

Complaint

IN THE MATTER OF

NUFARM LIMITEDCONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE
COMMISSION ACT

Docket No. C-4298; File No. 081 0130
Filed September 7, 2010 — Decision, September 7, 2010

The complaint alleges that Nufarm Limited's 2008 acquisition of A.H. Marks Holding Limited injured competition in the U.S. market for three types of phenoxy herbicides, MCPA, MCPP-p, and 2,4DB, which are widely used on grass, and wheat, barley, peanut, and alfalfa crops. The complaint alleges that the acquisition created a monopoly in the markets for MCPA and MCPP-p markets and substantially increased concentration in the 2,4DB market. The consent order requires Nufarm to divest A.H. Marks' MCPA rights and assets to a new competitor, Albaugh, Inc.; and to divest A.H. Marks' MCPP-p rights and assets to a second new competitor, PBI Gordon Co. The consent order also requires Nufarm to modify certain agreements related to MCPA and 2,4DB, in order to facilitate Albaugh and PBI Gordon's transition into the U.S. market. The consent order permits the Commission to appoint a trustee to ensure the assets are divested.

Participants

For the *Commission*: Jonathan Platt and Nancy Turnblacer.

For the *Respondent*: Steve Kowal, K&L Gates LLP; and David Stetler, Stetler and Duffy, Ltd.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Nufarm Limited ("Nufarm"), a corporation subject to the jurisdiction of the Commission, entered into an agreement, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, pursuant to which Nufarm acquired all the shares of A.H. Marks Holding Limited ("A. H. Marks") in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18,

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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. SUMMARY

1. In March 2008, Nufarm acquired A.H. Marks in a transaction combining two leading manufacturers of phenoxy herbicides. The acquisition resulted in Nufarm obtaining monopoly positions in two phenoxy herbicide markets (MCPA and MCPP-p) and reduced a third market (2,4DB) to a duopoly. The merger is likely to result in higher prices and other anticompetitive effects.

II. THE RESPONDENT

2. Respondent Nufarm is a corporation organized and existing under the laws of Australia, with its office and principal place of business located at 103-105 Pipe Road, Laverton North, Victoria 3026. Nufarm has two subsidiaries in the United States, Nufarm Americas and Nufarm Turf and Specialty, both located at 150 Harvester Drive, Suite 200, Burr Ridge, IL 60527.

3. Nufarm manufactures, markets, and distributes crop protection products, including herbicides, fungicides and insecticides in the United States. It is one of the world's leading producers and distributors of phenoxy herbicides such as MCPA, MCPP-p, and 2,4DB.

III. THE ACQUIRED COMPANY

4. Prior to the acquisition, A. H. Marks was a corporation organized and existing under the laws of the United Kingdom, with its office and principal place of business located at Wyke, Bradford, West Yorkshire, BD 12 9EJ, England, United Kingdom.

5. A.H. Marks produced and exported phenoxy herbicides to the United States.

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IV. THE ACQUISITION

6. On or about March 4, 2008, Nufarm, pursuant to an agreement with A.H. Mark's shareholders ("the Acquisition Agreement"), acquired all the issued shares of A. H. Marks ("the Acquisition").

V. JURISDICTION

7. At all times relevant herein, Nufarm has been, and is now, a corporation as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44; and at all times relevant herein, Nufarm has been, and is now, engaged in commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.

8. At all times relevant herein, A.H. Marks was a corporation as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44; and at all times relevant herein, A.H. Marks was engaged in commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.

VI. RELEVANT PRODUCT MARKET

9. Phenoxy herbicides, which include MCPA, MCPP-p, and 2,4DB, are widely used to eliminate broadleaf weeds from lawns, fields and crops. Specifically, MCPA, or products containing MCPA, are used frequently on wheat and barley crops, as well as on grass. MCPP-p, or products containing MCPP-p, are frequently used on grass. 2,4DB, or products containing 2,4DB, are used on peanut and alfalfa crops.

10. The relevant product markets in which to analyze the Acquisition include the manufacture and sale of these three phenoxy herbicides:

- a. MCPA or 2-methyl-4-chlorophenoxyacetic acid.

