission, and the Monitor.
- I. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the BV Business until the BV Effective Date, to minimize any risk of loss of competitive potential for the BV Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the BV Business, except for ordinary wear and tear.

IV.

IT IS FURTHER ORDERED that:

- A. Mr. Edward Gold, of PriceWaterhouseCoopers, United States (with the direct assistance of Messrs. Alfred Höhn and Wolfgang Nothhelfer, PriceWaterhouseCoopers, Germany), shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondent BASF and attached as Confidential Exhibit A ("Monitor Agreement"). The

Order to Maintain Assets

Monitor is appointed to assure that Respondent BASF expeditiously complies with all of its obligations and performs all of its responsibilities as required by the Orders.

- B. The Monitor Agreement shall require that, no later than one (1) day after the Acquisition Date, Respondent BASF transfers to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities, pursuant to the Orders, and consistent with the purposes of the Orders.
- C. No later than one (1) day after the Acquisition Date, Respondent BASF shall, pursuant to the Monitor Agreement, transfer to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities, pursuant to the Orders, and consistent with the purposes of the Orders.
- D. Respondent BASF 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 Respondent BASF's compliance with the terms of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission including, but not limited to:
 - a. Assuring that Respondent BASF expeditiously complies with all of its obligations and performs all of its responsibilities as required by the Orders; and
 - b. Monitoring any agreements between Respondent BASF and either the IB Acquirer or the BV Acquirer.

Order to Maintain Assets

2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
3. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondent BASF's personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, Related To Respondent BASF's compliance with its obligations under the Orders. Respondent BASF shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondent BASF's compliance with the Orders.
4. The Monitor shall serve, without bond or other security, at the expense of Respondent BASF 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 BASF, 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 services rendered, subject to the approval of the Commission.
5. Respondent BASF 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 reasonable expenses incurred in connection with the preparations 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

Order to Maintain Assets

from gross negligence, malfeasance, willful or wanton acts, or bad faith by the Monitor.

6. The Monitor Agreement shall provide that within one (1) month from the date the Monitor is appointed pursuant to this paragraph, and every sixty (60) days thereafter, the Monitor shall report in writing to the Commission concerning performance by Respondent BASF of its obligations under the Orders.
 7. Respondent BASF may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; provided, however, such agreement shall not restrict the Monitor from providing any information to the Commission.
- E. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Monitor's duties.
- F. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor:
1. The Commission shall select the substitute Monitor, subject to the consent of Respondent BASF, which consent shall not be unreasonably withheld. If Respondent BASF has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to Respondent BASF of the identity of any proposed Monitor, Respondent BASF shall be deemed to have consented to the selection of the proposed Monitor.

Order to Maintain Assets

2. Not later than ten (10) days after appointment of the substitute Monitor, Respondent BASF shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondent BASF's compliance with the relevant terms of the Orders in a manner consistent with the purposes of the Orders.
- G. 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 the Orders.
- H. A Monitor appointed pursuant to this Order may be the same person appointed as the Monitor pursuant to the Decision and Order and the Divestiture Trustee pursuant to the relevant provisions of the Decision and Order.

V.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order to Maintain Assets becomes final, and every sixty (60) days thereafter until Respondent BASF has fully complied with its obligations under Paragraphs II.A, II.B, II.C., III.A., III.B. (if Respondent BASF divests pursuant to III.A.2.a.), and VII.A. of the related Decision and Order in this matter, Respondent BASF shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order to Maintain Assets and the related Decision and Order; *provided, however*, that, after the Decision and Order in this matter becomes final, the reports due under this Order to Maintain Assets shall be consolidated with, and submitted to the Commission at the same time as, the reports required to be submitted by Respondent BASF pursuant to Paragraph IX of the Decision and Order.

VI.

Order to Maintain Assets

IT IS FURTHER ORDERED that Respondent BASF shall notify the Commission at least thirty (30) days prior to any proposed:

- A. dissolution of the Respondent BASF;
- B. acquisition, merger or consolidation of Respondent BASF;
or
- C. other change in the Respondent BASF, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order to Maintain Assets.

VII.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to Respondent BASF, Respondent BASF shall, without restraint or interference, permit any duly authorized representative(s) of the Commission:

- A. access, during business office hours of Respondent BASF 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 Respondent BASF related to compliance with this Order to Maintain Assets, which copying services shall be provided by Respondent BASF at its expense; and
- B. to interview officers, directors, or employees of Respondent BASF, who may have counsel present, regarding such matters.

Order to Maintain Assets

VIII.

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate on the earlier of:

- A. Three (3) 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 latter of:
 - 1. the day after the IB Effective Date;
 - 2. the day after the BV Effective Date;
 - 3. the day the related Decision and Order becomes final; or
- C. The day after the Commission otherwise directs that this Order to Maintain Assets is terminated.

By the Commission.

CONFIDENTIAL EXHIBIT A**MONITOR AGREEMENT**

**[Redacted From the Public Record, But Incorporated By
Reference]**

Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition of Ciba Holding Inc. by BASF SE (“Respondent BASF”), and Respondent BASF having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent BASF with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent BASF has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and an Order to 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, 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”):

1. Respondent BASF SE is a corporation organized, existing and doing business under and by virtue of the laws of Germany, with

Decision and Order

its office and principal place of business located at D-67056, Ludwigshafen, Germany.

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

ORDER**I.**

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

- A. “BASF” means BASF SE, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by BASF SE, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Ciba” means Ciba Holding Inc., a corporation organized, existing and doing business under and by virtue of the laws of Switzerland, with its office and principal place of business located at Klybeckstrasse 141, 4057 Basel, Switzerland.
- C. “Commission” means the Federal Trade Commission.
- D. “Acquisition” means Respondent BASF’s acquisition of Ciba.
- E. “Acquisition Date” means the date on which the Acquisition is consummated.
- F. “Blue RS-OPT” means the type of IB intermediate produced by BASF for sale to Ciba for the production of Ciba IB Pigments.

Decision and Order

- G. “BASF Blue RS-OPT Intellectual Property” means the BASF intellectual property Related To the manufacture and production of Blue RS-OPT including, but not limited to, software, computer programs, patents, licenses, know-how (including, but not limited to, flow sheets, process and instrumentation diagrams), risk analysis, certificates of analysis, goodwill, technology (including, but not limited to, equipment specifications and drawings), trade secrets (including, but not limited to, recipes and formulae), technical information (including, but not limited to, material and final product specifications), protocols (including, but not limited to, operational manuals), research and development, quality control information and the modifications or improvements to such intellectual property.
- H. “BV” means bismuth vanadate.
- I. “BV Acquirer” means the Person approved by the Commission to acquire the Ciba BV Business pursuant to this Order. The BV Acquirer may be the same Person as the IB Acquirer.
- J. “BV Divestiture Agreement” means all the divestiture agreements, licenses, assignments, and other agreements entered into by the BV Acquirer and Respondent BASF pursuant to Paragraph III.
- K. “BV Effective Date” means the date on which the divestitures, licensing, and assignments, pursuant to Paragraph III, are consummated.
- L. “BV Pigments” means chromatic inorganic bismuth vanadate pigments.
- M. “BV Tolling Agreement” means the agreement entered into between the BV Acquirer and Respondent BASF under which, among other things, Respondent BASF will produce the Ciba BV Pigments for the BV Acquirer for a limited

Decision and Order

period of time, and which shall be approved by the Commission and become a part of the BV Divestiture Agreement. The BV Tolling Agreement may include, among other things, an option for the BV Acquirer to acquire, during or for a defined period after the BV Tolling Agreement, machines and equipment located at the Maastricht Plant that are Related To the manufacture of the Ciba BV Pigments.

N. “Ciba BV Business” means:

1. Ciba BV Information;
2. Ciba BV Intellectual Property;
3. Ciba BV Inventory, at the BV Acquirer’s option; and
4. Ciba BV Packaging and Labeling Assets.

O. “Ciba BV Contracts” means the current customer contracts for Ciba BV Pigments, and any other contracts between Ciba and other Persons to the extent they pertain to the manufacture and sale of Ciba BV Pigments. Ciba BV Contracts shall include contracts between Ciba and a customer that are not exclusively for Ciba BV Pigments, but may include other Ciba products.

P. “Ciba BV Information” means all information owned by, or in the possession or control of, Ciba that is not in the public domain and that is Related To the research, Development, manufacture, marketing, commercialization, importation, exportation, cost, supply, sales, sales support, or use of the Ciba BV Pigments including, but not limited to, information not otherwise included in the Ciba BV Intellectual Property Relating To the Ciba BV Pigments including, but not limited to, customer lists, current and historical customer purchases and data, historical data, complaints, safety history, all data and information Relating To any of Ciba’s approvals,

Decision and Order

clearances, licenses, registrations, permits, franchises, product registrations, authorizations, or certifications issued by any federal, state, municipal, or foreign authority, or any third party, registrar or certification body Relating To the Ciba BV Pigments including, without limitation, all toxicology and epidemiology studies, filings, engineering and design documentation, manufacturing and test results and procedures, and any other information possessed by Ciba in any location Relating To Ciba BV Pigments.

Q. “Ciba BV Intellectual Property” means all of the following Related To each Ciba BV Pigment owned by Ciba, or for which Ciba has the right to sub-license from third parties as of the Acquisition Date including, but not limited to:

1. Copyrights;
2. Patents;
3. Software;
4. Trademarks;
5. Trade Dress;
6. trade secrets, know how, utility models, design rights, techniques, data, inventions, practices, recipes, raw material specifications, process descriptions, quality control methods in process, protocols, methods and other confidential or proprietary technical, business, research, Development and other information, and all rights in any jurisdiction to limit the use or disclosure thereof;
7. rights to obtain and file for Patents and Copyrights and registrations thereof;
8. rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation or breach of any of the foregoing; and

Decision and Order

9. the exclusive right to all Ciba BV intellectual property used in the research, Development, manufacturing, storage, distribution and sale of Ciba BV Pigments including, but not limited to, Software, computer programs, Patents, licenses (including, licenses to third-party software if transferable and sub-licenses to Software modified by Ciba), know-how (including, but not limited to, flow sheets, process and instrumentation diagrams), risk analysis, certificates of analysis, goodwill, technology (including, but not limited to, equipment specifications and drawings), trade secrets (including, but not limited to, recipes and formulae), technical information (including, but not limited to, material and final product specifications), marketing information, protocols (including, but not limited to, operational manuals), quality control information, Trademarks, trade names, service marks, logos, and the modifications or improvements to such intellectual property.

Provided, however, Ciba BV Intellectual Property does not include the corporate names or corporate Trade Dress of Ciba, or the related logos thereof, or the corporate names or corporate Trade Dress of any other corporations or companies owned or controlled by Respondent BASF or the related logos thereof;

Provided, further, however, Ciba BV Intellectual Property expressly includes all product formulations containing Ciba BV Pigments, licenses from customers related to the manufacture of Ciba BV Pigments for that specific customer, and all proprietary and/or trade secret information Related To Ciba BV Pigments for a particular customer.

- R. “Ciba BV Inventory” means all inventory of raw materials, intermediate work in process, and finished Ciba BV Pigments, wherever located.

Decision and Order

- S. “Ciba BV Packaging and Labeling Assets” means the packaging and labeling used to package and label Ciba BV Pigments.
- T. “Ciba BV Pigments” means the BV Pigments researched, developed, manufactured, and sold by Ciba before the BV Effective Date including, but not limited to, the products of Ciba designated by the following names: Irgacolor Prismo Red; Irgacolor Yellow 14247; Irgacolor Yellow 14247/A; Irgacolor Yellow 14247/C; Irgacolor Yellow 2GLMA; Irgacolor Yellow 2GLMA/B; Irgacolor Yellow 2GLMA/C; Irgacolor Yellow 2GLMA/D; Irgacolor Yellow 2GTF; Irgacolor Yellow 2GTM; Irgacolor Yellow 2GTP; Irgacolor Yellow 3GLM; Irgacolor Yellow 3GLM/B; Irgacolor Yellow 3RLM; Irgacolor Yellow 5RLM; Irgazin Yellow 2093; Irgazin Yellow 2093/B; Irgazin Yellow 2094; Irgazin Yellow 2GTA; and Irgacolor Yellow 14189A.
- U. “Ciba IB Business” means:
1. Ciba IB Information;
 2. Ciba IB Intellectual Property;
 3. Ciba IB Inventory, at the IB Acquirer’s option; and
 4. Ciba IB Packaging and Labeling Assets.
- V. “Ciba IB Contracts” means the current customer contracts for Ciba IB Pigments, and any other contracts between Ciba and other Persons to the extent they pertain to the manufacture and sale of Ciba IB Pigments. Ciba IB Contracts shall include contracts between Ciba and a customer that are not exclusively for Ciba IB Pigments, but may include other Ciba products.

Decision and Order

- W. “Ciba IB Intermediate Supply Contract” means the current agreement between Respondent BASF and Ciba for the supply of Blue RS-OPT, dated November 1993.
- X. “Ciba IB Information” means all information owned by, or in the possession or control of, Ciba that is not in the public domain and that is Related To the research, Development, manufacture, marketing, commercialization, importation, exportation, cost, supply, sales, sales support, or use of the Ciba IB Pigments including but not limited to, information not otherwise included in the Ciba IB Intellectual Property Relating To the Ciba IB Pigments including, but not limited to, customer lists, current and historical customer purchases and data, historical data, complaints, safety history, all data and information Relating To any of Ciba’s approvals, clearances, licenses, registrations, permits, franchises, product registrations, authorizations, or certifications issued by any federal, state, municipal, or foreign authority, or any third party, registrar or certification body Relating To the Ciba IB Pigments including, without limitation, toxicology and epidemiology studies, filings, engineering and design documentation, manufacturing and test results and procedures, and any other information possessed by Ciba in any location Relating To Ciba IB Pigments.
- Y. “Ciba IB Intellectual Property” means all of the following Related To each Ciba IB Pigment owned by Ciba or for which Ciba has the right to sub-license to third parties as of the Acquisition Date including but not limited to:
1. Copyrights;
 2. Patents;
 3. Software;
 4. Trademarks;

Decision and Order

5. Trade Dress;
6. trade secrets, know-how, utility models, design rights, techniques, data, inventions, practices, recipes, raw material specifications, process descriptions, quality control methods in process, protocols, methods and other confidential or proprietary technical, business, research, Development and other information, and all rights in any jurisdiction to limit the use or disclosure thereof;
7. rights to obtain and file for Patents and Copyrights and registrations thereof;
8. rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation or breach of any of the foregoing; and
9. the exclusive right to all Ciba IB intellectual property used in the research, Development, manufacturing, storage, distribution and sale of Ciba IB Pigments including, but not limited to, Software, computer programs, Patents, licenses (including, licenses to third-party software if transferable and sub-licenses to software modified by Ciba), know-how (including, but not limited to, flow sheets, process and instrumentation diagrams), risk analysis, certificates of analysis, goodwill, technology (including, but not limited to, equipment specifications and drawings), trade secrets (including, but not limited to, recipes and formulae), technical information (including, but not limited to, material and final product specifications), marketing information, protocols (including, but not limited to, operational manuals), quality control information, Trademarks, trade names, service marks, logos, and the modifications or improvements to such intellectual property.

Decision and Order

Provided, however, Ciba IB Intellectual Property does not include the corporate names or corporate Trade Dress of Ciba, or the related logos thereof or the corporate names or corporate Trade Dress of any other corporations or companies owned or controlled by Respondent BASF or the related logos thereof;

Provided, further, however, Ciba IB Intellectual Property expressly includes all product formulations containing Ciba IB Pigments, licenses from customers Related To the manufacture of Ciba IB Pigments for that specific customer, and all proprietary and/or trade secret information related to a particular customer.

- Z. “Ciba IB Inventory” means all inventory of raw materials, intermediate work in process, and finished Ciba IB Pigments, wherever located.
- AA. “Ciba IB Packaging and Labeling Assets” means the packaging and labeling used to package and label Ciba IB Pigments.
- BB. “Ciba IB Pigments” means IB Pigments researched, Developed, manufactured, or sold by Ciba before the IB Effective Date including, but not limited to, the Ciba products designated by the following names: Cromophtal Blue A3R, Cromophtal Blue A3RJ, and Irgazin Blue A3RN.
- CC. “Confidential Business Information” means competitively sensitive, proprietary, and all other information that is not in the public domain owned by or pertaining to a Person or a Person’s business, and includes, but is not limited to, all customer lists, price lists, contracts, cost information, marketing methods, patents, technologies, processes, or other trade secrets.
- DD. “Copyrights” means rights to all original works of authorship of any kind directly Related To the Ciba IB

Decision and Order

Pigments or Ciba BV Pigments, as applicable, and any registrations and applications for registrations thereof, including, but not limited to, the following: all such rights with respect to all promotional, marketing and advertising materials, educational and training materials for the sales force, and sales forecasting models; copyrights in all process development data and reports relating to the research and development of the Ciba IB Pigments or Ciba BV Pigments, as applicable, or of any materials used in the research, Development, manufacture, marketing or sale of the Ciba IB Pigments or the Ciba BV Pigments, including copyrights in all raw data, statistical programs developed (or modified in a manner material to the use or function thereof (other than through user preferences)) to analyze research data, market research data, market intelligence reports and statistical programs (if any) used for marketing and sales research; all copyrights in customer information; all records relating to employees who accept employment with either the IB Acquirer or the BV Acquirer, as applicable (excluding any personnel records the transfer of which is prohibited by applicable law); all copyrights in records, including customer lists, sales force call activity reports, vendor lists, sales data, manufacturing records, manufacturing processes, and supplier lists; all copyrights in data contained in laboratory notebooks relating to the Ciba IB Pigments or the Ciba BV Pigments; all copyrights in analytical and quality control data; and all correspondence with governmental agencies.