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- b. MCP-P or 2-(4-chloro-2-methylphenoxy) propanoic acid.
- c. 2,4DB or 4-(2,4-dichlorophenoxy) butyric acid, 4-(2,4-dichlorophenoxy) butanoic acid.

VII. RELEVANT GEOGRAPHIC MARKET

11. The relevant geographic area within which to analyze the effects of the Acquisition is the United States.

VIII. STRUCTURE OF THE MARKET

12. The Acquisition merged the only competitors in the markets for MCPA and MCP-P and two of only three competitors in the 2,4DB market.

13. The Acquisition substantially increased concentration in the already highly concentrated MCPA, MCP-P, and 2,4DB markets.

IX. COMPETITIVE EFFECTS

14. The Acquisition may have substantially lessened competition in the relevant markets by, among other things:

- a. Eliminating actual, direct, and substantial, competition between Nufarm and A.H. Marks;
- b. Reducing the number of competitors in the MCPA and MCP-P markets from two to one, creating monopolies in the markets for both products, and giving Nufarm substantial market power;
- c. Reducing the number of competitors in the 2,4DB market from three to two and giving Nufarm substantial market power;
- d. Facilitating the ability of Nufarm to exercise unilateral market power in the markets for MCPA, MCP-P and 2,4DB;

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- e. Reducing Nufarm's incentives to improve service or product quality or to pursue further innovation; and
- f. Allowing Nufarm, unconstrained by effective competition, to increase prices.

X. ENTRY CONDITIONS

15. Entry into the MCPA, MCPP-p and 2,4DB markets would not be timely, likely, or sufficient to prevent or defeat the anticompetitive effects of the Acquisition.

16. In order to enter the MCPA, MCPP-p or 2,4DB markets, a new entrant would need, among other things, access to supply of the herbicides and the requisite regulatory approvals from federal and state agencies to market the products in the United States. To obtain the necessary regulatory approvals, the entrant would have to submit and periodically update extensive environmental and toxicological testing data. The costs of entering the relevant markets for MCPA, MCPP-p, and 2,4DB are high compared to the limited potential sales revenues available to an entrant. As a result, entry into each of the relevant markets would require substantial sunk costs that would likely make entry unprofitable. New entry into the relevant markets sufficient to achieve significant market impact within two years is therefore unlikely to occur.

17. In addition, Nufarm's contracts with The Dow Chemical Company and joint venture with Aceto Corp. restricted these firms' competitive activities in the markets for MCPA and 2,4-DB and posed additional barriers to entry.

XI. VIOLATIONS CHARGED

18. The Acquisition Agreement described in Paragraph 6 constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and the Acquisition described in Paragraph 6 constitutes a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

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WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this seventh day of September, 2010, issues its complaint against said respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of the acquisition by Respondent Nufarm Limited (“Nufarm”) of A.H. Marks Holding Limited (“AHM”), and Respondent having been furnished thereafter with a copy of a draft of 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 with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated said Acts, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with

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the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint and makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent Nufarm is a corporation organized, existing and doing business under and by virtue of the laws of Australia, with its offices and principal place of business located at 103-105 Pipe Road, Laverton North, Victoria 3026, Australia, with the offices and principal place of business of its United States’ subsidiary, Nufarm Americas, Inc., located at 150 Harvester Drive, Suite 200, Burr Ridge, IL 60527.
2. The Federal Trade Commission has jurisdiction over 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. “Nufarm” means Nufarm Limited, its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Nufarm, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Aceto” means Aceto Corporation, a corporation organized, existing, and doing business under and by virtue of the laws of the state of New York, with its office and principal place of business located at One Hollow Lane, Lake Success, NY, 11042.
- C. “Aceto Contracts” means all contracts entered into

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between Nufarm and Aceto relating to 2,4DB, including but not limited to the following: Operating Agreement of S.R.F.A. LLC; License Agreement for Technical Registrations; Sales Agent Agreement for the Sale of Formulated Products by Aceto Agricultural Chemicals Corporation; Sales Agent Agreement for the Sale of Formulated Products by Nufarm Americas, Inc.; Collateral Agreement (January 22, 2004); License Agreement for Additional Formulated Labels; License Agreement for Trademarks and Formulations; and Agreement for the Manufacture and Supply of Formulated Products. “Aceto Contracts” includes any subsequent contracts modifying, amending, or omitting any term(s) within these contracts.

- D. “Aceto/Nufarm Joint Venture” means the joint venture between Aceto and Respondent relating to 2,4DB, formed by and operated pursuant to the Aceto Contracts.
- E. “AHM” means A.H. Marks Holding Limited, a corporation organized, existing, and doing business, prior to March 5, 2008, under and by virtue of the laws of the United Kingdom, with its office and principal place of business located at Wyke, Bradford, West Yorkshire, BD12 9EJ, England, United Kingdom.
- F. “Albaugh” means Albaugh, Inc., a privately held corporation with its offices and principal place of business at 1525 NE 36th Street, Ankeny, IA, 50021.
- G. “Albaugh Divestiture Agreement” means the Sale and Purchase Agreement between AHM and Albaugh relating to MCPA.
- H. “Closing Date” means the date on which Respondent (or a Divestiture Trustee) divests the Divestiture Assets as required by Paragraph II. and Paragraph III. (or Paragraph VIII.) of this Order.
- I. “Commission” means the Federal Trade Commission.

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- J. “Commission-approved Acquirer” means each acquirer that receives the prior approval of the Commission pursuant to Paragraph II. and Paragraph III. (or Paragraph VIII.) of this Order.
- K. “Direct Cost” means a cost not to exceed the cost of direct labor, direct overhead, materials, travel and other expenditures to the extent the costs are directly incurred to provide the product, and shall not include corporate overhead, fines, penalties, or other liabilities.
- L. “Divestiture Agreement” means the agreements, licenses, assignments, and all other agreements entered into by the Commission-approved Acquirers and Respondent and approved by the Commission pursuant to this Order, including the Albaugh Divestiture Agreement, or any other applicable MCPA Divestiture Agreement, the PBI Gordon Divestiture Agreement, or any other applicable MCPP-p Divestiture Agreement.
- M. “Divestiture Assets” means the MCPA Divestiture Assets and the MCPP-p Divestiture Assets.
- N. “Divestiture Trustee” means a trustee appointed by the Commission pursuant to Paragraph VIII. of this Order.
- O. “Dow” means Dow AgroSciences LLC, a Delaware limited liability company and wholly-owned subsidiary of The Dow Chemical Company, with its offices and principal place of business at 9330 Zionsville Road, Indianapolis, IN 46268, and further expressly includes Sanachem Ltd., Kempton Park, South Africa.
- P. “Dow Contracts” means the following contracts entered into by Dow and Nufarm: (a) 2009 Commercial Agreement, (b) 2009 MCPA Supply Agreement (MCPA Straight Products), and (c) 2009 MCPA Supply Agreement (Mixtures); “Dow Contracts” includes any subsequent contracts

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modifying, amending, or omitting any term(s) within these contracts.

- Q. “EPA” means the United States Environmental Protection Agency.
- R. “Intellectual Property” means patents; copyrights; trademarks, trade dress, trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, development and other information; and rights to obtain and file for patents and copyrights and registrations thereof, including but not limited to the confidential statements of formula for the Products.
- S. “LCPA” means the chiral intermediate, L-chloropropionic acid.
- T. “LCib” means L-(2)-Chloropropionic acid isobutyl ester.
- U. “MCPA” means 2-methyl-4-chlorophenoxyacetic acid.
- V. “MCP-p” means 2-(4-chloro-2-methylphenoxy) propanoic acid.
- W. “2,4DB” means 4-(2,4-dichlorophenoxy) butyric acid.
- X. “2,4DB Task Force” means the current (as of the date this Order becomes final) Task Force relating to 2,4DB and, if applicable, its successors
- Y. “2,4DB Task Force Seat” means membership in the 2,4DB Task Force, with all attendant rights and privileges at least equivalent to those owned or enjoyed by any and all other members, including but not limited to ownership interests in, and access to, all data generated or owned by the 2,4DB Task Force or jointly-owned by its members, and all data otherwise accessible to 2,4DB Task Force members as a function or benefit of their membership in the Task Force for use in obtaining regulatory approvals or any other

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purpose, and further including all costs of transferring membership to the Commission-approved Acquirer, including contributions to the 2,4DB Task Force or its members for data generated prior to the transfer, which shall be the responsibility of Respondent.