EE. “Designated BV Employee” means the employee or person filling the job descriptions listed in Confidential Exhibit A to this Order. “Designated BV Employee” may include any other person not listed on Confidential Exhibit A to this Order who has been determined by the BV Acquirer, the Monitor, and Commission staff to have devoted more than 25% of his/her time to Ciba BV Pigments in the twelve (12) months preceding the Acquisition Date.

Decision and Order

- FF. “Designated IB Employee” means the employee or person filling the job descriptions listed in Confidential Exhibit B to this Order. “Designated IB Employee” may include any other person not listed on Confidential Exhibit B to this Order who has been determined by the IB Acquirer, the Monitor, and Commission staff to have devoted more than 25% of his/her time to Ciba IB Pigments in the twelve (12) months preceding the Acquisition Date.
- GG. “Development” means all research and development activities, including, without limitation, the following: test method development; stability testing; toxicology; formulation, including without limitation, customized formulation for a particular customer(s); process development; manufacturing scale-up; development-stage manufacturing; quality assurance/quality control development; statistical analysis and report writing; and conducting experiments for the purpose of obtaining any and all product approvals or certifications. Develop means to engage in Development.
- HH. “Huningue Plant” means the facility currently owned by Ciba located at Boîte Postale 151, 28, Rue de la Chapelle, Huningue Cedex 68331, France.
- II. “IB” means indanthrone blue.
- JJ. “IB Acquirer” means the Person approved by the Commission to acquire the assets and businesses pursuant to Paragraph II of this Order. The IB Acquirer may be the same Person as the BV Acquirer.
- KK. “IB Divestiture Agreement” means all the divestiture agreements, licenses, assignments, and other agreements entered into by the IB Acquirer and Respondent BASF pursuant to Paragraph II of this Order.

Decision and Order

- LL. “IB Effective Date” means the date on which the divestitures, licensing, and assignments, pursuant to Paragraph II of this Order, are consummated.
- MM. “IB Finishing Agreement” means the agreement between the IB Acquirer and Respondent BASF under which Respondent BASF will produce the IB Pigments, which shall be approved by the Commission and become a part of the IB Divestiture Agreement. The IB Finishing Agreement, shall include, among other things, a term of up to thirty (30) months, an option for the IB Acquirer to extend the term, subject to the Commission’s prior approval, and an option for the IB Acquirer to terminate the IB Finishing Agreement with sixty (60) days notice.
- NN. “IB Pigments” means organic indanthrone blue pigments based on the indanthrone chemical structure.
- OO. “Licensed Ciba BV Intellectual Property” means the Ciba BV Intellectual Property that was not used by Ciba exclusively for the Ciba BV Pigments.
- PP. “Licensed Ciba IB Intellectual Property” means the Ciba IB Intellectual Property that was not used by Ciba exclusively for the Ciba IB Pigments.
- QQ. “Maastricht Plant” means the facility currently owned by Ciba and located at Sortieweg 39, Maastricht 6219 NT, The Netherlands.
- RR. “Maastricht Plant BV Lease Agreement” means the agreement entered into between Respondent BASF and the BV Acquirer, that is part of the BV Divestiture Agreement, for the lease of the Maastricht Plant BV Leased Area and access to the Maastricht Plant BV Operational Areas for the duration of the lease. The Maastricht Plant BV Lease Agreement, shall include, among other things, a term of up to thirty (30) months, an option for the BV Acquirer to

Decision and Order

extend the term, subject to the Commission's prior approval, and an option for the BV Acquirer to terminate the Maastricht Plant BV Lease Agreement with sixty (60) days notice. The Maastricht Plant BV Lease Agreement may include, at the BV Acquirer's option, and in a manner that fully protects the rights of the BV Acquirer:

1. A requirement that Respondent BASF move and pay for the consolidation of laboratory and office facilities at the Maastricht Plant Relating To the Ciba BV Pigments.
2. An option for the BV Acquirer to acquire equipment including, but not limited to, manufacturing machines and laboratory equipment, that is Related To the production of Ciba BV Pigments and is covered within the terms of the Maastricht Plant BV Lease Agreement. The option shall not include, unless agreed to by Respondent BASF, any equipment that is shared by the BV Acquirer and Respondent BASF at the Maastricht Plant.
3. Terms Relating To trucking services provided at the Maastricht Plant Relating To the Ciba BV Pigments.
4. Terms Relating To licenses, permits, and authorizations including, but not limited to, permits for environmental, waste water, discharge and ground water withdrawal, and building.
5. A site services agreement providing for, among other things, plant security, canteen services, property taxes, workshop facilities and personnel, and warehousing services, to be provided to the BV Acquirer at or consistent with the level of services currently provided at the Maastricht Plant for the Maastricht Plant BV Leased Area.

Decision and Order

6. Terms Relating To the disposal of waste water and sludge produced as part of the manufacturing of the Ciba BV Pigments at the Maastricht Plant.

SS. “Maastricht Plant BV Leased Area” means the areas and buildings at the Maastricht Plant, described in Exhibit C to this Order, and any other facilities or machines or areas at the Maastricht Plant reasonably necessary for manufacture, storage, and distribution of BV Pigments by the BV Acquirer, and may include areas within the Maastricht Plant BV Operational Areas.

TT. “Maastricht Plant BV Operational Areas” means the:

1. areas appurtenant to and used in the operation of the Maastricht Plant BV Leased Area including, but not limited to, loading and unloading areas, and storage areas for inputs and inventory, at the Maastricht Plant, excluding any such facilities or machines or areas exclusively used for the manufacture, storage, or distribution of products other than Ciba BV Pigments;
2. areas for the use of employees working at the areas leased pursuant to the Maastricht Plant BV Lease Agreement, similar to those areas available to Respondent BASF employees working at the Maastricht Plant, including, but not limited to, exits and entrances, parking areas, machine rooms, work rooms, break rooms, bathrooms, and locker rooms;
3. existing easements and rights of way relating to the leased areas; and
4. related facilities required for the storage and transfer of products produced at the Maastricht Plant BV Leased Area by the BV Acquirer.

Decision and Order

- UU. “Patents” means all patents, patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications for certificates of invention and statutory invention registrations, in each case existing as of the Acquisition Date, and includes all reissues, additions, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions, Related To any product of or owned by Ciba as of the Acquisition Date.
- VV. “Person” means any natural person, partnership, corporation, association, trust, joint venture, government, government agency, division, or department, or other business or legal entity.
- WW. “Relating To” or “Related To” means pertaining in any way to, and is not limited to that which pertains exclusively to or primarily to.
- XX. “Software” means computer programs Related To the production of the Ciba BV Pigments or the Ciba IB Pigments, respectively, including all software implementations of algorithms, models, and methodologies whether in source code or object code form, databases and compilations, including any and all data and collections of data, all documentation, including user manuals and training materials, Related To any of the foregoing and the content and information contained on any website; provided, however, that Software does not include software that is readily purchasable or licensable from sources other than Respondent BASF and which has not been modified in a manner material to the use or function thereof (other than through user preference settings). Provided, further, however, that Software to be divested as part of the Ciba IB Business shall mean only that software specifically

Decision and Order

applicable to the production of the Ciba IB Pigments at the IB Acquirer's production facility.

YY. "Trade Dress" means the current trade dress of a particular product or Person including, without limitation, product packaging, logos, and the lettering of the product trade name, brand name, or corporate name.

ZZ. "Trademark(s)" means all proprietary names or designations, trademarks, service marks, trade names, and brand names, including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof) and all common law rights, and the goodwill symbolized thereby and associated therewith, for the Ciba IB Pigments or the Ciba BV Pigments.

II.