- Z. “MCPA Divestiture Agreement” means the Divestiture Agreement approved by the Commission pursuant to Paragraph II. (or Paragraph VIII.) of this Order relating to the divestiture of the MCPA Divestiture Assets; the “MCPA Divestiture Agreement” includes, as appropriate, the Albaugh Divestiture Agreement.
- AA. “MCPA Divestiture Assets” means (1) the MCPA Task Force Seat and (2) all AHM Registrations relating to MCPA.
- BB. “MCPA Task Force” means the current (as of the date this Order becomes final, at that time known as 1994 MCPA Task Force III) Task Force relating to MCPA and, if applicable, its successors.
- CC. “MCPA Task Force Seat” means AHM’s membership in the MCPA Task Force, with all attendant rights and privileges at least equivalent to those owned or enjoyed by any and all other members, including but not limited to ownership interests in, and access to, all data generated or owned by the MCPA Task Force or jointly-owned by its members, and all data otherwise accessible to MCPA Task Force members as a function or benefit of their membership in the Task Force for use in obtaining regulatory approvals or any other purpose, and further including all costs of transferring membership to the Commission-approved Acquirer, including contributions to the MCPA Task Force or its members for data generated prior to the transfer, which shall be the responsibility of Respondent. “MCPA Task Force Seat” means AHM’s membership in the MCPA Task Force as held by AHM prior to its acquisition by Nufarm; *provided, however*, that should there be any disparity between the rights or

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privileges between the MCPA Task Force Seat held by Nufarm prior to the AHM acquisition and the MCPA Task Force seat held by AHM at the time of its acquisition by Nufarm, “MCPA Task Force Seat” shall mean the MCPA Task Force seat with the greater or more extensive rights or privileges.

- DD. “MCPP-p Divestiture Agreement means the Divestiture Agreement approved by the Commission pursuant to Paragraph III. (or Paragraph VIII.) of this Order relating to the divestiture of the MCPP-p Divestiture Assets; the “MCPP-p Divestiture Agreement” includes, as appropriate, the PBI Gordon Divestiture Agreement.
- EE. “MCPP-p Divestiture Assets” means (1) the MCPP-p Task Force Seat and (2) all AHM Registrations relating to MCPP-p.
- FF. “MCPP-p Task Force” means the current (as of the date this Order becomes final) Task Force relating to MCPP-p and, if applicable, its successors.
- GG. “MCPP-p Task Force Seat” means AHM’s membership in the MCPP-p Task Force, with all attendant rights and privileges at least equivalent to those owned or enjoyed by any and all other members, including but not limited to ownership interests in, and access to, all data generated or owned by the MCPP-p Task Force or jointly-owned by its members, and all data otherwise accessible to MCPP-p Task Force members as a function or benefit of their membership in the Task Force for use in obtaining regulatory approvals or any other purpose, and further including all costs of transferring membership to the Commission-approved Acquirer, including contributions to the MCPP-p Task Force of its members for data generated prior to the transfer, which shall be the responsibility of Respondent. “MCPP-p Task Force Seat” means AHM’s membership in the MCPP-p Task Force as held by AHM prior to its acquisition by Nufarm; *provided, however*, that should

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there be any disparity between the rights or privileges between the MCPP-p Task Force Seat held by Nufarm prior to the AHM acquisition and the MCPP-p Task Force seat formerly held by AHM, “MCPP-p Task Force Seat” shall mean the MCPP-p Task Force seat with the greater or more extensive rights or privileges.