IT IS FURTHER ORDERED that, within six (6) months of the date on which this Order becomes final:

- A. Respondent BASF shall divest the Ciba IB Business, assign the Ciba IB Intermediate Supply Contract and Ciba IB Contracts, and enter into a fully paid-up, irrevocable, royalty-free, non-exclusive license for the BASF Blue RS-OPT Intellectual Property, absolutely and in good faith, at no minimum price, only to an IB Acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission.

The IB Divestiture Agreement (which shall include, among other things, the divestiture agreement, the assignments, and license) between Respondent BASF and the IB Acquirer shall not vary or contradict, or be construed to vary or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of the IB Acquirer or to reduce any obligations of Respondent BASF under such agreements, and such agreement, if approved by the Commission as the IB

Decision and Order

Divestiture Agreement, shall be incorporated by reference into this Order and made a part hereof.

Provided, however, with respect to assets that are to be divested or agreements entered into pursuant to this paragraph at the IB Acquirer's option, Respondent BASF need not divest such assets or enter into such agreements only if the IB Acquirer chooses not to acquire such assets or enter into such agreements and the Commission approves the divestiture without such assets or agreements.

Provided, further, however, that if any of the Ciba IB Contracts are not assignable or the contracting Person refuses to accept the IB Acquirer, Respondent BASF shall use best efforts to facilitate the IB Acquirer in securing a similar contract with similar terms from: (1) the customer, if it is a customer contract, or (2) the same or a different Person supplying such product or service, if it is a supply contract.

Provided, further, however, that Respondent BASF shall be required to grant the IB Acquirer only the non exclusive rights to use Trademarks Relating To the Ciba IB Pigments solely to describe the IB Acquirer's products as comparable, functionally equivalent, or chemically equivalent to the pertinent Ciba IB Pigments in communications with individual customers, or on the IB Acquirer's website for a period of one (1) year after the IB Effective Date, if such products are made at the Huningue Plant using the Ciba IB Pigment formulae transferred pursuant to this Paragraph II.

Provided, further, however, that Respondent BASF shall be allowed to receive a fully paid-up, irrevocable, royalty-free license to the Licensed Ciba IB Intellectual Property, for use by Respondent BASF in the research, Development, production, manufacture, and sale of products other than IB Pigments.

- B. Respondent BASF shall, at the IB Acquirer's option, agree to amend the Ciba IB Intermediate Supply Contract to allow the IB Acquirer, within six (6) months after the IB Effective

Decision and Order

Date, to renegotiate the terms of the Ciba IB Intermediate Supply Contract including, but not limited to, duration, price, and termination terms.

- C. Respondent BASF shall enter into an IB Finishing Agreement, absolutely and in good faith, at no minimum price, only with an IB Acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission. The IB Finishing Agreement shall become a part of the IB Divestiture Agreement.
- D. During the term of the IB Finishing Agreement:
 - 1. Respondent BASF shall not terminate the IB Finishing Agreement before the end of the term approved by the Commission without:
 - a. the written agreement of the IB Acquirer and thirty (30) days prior notice to the Commission; or,
 - b. in the case of a proposed unilateral termination by Respondent BASF due to an alleged breach of an agreement by the IB Acquirer, sixty (60) days notice of such termination. *Provided, however*, such sixty (60) days notice shall only be given after the parties have:
 - (1) attempted to settle the dispute between themselves, and
 - (2) engaged in arbitration and received an arbitrator's decision, or
 - (3) received a final court decision after all appeals.
 - 2. Respondent BASF shall take such actions as are necessary to prevent the destruction, removal, wasting, deterioration, or impairment of the facilities and

Decision and Order

machines Related To the finishing of the Ciba IB Pigments; *provided, however*, Respondent BASF shall give the IB Acquirer sixty (60) days prior notice of any facility maintenance, including ordinary and regular maintenance, when such maintenance may affect Respondent BASF's obligations under the IB Finishing Agreement; *provided, further, however*, in the event Respondent BASF cannot give the IB Acquirer sixty (60) days prior notice, then Respondent BASF must notify the IB Acquirer as soon as it first notifies any persons at the Huningue Plant regarding maintenance or problems that may affect Respondent BASF's obligations under the IB Finishing Agreement.

3. Respondent BASF shall allow employees of the IB Acquirer, with reasonable notice, access at the Huningue Plant to the:
 - a. facilities, laboratories, and machines that finish the Ciba IB Pigments, and
 - b. areas where finished Ciba IB Pigments are stored and distributed.

Provided, however, Respondent BASF may restrict access to the machines finishing the Ciba IB Pigments during such time, if any, as those machines are being used to produce other products.

- E. Respondent BASF shall, at the IB Acquirer's option, provide electronic access to extracted information Relating To the production, storage, and distribution of the Ciba IB Pigments.
- F. Respondent BASF shall, not later than the IB Effective Date and at the IB Acquirer's option, enter into one or more transition services agreements for the provision of services to be provided by Respondent BASF to the IB Acquirer.

Decision and Order

Such agreements shall be subject to the prior approval of the Commission and become a part of the IB Divestiture Agreement.

1. Such agreements may include, but are not limited to:
 - a. an agreement for technical assistance. Such transition services agreements may have a duration extending throughout, or for a defined period beyond, the term of the IB Finishing Agreement and may include, among other things, assistance in the establishment of Ciba IB Pigment finishing machinery and production of the Ciba IB Pigments at the IB Acquirer's facility.
 - b. an agreement granting the IB Acquirer the right to use, for a period from six (6) to twelve (12) months from the IB Effective Date, the Ciba IB Packaging and Labeling Assets, *provided, however*, Respondent BASF may require that the IB Acquirer alter such packaging and labeling to make clear that the IB Acquirer is the seller of that product by, among other things, affixing a label to such packaging.
2. Respondent BASF shall not terminate any transition services agreement before the end of the term approved by the Commission without:
 - a. the written agreement of the IB Acquirer and thirty (30) days prior notice to the Commission; or,
 - b. in the case of a proposed unilateral termination by Respondent BASF due to an alleged breach of an agreement by the IB Acquirer, sixty (60) days notice of such termination. *Provided, however*, such sixty (60) days notice shall only be given after the parties have:

Decision and Order

- (1) attempted to settle the dispute between themselves, and
- (2) engaged in arbitration and received an arbitrator's decision, or
- (3) received a final court decision after all appeals.

G. The purposes of this Paragraph II of the Order are: (1) to ensure the continuation of the Ciba IB Business as a going concern in the same manner in which it conducted business as of the date the Consent Agreement is signed, (2) to ensure that the IB Acquirer has the intention and ability to produce the Ciba IB Pigments at facilities independent of Respondent BASF, similar to Ciba's independent production of Ciba IB Pigments, (3) to allow the IB Acquirer, using the IB Finishing Agreement, a sufficient amount of time to replicate the certifications and approvals (currently required by Persons acquiring Ciba IB Pigments from the Huningue Plant) for the manufacture of IB Pigments at another manufacturing facility, and (4) to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

Decision and Order

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

- A. Within six (6) months of the date on which this Order becomes final:
1. Respondent BASF shall divest the Ciba BV Business, and assign the Ciba BV Contracts, absolutely and in good faith, at no minimum price, only to a BV Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission; and
 2. Respondent BASF shall choose either to:
 - a. divest the Maastricht Plant BV Leased Area absolutely and in good faith, at no minimum price, only to a BV Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission; or
 - b. lease the Maastricht Plant BV Leased Area absolutely and in good faith, at no minimum price, only to a BV Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission; or
 - c. enter into a BV Tolling Agreement absolutely and in good faith, at no minimum price, only with a BV Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

The BV Divestiture Agreement between Respondent BASF and the BV Acquirer shall not vary or contradict, or be construed to vary or

Decision and Order

contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of the BV Acquirer or to reduce any obligations of Respondent BASF under such agreements, and such agreement, if approved by the Commission as the BV Divestiture Agreement, shall be incorporated by reference into this Order and made a part hereof.

Provided, however, with respect to assets that are to be divested or agreements entered into pursuant to this paragraph at the BV Acquirer's option, Respondent BASF need not divest such assets or enter into such agreements only if the BV Acquirer chooses not to acquire such assets or enter into such agreements and the Commission approves the divestiture without such assets or agreements.

Provided, further, however, that Respondent BASF shall be required to grant the BV Acquirer only the non exclusive rights to use Trademarks Relating To the Ciba BV Pigments solely to describe the BV Acquirer's products as comparable, functionally equivalent, or chemically equivalent to the pertinent Ciba BV Pigments in communications with individual customers, or on the BV Acquirer's website for a period of one (1) year after the BV Effective Date, if such products are made at the Maastricht Plant using the Ciba BV Pigment formulae transferred pursuant to this Paragraph III.