- HH. “Nufarm Customer” means any company or person that purchased or purchases MCPA, MCPP-p, or 2,4DB from Nufarm or AHM.
- II. “Nufarm Customer Contract” means any agreement entered into by Nufarm or AHM with a Nufarm Customer with respect to the purchase, supply, or sale of MCPA, MCPP-p or 2,4DB, with the exception of (1) the Dow Contracts, (2) the Aceto Contracts, (3) any Divestiture Agreements, or (4) agreements to the extent such agreements relate solely to the purchase, supply, or sale of blended products in which the Product(s) are not the sole active ingredients. “Nufarm Customer Contract” includes (1) Nufarm Customer Contracts in effect as of the date Respondent executed the Agreement Containing Consent Order, and (2) Nufarm Customer Contracts entered into by Respondent with a Nufarm Customer any time from the date Respondent executed the Agreement Containing Consent Order until six (6) months after the latest of the Closing Dates.
- JJ. “PBI Gordon” means PBI Gordon Corporation, a corporation organized and existing under the laws of Missouri, U.S.A., with offices at 1217 W. 12th Street, Kansas City, Missouri 64101.
- KK. “PBI Gordon Divestiture Agreement” means the Sale and Purchase Agreement between Respondent and PBI Gordon relating to MCPP-p.
- LL. “Products” means MCPA; MCPP-p; and/or 2,4DB.
- MM. “Registration” means existing registrations and approvals, including those granted or issued by any

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and all local, state, provincial, and federal entities (including but not limited to the EPA, the California Environmental Protection Agency, and the Canadian Pest Management Regulatory Agency of Health Canada), permitting, necessary or required for, or relating to the manufacture, sale, or use of the Products in the United States or Canada as technical products or the manufacture, sale, or use of the Products in formulations or end-use products in which one of the Products is the sole active ingredient in the formulation or end-use product. “Registration” also includes supplemental registration or repack registration approvals granted to customers, alternative sources, suppliers, or other third parties that have qualified a Product for manufacture, sale, or use in the United States or Canada by the customer, alternative source, supplier, or other third party; “Registration” also includes licensing of or access to data, including but not limited to Respondent’s confidential statements of formula, that are required for the completion of any necessary Registrations or approvals required by any governmental entity and for the addition of new sources for the Products.

NN. “Respondent” means Nufarm.

OO. “Task Force” means any group of industry participants formed to generate data, including environmental and toxicology data, for specific active ingredients or for industry-wide issues such as spray drift or worker exposure, and expressly includes, though is not limited to: the MCPA Task Force Three; 2,4DB Task Force; MCPP-p Task Force.

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

A. By no later than five (5) days after the date on which this Order is accepted for public comment, Respondent shall divest the MCPA Divestiture Assets to Albaugh pursuant to and in accordance with the Albaugh

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Divestiture Agreement, absolutely and in good faith; *provided, however*, that if Respondent has divested the MCPA Divestiture Assets to Albaugh prior to the date this Order becomes final and if, at the time the Commission determines to make this Order final:

1. The Commission determines and notifies Respondent that Albaugh is not an acceptable acquirer of the MCPA Divestiture Assets, then Respondent shall immediately rescind the transaction with Albaugh and shall divest the MCPA Divestiture Assets no later than six (6) months from the date the Order becomes final, absolutely and in good faith, at no minimum price, to a Commission-approved Acquirer and only in a manner that receives the prior approval of the Commission; or
 2. The Commission determines and notifies Respondent that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct the Respondent, or appoint a Divestiture Trustee, pursuant to Paragraph IV of this Order, to effect such modifications to the manner of divesting the MCPA Divestiture Assets to Albaugh (including, but not limited to, entering into additional agreements or arrangements) as may be necessary to satisfy the requirements of this Order.
- B. Prior to completing the divestiture required by this Paragraph, Respondent shall obtain all third-party consents and satisfy all other conditions, to the extent necessary, required to facilitate the divestitures, or as otherwise required by Paragraph II., including obtaining any consents or waivers of, or payments to, third parties required to access data or transfer assets.
- C. Respondent shall (and the Divestiture Agreements shall include provisions that, subject to the prior approval of the Commission, satisfy the following):