Provided, further, however, that Respondent BASF shall be allowed to receive a fully paid-up, irrevocable, royalty-free license to the Licensed Ciba BV Intellectual Property, for use by Respondent BASF in the research, Development, production, manufacture, and sale of products other than BV Pigments.

B. If the BV Acquirer acquires the Maastricht Plant BV Leased Area, Respondent BASF shall agree to include in the BV Divestiture Agreement, at the Acquirer's option:

1. an agreement with the BV Acquirer providing:

Decision and Order

- a. for access to the Maastricht Plant BV Operational Areas, and
 - b. that Respondent BASF shall maintain the Maastricht Plant BV Operational Areas in the same general way in which it maintains the other areas at the Maastricht Plant and common areas of the Maastricht Plant including, but not limited to, the uninterrupted provision of utilities and services;
2. an agreement that Respondent BASF move and pay for the consolidation of laboratory and office facilities at the Maastricht Plant Relating To the Ciba BV Pigments;
3. a transition services agreement for the provision of technical services by Respondent BASF, for a limited time, Related To the manufacture of Ciba BV Pigments including, but not limited to, computer and back office services;
4. an agreement Relating To trucking services provided at the Maastricht Plant Relating To the Ciba BV Pigments;
5. an agreement Relating To licenses, permits, and authorizations including, but not limited to, permits for environmental, waste water, discharge and ground water withdrawal, and building;
6. a site services agreement providing for, among other things, plant security, canteen services, property taxes, workshop facilities and personnel, and warehousing services, to be provided to the BV Acquirer at or consistent with the level of services currently provided at the Maastricht Plant for the Maastricht Plant BV Leased Area; and

Decision and Order

7. an agreement Relating To the disposal of waste water and sludge produced as part of the manufacturing of the Ciba BV Pigments at the Maastricht Plant.
- C. If the BV Acquirer leases the Maastricht Plant BV Leased Area:
1. Respondent BASF shall not terminate the Maastricht Plant BV Lease Agreement or any of the agreements entered into pursuant to this Paragraph III before the end of the term approved by the Commission without:
 - a. the written agreement of the BV Acquirer and thirty (30) days prior notice to the Commission; or,
 - b. in the case of a proposed unilateral termination by Respondent BASF due to an alleged breach of an agreement by the BV Acquirer, sixty (60) days notice of such termination. *Provided, however*, such sixty (60) days notice shall only be given after the parties have:
 - (1) attempted to settle the dispute between themselves, and
 - (2) engaged in arbitration and received an arbitrator's decision, or
 - (3) received a final court decision after all appeals.
 2. During the term of the Maastricht Plant BV Lease Agreement:
 - a. Respondent BASF shall, except as requested by the BV Acquirer, take such actions as are necessary to prevent the destruction, removal, wasting, deterioration, or impairment of the Maastricht Plant BV Operational Areas, *provided, however*, that

Decision and Order

Respondent BASF shall give the BV Acquirer sixty (60) days prior notice of any facility maintenance, including ordinary and regular maintenance, when such maintenance may affect the operation of or access to the Maastricht Plant BV Operational Areas or the Maastricht Plant BV Leased Area; provided, further, however, that in the event Respondent BASF cannot give the BV Acquirer sixty (60) days prior notice, then Respondent BASF must notify the BV Acquirer as soon as it first notifies any persons at the Maastricht Plant regarding maintenance or problems that may affect the operation of or access to the Maastricht Plant BV Operational Areas or the Maastricht Plant BV Leased Area; and

- b. Respondent BASF shall maintain the Maastricht Plant BV Operational Areas in the same general way in which it maintains the other areas at the Maastricht Plant and common areas of the Maastricht Plant (to the extent the BV Acquirer complies with the lease terms) including, but not limited to, the uninterrupted provision of utilities and services.

D. If the BV Acquirer enters into a BV Tolling Agreement:

- 1. Respondent BASF shall not terminate the BV Tolling Agreement before the end of the term approved by the Commission without:
 - a. the written agreement of the BV Acquirer and thirty (30) days prior notice to the Commission; or,
 - b. in the case of a proposed unilateral termination by Respondent BASF due to an alleged breach of an agreement by the BV Acquirer, sixty (60) days notice of such termination. *Provided, however*, such sixty (60) days notice shall only be given after the parties have:

Decision and Order

- (1) attempted to settle the dispute between themselves, and
- (2) engaged in arbitration and received an arbitrator's decision, or
- (3) received a final court decision after all appeals.

2. For the duration of the BV Tolling Agreement:

- a. Respondent BASF shall take such actions as are necessary to prevent the destruction, removal, wasting, deterioration, or impairment of the facilities and machines Related To the finishing of the Ciba BV Pigments; *provided, however*, Respondent BASF shall give the BV Acquirer sixty (60) days prior notice of any facility maintenance, including ordinary and regular maintenance, when such maintenance may affect Respondent BASF's obligations under the BV Tolling Agreement; *provided, further, however*, in the event Respondent BASF cannot give the BV Acquirer sixty (60) days prior notice, then Respondent BASF must notify the BV Acquirer as soon as it first notifies any persons at the Maastricht Plant regarding maintenance or problems that may affect Respondent BASF's obligations under the BV Tolling Agreement;
- b. Respondent BASF shall allow employees of the BV Acquirer, with reasonable notice, access at the Maastricht Plant:
 - (1) to the facilities and machines that produce and test the Ciba BV Pigments, and
 - (2) the areas where finished products are stored and distributed.

Decision and Order

- c. Respondent BASF shall, at the BV Acquirer's option, provide electronic access to extracted information Relating To the production, storage, and distribution of the Ciba BV Pigments.
- E. Respondent BASF shall enter, not later than the BV Effective Date and at the BV Acquirer's option, into one or more transition services agreements for the provision of services to be provided by Respondent BASF to the BV Acquirer. Such agreements shall be subject to the prior approval of the Commission and become a part of the BV Divestiture Agreement.
- 1. Such agreements may include, but are not limited to:
 - a. an agreement for technical assistance. If there is a BV Tolling Agreement, such transition services agreements may have a duration extending throughout, or for a defined period beyond, the term of the BV Tolling Agreement and may include, among other things, assistance in the establishment of Ciba BV Pigment machinery and production of the Ciba BV Pigment at the BV Acquirer's facility.
 - b. an agreement granting the BV Acquirer the right to use, for a period from six (6) to twelve (12) months from the BV Effective Date, the Ciba BV Packaging and Labeling Assets, *provided, however*, Respondent BASF may require that the BV Acquirer must alter such packaging and labeling to make clear that the BV Acquirer is the seller of that product by, among other things, affixing a label to such packaging.
 - 2. Respondent BASF shall not terminate any transition services agreement before the end of the term approved by the Commission without:

Decision and Order

- a. the written agreement of the BV Acquirer and thirty (30) days prior notice to the Commission; or,
 - b. in the case of a proposed unilateral termination by Respondent BASF due to an alleged breach of an agreement by the BV Acquirer, sixty (60) days notice of such termination. *Provided, however*, such sixty (60) days notice shall only be given after the parties have:
 - (1) attempted to settle the dispute between themselves, and
 - (2) engaged in arbitration and received an arbitrator's decision, or
 - (3) received a final court decision after all appeals.
- F. The purposes of this Paragraph III of the Order are: (1) to ensure the continuation of the Ciba BV Business as a going concern in the same manner in which it conducted business as of the date the Consent Agreement is signed, (2) to ensure that the BV Acquirer has the intention and ability to produce the Ciba BV Pigments at facilities independent of Respondent BASF, similar to Ciba's independent production of Ciba BV Pigments, or as an independent producer of Ciba BV Pigments at facilities owned at the Maastricht Plant, (3) to allow the BV Acquirer, if it chooses to enter into a BV Tolling Agreement, to do so for a sufficient amount of time to replicate the certifications and approvals (currently required by Persons acquiring Ciba BV Pigments from the Maastricht Plant) for the manufacture of BV Pigments at another manufacturing facility, and (4) to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

Decision and Order

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

- A. Respondent BASF and Respondent BASF's employees shall not (1) during or after the term of the BV Tolling Agreement, if applicable, or (2) during or after the term of the Maastricht Plant BV Lease Agreement, if applicable, or (3) after the divestiture of the Maastricht Plant BV Leased Area, if applicable, use or share, directly or indirectly, any Confidential Business Information Relating To the Ciba BV Pigments (including, but not limited to, the production, transportation, delivery, storage, distribution, marketing, and sale of Ciba BV Pigments by the BV Acquirer from the Maastricht Plant) with any of Respondent BASF's employees who manage, produce, or sell, Respondent BASF's BV products; and
- B. Respondent BASF and Respondent BASF's employees shall not during or after the term of the IB Finishing Agreement use or share, directly or indirectly, any Confidential Business Information Relating To the Ciba IB Pigments (including, but not limited to, the production, transportation, delivery, storage, distribution, marketing, and sale of Ciba IB Pigments by the IB Acquirer from the Huningue Plant) with any of Respondent BASF's employees who manage, produce, or sell, Respondent BASF's IB products.

Provided, however, the provisions of Paragraphs IV.A. and IV.B. apply except:

- 1. As otherwise allowed in this Order;
- 2. As provided for in a transition services agreement;
- 3. As consented to by the BV Acquirer or IB Acquirer;
- 4. As required by law;

Decision and Order

5. In negotiating agreements to divest assets pursuant to this Order and engaging in related due diligence;
 6. In complying with this Order;
 7. To the extent necessary to allow Respondent BASF to comply with the requirements and obligations of the laws of the United States and other countries;
 8. In defending legal claims, investigations or enforcement actions threatened or brought against or related to the Ciba BV Business or Ciba IB Business; and
 9. In obtaining legal advice.
- C. Respondent BASF shall require any Persons with access to Confidential Business Information Relating To the Ciba BV Pigments and the Ciba IB Pigments to enter into agreements, within ten (10) days after the BV Effective Date or IB Effective Date, respectively, not to disclose any Confidential Business Information Relating To the Ciba BV Pigments or the Ciba IB Pigments, respectively, to Respondent BASF or to any third party except as otherwise permitted by this Order. Copies of such agreements shall be retained by Respondent BASF, and provided to the Commission and the Monitor.

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

- A. Mr. Edward Gold of PriceWaterhouseCoopers, United States (with the direct assistance of Messrs. Alfred Höhn and Wolfgang Nothhelfer, PriceWaterhouseCoopers, Germany), shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondent BASF and attached as Confidential Exhibit D (“Monitor Agreement”). The Monitor is appointed to assure that Respondent BASF

Decision and Order

expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order;

- B. The Monitor Agreement shall require that, no later than one (1) day after the Acquisition Date, Respondent BASF transfers to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities, pursuant to this Order and the Asset Maintenance Order, and consistent with the purposes of the Decision and Order.
- C. No later than one (1) day after the Acquisition Date, Respondent BASF shall, pursuant to the Monitor Agreement, transfer to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities, pursuant to this Order and the Asset Maintenance Order, and consistent with the purposes of the Decision and Order.
- D. Respondent BASF 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 Respondent BASF's compliance with the terms of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission including, but not limited to:
 - a. Assuring that Respondent BASF expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order; and
 - b. Monitoring any agreements between Respondent BASF and either the IB Acquirer or the BV Acquirer.

Decision and Order

2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
3. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondent BASF's personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, Related To Respondent BASF's compliance with its obligations under the Order. Respondent BASF shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondent BASF's compliance with the Order.
4. The Monitor shall serve, without bond or other security, at the expense of Respondent BASF 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 BASF, 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 services rendered, subject to the approval of the Commission.
5. Respondent BASF 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 reasonable expenses incurred in connection with the preparations 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

Decision and Order

from gross negligence, malfeasance, willful or wanton acts, or bad faith by the Monitor.

6. The Monitor Agreement shall provide that within one (1) month from the date the Monitor is appointed pursuant to this paragraph, and every sixty (60) days thereafter, the Monitor shall report in writing to the Commission concerning performance by Respondent BASF of its obligations under the Order.
 7. Respondent BASF may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Monitor from providing any information to the Commission.
- E. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Monitor's duties.
- F. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor:
1. The Commission shall select the substitute Monitor, subject to the consent of Respondent BASF, which consent shall not be unreasonably withheld. If Respondent BASF has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to Respondent BASF of the identity of any proposed Monitor, Respondent BASF shall be deemed to have consented to the selection of the proposed Monitor.

Decision and Order

2. Not later than ten (10) days after appointment of the substitute Monitor, Respondent BASF shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondent BASF's compliance with the relevant terms of the Order in a manner consistent with the purposes of the Order.
- G. 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 the Order.
- H. A Monitor appointed pursuant to this Order may be the same person appointed as the Divestiture Trustee pursuant to the relevant provisions of this Order.

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

- A. If Respondent BASF has not fully complied with the obligations as required by Paragraphs II and III of this Order, the Commission may appoint a Divestiture Trustee to divest the Ciba IB Business and the Ciba BV Business, and enter into other agreements, assignments, and licenses, in a manner that satisfies the requirements of this Order.

In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondent BASF shall consent to the appointment of a Divestiture Trustee in such action to effectuate the divestitures and other obligations as described in Paragraphs II and III. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph VI shall preclude

Decision and Order

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 Respondent BASF to comply with this Order.

- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent BASF, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondent BASF has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent BASF of the identity of any proposed Divestiture Trustee, Respondent BASF shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondent BASF shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestitures required by this Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph VI, Respondent BASF shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
 - 1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest the Ciba IB Business and enter into the IB Finishing Agreement, and/or divest the Ciba BV Business, and either divest or lease the Maastricht Plant BV Leased Area, or enter into the BV Tolling

Decision and Order

Agreement, and enter into all agreements, licenses and assignments as described in Paragraphs II and III of this Order.

2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to divest the Ciba IB Business and enter into the IB Finishing Agreement, and/or divest the Ciba BV Business, and either divest or lease the Maastricht Plant BV Leased Area, or enter into the BV Tolling Agreement, and enter into all agreements, licenses and assignments as described in Paragraphs II and III of this Order, absolutely and in good faith, at no minimum price, to one or more acquirers that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period or periods may be extended by the Commission; *provided, however*, the Commission may extend the divestiture period only two (2) times.
3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the relevant assets that are required to be divested by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondent BASF shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent BASF shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent BASF shall extend the time for divestiture under this Paragraph

Decision and Order

VI in an amount equal to the delay, as determined by the Commission.

4. The Divestiture Trustee shall use best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent BASF's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an acquirer as required by this Order;

Provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity for assets and businesses to be divested pursuant to Paragraph II and Paragraph III, respectively, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondent BASF from among those approved by the Commission;

Provided, further, however, that Respondent BASF shall select such entity within five (5) days after receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent BASF, 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 Respondent BASF, 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 of the account of the Divestiture Trustee, including fees for the Divestiture

Decision and Order

Trustee's services, all remaining monies shall be paid at the direction of the Respondent BASF, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

6. Respondent BASF 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 losses, claims, damages, liabilities, or expenses result from gross negligence, malfeasance, willful or wanton acts, or bad faith by the Divestiture Trustee.
7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.
8. The Divestiture Trustee shall act in a fiduciary capacity for the benefit of the Commission.
9. The Divestiture Trustee shall report in writing to Respondent BASF and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
10. Respondent BASF may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the

Decision and Order

Divestiture Trustee from providing any information to the Commission.

11. The Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.
- E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph VI.
- F. 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 obligations under Paragraphs II and III of this Order.
- G. The Divestiture Trustee(s) appointed pursuant to Paragraph VI of this Order may be the same Person appointed as the Monitor pursuant to Paragraph V of this Order.

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

- A. Beginning from the Acquisition Date until ninety (90) days after each of the IB Effective Date and the BV Effective Date, Respondent BASF shall, in a manner consistent with local labor laws:
 1. facilitate employment interviews between each Designated IB Employee and the IB Acquirer, and

Decision and Order

between each Designated BV Employee and the BV Acquirer, including providing the names and contact information for such employees and allowing such employees reasonable opportunity to interview with the IB Acquirer or the BV Acquirer, respectively, and shall not discourage such employee from participating in such interviews;

2. not interfere in employment negotiations between each Designated IB Employee and the IB Acquirer, or between each Designated BV Employee and the BV Acquirer;
3. with respect to each Designated IB Employee or Designated BV Employee who receives an offer of employment from the IB Acquirer or BV Acquirer, respectively:
 - a. not prevent, prohibit, or restrict, or threaten to prevent, prohibit, or restrict:
 - (1) the Designated IB Employee from being employed by the IB Acquirer, and shall not offer any incentive to the Designated IB Employee to decline employment with the IB Acquirer; or
 - (2) the Designated BV Employee from being employed by the BV Acquirer, and shall not offer any incentive to the Designated BV Employee to decline employment with the BV Acquirer.
 - b. cooperate with:
 - (1) the IB Acquirer in effecting transfer of the Designated IB Employee to the employ of the IB Acquirer, if the Designated IB Employee accepts an offer of employment from the IB Acquirer; or

Decision and Order

- (2) the BV Acquirer in effecting transfer of the Designated BV Employee to the employ of the BV Acquirer, if the Designated BV Employee accepts an offer of employment from the BV Acquirer;
- c. eliminate any contractual provisions or other restrictions entered into or imposed by Respondent BASF that would otherwise prevent the Designated IB Employee or Designated BV Employee from being employed by the IB Acquirer or BV Acquirer, respectively;
- d. eliminate any confidentiality restrictions that would prevent:
 - (1) the Designated IB Employee who accepts employment with the IB Acquirer from using or transferring to the IB Acquirer any information Relating To the operation of the Ciba IB Business; or
 - (2) the Designated BV Employee who accepts employment with the BV Acquirer from using or transferring to the BV Acquirer any information Relating To the operation of the Ciba BV Business.
- e. unless alternative arrangements are agreed upon with the IB Acquirer or BV Acquirer, retain the obligation for the benefit of:
 - (1) any Designated IB Employee who accepts employment with the IB Acquirer, all accrued bonuses, vested pensions, and other accrued benefits;

Decision and Order

- (2) any Designated BV Employee who accepts employment with the BV Acquirer, all accrued bonuses, vested pensions, and other accrued benefits.

Provided, however, that Respondent BASF may require that offers of employment made to Designated BV Employees working the Maastricht Plant and necessary for the performance of the BV Tolling Agreement, if any, must specify a start date after termination of the BV Tolling Agreement.

- B. Respondent BASF shall not, for a period of two (2) years following the BV Effective Date and IB Effective Date, respectively, directly or indirectly, solicit, induce, or attempt to solicit or induce:
 1. any Designated IB Employee who is employed by the IB Acquirer to terminate his or her employment relationship with the IB Acquirer, unless that employment relationship has already been terminated by the IB Acquirer; *provided, however,* Respondent BASF may make general advertisements for employees including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at the IB Acquirer's employees; *provided, further, however,* Respondent BASF may hire Designated IB Employees who apply for employment with Respondent BASF as long as such employees were not solicited by Respondent BASF in violation of this Paragraph.
 2. any Designated BV Employee who is employed by the BV Acquirer to terminate his or her employment relationship with the BV Acquirer, unless that employment relationship has already been terminated by the BV Acquirer; *provided, however,* Respondent BASF may make general advertisements for employees including, but not limited to, in newspapers, trade

Decision and Order

publications, websites, or other media not targeted specifically at the BV Acquirer's employees; *provided, further, however*, Respondent BASF may hire Designated BV Employees who apply for employment with Respondent BASF as long as such employees were not solicited by Respondent BASF in violation of this Paragraph.

VIII.

IT IS FURTHER ORDERED that for a period of ten (10) years from the date this Order becomes final:

- A. Respondent BASF shall not, without the prior approval of the Commission, acquire, directly or indirectly, any assets divested pursuant to this Order, *provided, however*, prior approval shall not be required by Respondent BASF to take possession of the areas of the Maastricht Plant covered by the Maastricht Plant BV Lease Agreement after such agreement (1) expires according to its terms, or (2) is terminated by the BV Acquirer, and in both cases, the BV Acquirer notifies Respondent BASF that it is abandoning all of its rights to the Maastricht BV Leased Area. In such a situation, Respondent BASF shall provide written notification to the Commission of the timing and terms of the termination and abandonment as soon as possible after Respondent BASF receives notice from the BV Acquirer; and
- B. Respondent BASF shall not, without providing advance written notification to the Commission in the manner described in this Paragraph VIII.B., directly or indirectly, acquire:
 - 1. any stock, share capital, equity, or other interest in any Person, corporate or non corporate, that produces, designs, manufactures, or sells BV Pigments or IB Pigments in or into the United States; or

Decision and Order

2. any assets used, at the time of the acquisition, in the design, manufacture, production, or sale of BV Pigments or IB Pigments in or into the United States.

Said notification shall be given 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 (herein referred to as “the Notification”), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Respondent BASF and not of any other party to the transaction. Respondent BASF shall provide the Notification to the Commission at least thirty days prior to consummating the 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), Respondent BASF 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 may be requested and, where appropriate, granted by letter from the Bureau of Competition.

Provided, however, that prior notification shall not be required by this paragraph 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.

Provided, further, however, that prior notification shall not be required by this Paragraph VIII.B. for an acquisition, if Respondent BASF acquires no more than one percent of the outstanding securities or other equity interest in an entity described in this Paragraph VIII.B.

Decision and Order

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

- A. Within thirty (30) days after the date this Order becomes final, and every sixty (60) days thereafter until Respondent BASF has fully complied with Paragraphs II.A, II.B, II.C., III.A., III.B. (if Respondent BASF divests pursuant to III.A.2.a.), and VII.A. of this Order, Respondent BASF shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. Respondent BASF shall submit at the same time a copy of its report concerning compliance with this Order to the Monitor or Divestiture Trustee, if any Divestiture Trustee has been appointed pursuant to this Order. Respondent BASF shall include in its report, among other things that are required from time to time, a full description of the efforts being made to comply with the relevant Paragraphs of the Order, including a description of all substantive contacts or negotiations related to the divestiture of the relevant assets and the identity of all parties contacted. Respondent BASF shall include in its report copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning completing the obligations.
- B. Beginning twelve (12) months after the date this Order becomes final, and annually thereafter on the anniversary of the date this Order becomes final, for the next nine (9) years, Respondent BASF shall submit to the Commission a verified written report setting forth in detail the manner and form in which it has complied, is complying, and will comply with this Order. Respondent BASF shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with the Order and copies of all written communications to and from all persons relating to this

Decision and Order

Order. Additionally, Respondent BASF shall include in its compliance report whether or not it (i) made any notifiable acquisitions pursuant to Paragraph VIII, (ii) directly or indirectly, acquired any stock, share capital, equity, or other interest in any Person, corporate or non-corporate that produces, designs, manufactures, or sells BV Pigments or IB Pigments in or into areas other than the United States, and (iii) directly or indirectly, acquired any assets used, at the time of the acquisition, in the design, manufacture, production, or sale of BV Pigments or IB Pigments in or into areas other than the United States. Respondent BASF shall include a description of such acquisitions including, but not limited to, the identity of the Person or assets acquired, the location of the Person or assets, and a detailed description of the assets or Person and its BV Pigments or IB Pigments sales or manufacturing.

X.

IT IS FURTHER ORDERED that Respondent BASF shall notify the Commission at least thirty (30) days prior to any proposed:

- A. dissolution of the Respondent BASF;
- B. acquisition, merger or consolidation of Respondent BASF;
or
- C. other change in the Respondent BASF, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

XI.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5)

Decision and Order

days notice to Respondent BASF, Respondent BASF shall, without restraint or interference, permit any duly authorized representative(s) of the Commission:

- A. access, during business office hours of Respondent BASF 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 Respondent BASF related to compliance with this Order, which copying services shall be provided by Respondent BASF at its expense; and
- B. to interview officers, directors, or employees of Respondent BASF, who may have counsel present, regarding such matters.

XII.

IT IS FURTHER ORDERED that this Order shall terminate on May 14, 2019.

By the Commission.

Decision and Order

**CONFIDENTIAL EXHIBIT A
DESIGNATED CIBA BV EMPLOYEES**

**[Redacted From the Public Record, But Incorporated By
Reference]**

**CONFIDENTIAL EXHIBIT B
DESIGNATED CIBA IB EMPLOYEES**

**[Redacted From the Public Record, But Incorporated By
Reference]**

**CONFIDENTIAL EXHIBIT C
MAASTRICHT PLANT BV LEASED AREA**

**[Redacted From the Public Record, But Incorporated By
Reference]**

Analysis to Aid Public Comment

**CONFIDENTIAL EXHIBIT D
MONITOR AGREEMENT**

**[Redacted From the Public Record Version, But Incorporated
By Reference]**

**ANALYSIS OF CONSENT ORDERS 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 BASF SE (“BASF” or “Respondent”) to remedy the anticompetitive effects stemming from BASF’s proposed acquisition of Ciba Holding Inc. (“Ciba”). Under the terms of the Consent Agreement, BASF is required to divest to a Commission-approved buyer certain Ciba assets and intellectual property relating to two of its high performance pigment businesses.

The proposed Consent Agreement has been placed on the public record for thirty (30) days to receive comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will review the Consent Agreement and comments received and decide whether to withdraw from the proposed Consent Agreement, modify it, or make final the Consent Agreement’s proposed Decision and Order.

Pursuant to an Agreement and Plan of Merger dated September 15, 2008, BASF proposes to purchase all of Ciba’s outstanding stock in a transaction valued at approximately \$5.1 billion. The Commission’s complaint alleges that the proposed acquisition, if

Analysis to Aid Public Comment

consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act (“FTC Act”), as amended, 15 U.S.C. § 45, by lessening competition in the world markets for the research, development, manufacture and sale of bismuth vanadate and indanthrone blue pigments. The Consent Agreement will remedy the alleged violation by divesting certain Ciba assets and intellectual property to a third party thereby replacing the lost competition that would result from the acquisition in these markets.

II. The Parties

BASF, headquartered in Ludwigshafen, Germany, is the world’s leading chemical company. It manufactures, among other things, chemicals, plastics, agricultural products, fine chemicals and high performance pigments. BASF is a leading supplier of several high performance pigments including bismuth vanadate and indanthrone blue. In 2008, BASF’s worldwide sales were approximately \$79.5 billion.

Ciba, headquartered in Basel, Switzerland, is a leading supplier of chemicals used to, among other things, provide color performance and care for plastics, coatings, textile, paper, home and personal care products. Ciba is a leading supplier of high performance pigments including bismuth vanadate and indanthrone blue. In 2008, Ciba’s worldwide sales were approximately \$5.4 billion.

III. The Complaint

According to the Commission’s Complaint, the relevant lines of commerce in which to analyze the effects of the proposed acquisition are the markets for the research, development, manufacture, and sale of bismuth vanadate and indanthrone blue pigments. Pigments are small particles that are used to impart color to a wide variety of products including inks, coatings, plastics and fibers. Bismuth vanadate and indanthrone blue are high performance pigments. High performance pigments are pigments that offer superior durability and light fastness compared to other

Analysis to Aid Public Comment

pigments such as commodity pigments. As a result, high performance pigments are particularly suited for use in products that are exposed to sunlight and weather, such as automotive coatings.

Bismuth vanadate is a high performance pigment that imparts a brilliant yellow coloration with a green tint. Bismuth vanadate is primarily used in applications requiring exposure to high temperatures because of its durability under such conditions. Because no other pigment offers the same combination of unique color and high performance characteristics that bismuth vanadate provides, customers of bismuth vanadate could not achieve the same colors and performance levels in their products without it. Thus, there are no substitute products that customers of bismuth vanadate could turn to even in the face of a significant price increase.

Indanthrone blue is a high performance pigment that imparts a blue coloration with a tinge of red. Because of its durability and light fastness, indanthrone blue is used primarily in automotive coatings. Similar to bismuth vanadate, no other pigment offers the same combination of unique color and high performance characteristics that indanthrone blue provides and customers of indanthrone blue could not achieve the same colors and performance levels in their products without it. Thus, there are no substitute products that customers of indanthrone blue could turn to even if faced with a significant price increase.

The Complaint alleges that the relevant geographic market in which to analyze the anticompetitive effects of the proposed acquisition is the world. Transportation costs and technical barriers to worldwide shipment of the relevant products are insignificant. As a result, several pigment suppliers manufacture these products in a single location and ship them worldwide. For example, BASF and Ciba supply the relevant products for their customers worldwide from their production facilities in Europe.

The Complaint further alleges that the relevant markets are highly concentrated. In the bismuth vanadate market, the proposed transaction would reduce the number of significant players in that

Analysis to Aid Public Comment

market from four to three and the combined entity would have a market share of approximately 60 percent based on sales. The market for indanthrone blue is also highly concentrated with BASF and Ciba constituting two of only three significant suppliers. In that market, the combined entity's market share would be approximately 56 percent based on sales. By eliminating competition between BASF and Ciba in the relevant markets, the proposed transaction would allow the combined firm to unilaterally exercise market power, as well as increase the likelihood of coordinated interaction among the remaining suppliers. As a result, the proposed transaction would increase the likelihood that purchasers of bismuth vanadate and indanthrone blue would be forced to pay higher prices for these products and that innovation and service in these markets would decline.

Entry into either relevant market is not likely and would not be timely or sufficient to deter or counteract the anticompetitive effects that would result from the proposed merger. It would take a new entrant well over two years to complete all of the requisite steps for entry, including: researching and developing the pigment technology; building a manufacturing facility; and passing the rigorous qualification testing required to get customer approval. Additionally, new entry into either the bismuth vanadate or indanthrone blue markets is unlikely to occur because the capital investment to become a viable supplier is high relative to the limited sales opportunities available to new entrants.

IV. Terms of the Proposed Order

The proposed Consent Agreement effectively remedies the proposed merger's anticompetitive effects in the markets for bismuth vanadate and indanthrone blue pigments. BASF is required to divest assets used to research, develop, manufacture, and sell those products. The divested assets will permit the acquirer to become a viable competitor in the relevant markets.

The assets to be divested include Ciba's bismuth vanadate production assets which are located in Europe, or provides a

Analysis to Aid Public Comment

mechanism for, at the acquirer's option, production to be relocated to the acquirer's production facilities. More specifically, BASF can either: (1) divest the Ciba bismuth vanadate production facility, (2) lease the production facility to the acquirer, or (3) enter into a tolling agreement that provides sufficient time for the acquirer to begin production at its own facilities and to qualify that production with customers. The indanthrone blue production assets will be used to produce that product pursuant to a tolling arrangement at the Ciba facilities until the acquirer of those assets is prepared to shift production to its own facilities. All tangible assets and intellectual property used to produce the relevant products will also be divested. Several credible acquirers have expressed interest in purchasing the assets to be divested.

The provisions ordering the two divestitures further include ancillary relief such as supply agreements, protections for confidential information, assistance in hiring of key employees, and the appointment of a monitor to oversee the divestiture process to ensure that the acquirer, or acquirers, of the relevant assets will be able to effectively compete in the research, development, manufacture, and sale of bismuth vanadate and indanthrone blue pigments. A final Order to Maintain Assets has also been issued.

The proposed Consent Agreement includes a provision that allows the Commission to appoint an interim monitor to ensure that BASF expeditiously complies with all of its obligations and performs all of its responsibilities as required by the Commission's Decision and Order. If appointed, the interim monitor would be required to file periodic reports with the Commission to ensure that the Commission remains informed about the status of the divestitures and the efforts being made to accomplish the divestitures.

Finally, the Consent Agreement contains provisions that allow the Commission to appoint a divestiture trustee to divest the assets that are the subject of the Commission's Decision and Order if BASF fails to divest the designated assets within six (6) months after the Consent Agreement is accepted by the Commission for Public

Analysis to Aid Public Comment

Comment. To ensure that the Commission remains informed about the status of the proposed divestitures and the transfer of the assets, the proposed Consent Agreement requires BASF to file reports with the Commission periodically until the divestitures and transfers are accomplished.

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

Complaint

IN THE MATTER OF

**WHOLE FOODS MARKET, INC.,
AND
WILD OATS MARKETS, INC.****CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL
TRADE COMMISSION ACT**

*Docket No. 9324, File No. 071 0114
Complaint, June 27, 2007 – Decision, May 28, 2009*

This consent order addresses the \$700 million acquisition by Whole Foods Market Inc., of Wild Oats Markets, Inc. The combination of Whole Foods and Wild Oats would provide Whole Foods with market power post-acquisition in the premium natural and organic supermarkets market, leading to significant anticompetitive effects. Both the district court and administrative complaints alleged that the combined company would increase prices, and decrease the quality and number of offered services, if the merger were permitted to close. The consent order requires Whole Foods to divest 32 stores, along with associated Wild Oats intellectual property and related assets, leases, properties, and government permits. The Order to Maintain Assets will require Whole Foods to maintain the operating status of the open stores, and maintain all leases (open and dark stores) until divestiture is complete.

Participants

For the Commission: Tom Brock, Malcolm Catt, Sean Dillon, Jil Frumin, Kevin Hahm, Albert Kim, Kenneth A. Libby, Mazor Matzkevich, Brendan McNamara, Jonathan Platt, Stephanie Reynolds, Andrea Ryan, Jennifer Schwab, Jennifer Stiefvater, Laura Sullivan, Matt Tabas, Nicholas Widnell, and Michelle Yost.

For the Respondents: Jeffrey Brennan, Paul Denis, and James Fishkin, Dechert LLP, and Lanny Davis, Orrick, Herrington & Sutcliffe LLP.