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1. Ensure that the Commission-approved Acquirer is not liable to the MCPA Task Force or to individual members of the MCPA Task Force for any past costs or expenses of the MCPA Task Force (including but not limited to data compensation, initiation fees, and other costs);
 2. Use best efforts to ensure that the Commission-approved Acquirer retains rights equivalent to the rights of the other members of the MCPA Task Force and that the Commission-approved Acquirer's rights cannot be reduced or restricted by future actions of the other members of the MCPA Task Force; and
 3. In order to enable the Commission-approved Acquirer of the MCPA Divestiture Assets to supply customers with MCPA at a similar quantity, in a similar manner, and of similar quality as Respondent was supplying customers with MCPA, provide supply of MCPA to the Commission-approved Acquirer of the MCPA Divestiture Assets, at the option of the Commission-approved Acquirer, pursuant to terms and conditions subject to the prior approval of the Commission; *provided, however*, that Nufarm shall use best efforts to minimize its costs and to use its manufacturing plants in connection with the supply of MCPA in a manner that is intended to result in the greatest cost savings to the Commission-approved Acquirer.
- D. The Divestiture Agreements 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 any Commission-approved Acquirer or to reduce any obligations of Respondent under such agreements, and each such agreement, if approved by the Commission as the Divestiture Agreement, shall be incorporated by reference into this Order and made a part hereof. Respondent shall comply with all terms of

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the Divestiture Agreements, and any breach by Respondent of any term of the Divestiture Agreements shall constitute a violation of this Order. If any term of the Divestiture Agreements varies from the terms of this Order (“Order Term”), then to the extent that Respondent cannot fully comply with both terms, the Order Term shall determine Respondent’s obligations under this Order. Any material modification of any Divestiture Agreement between the date the Commission approves the Divestiture Agreement and the Closing Date, without the prior approval of the Commission, or any failure to meet any material condition precedent to closing (whether waived or not), shall constitute a violation of this Order. Notwithstanding any paragraph, section, or other provision of the Divestiture Agreements, for a period of three (3) years after the relevant Closing Date, any modification of a Divestiture Agreement, without the approval of the Commission, shall constitute a failure to comply with this Order. Respondent shall provide written notice to the Commission not more than five (5) days after any modification (material or otherwise) of the Divestiture Agreement, or after any failure to meet any condition precedent (material or otherwise) to closing (whether waived or not).

- E. Until Respondent complies with Paragraph II. (or Paragraph VIII.) of this Order, Respondent shall continue to comply with the obligations of the July 15, 2009, asset maintenance agreement between counsel for Respondent and Commission staff, and Respondent shall take such actions as are necessary to maintain the viability, marketability, validity, and good-standing of Nufarm’s and AHM’s Task Force Seats and Registrations and to prevent the dissolution, revocation, withdrawal, impairment, or restriction of Nufarm’s and AHM’s MCPA Task Force Seats and Registrations.
- F. The purpose of the divestiture of the Divestiture Assets and the additional requirements in Paragraph II. is to

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remedy the lessening of competition in the manufacture and sale of each Product as alleged in the Commission's complaint and to ensure that divestiture of the Divestiture Assets: (a) vests an entrant with market access and regulatory positions at least identical to AHM; (b) includes the enumerated obligations (Paragraph II.C.); and (c) provides such additional accommodations reasonably required by the entrant to expeditiously enter and commence viable and sustainable participation in the markets as alleged in the Commission's complaint.

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

- A. By no later than five (5) days after the date on which this Order is accepted for public comment, Respondent shall divest the MCPP-p Divestiture Assets to PBI Gordon pursuant to and in accordance with the PBI Gordon Divestiture Agreement, absolutely and in good faith; *provided, however*, that if Respondent has divested the MCPP-p Divestiture Assets to PBI Gordon prior to the date this Order becomes final and if, at the time the Commission determines to make this Order final:
1. The Commission determines and notifies Respondent that PBI Gordon is not an acceptable acquirer of the MCPP-p Divestiture Assets, then Respondent shall immediately rescind the transaction with PBI Gordon and shall divest the MCPP-p Divestiture Assets no later than six (6) months from the date the Order becomes final, absolutely and in good faith, at no minimum price, to a Commission-approved Acquirer and only in a manner that receives the prior approval of the Commission; or
 2. The Commission determines and notifies Respondent that the manner in which the divestiture was accomplished is not acceptable, the

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Commission may direct the Respondent, or appoint a Divestiture Trustee, pursuant to Paragraph IV of this Order, to effect such modifications to the manner of divesting the MCPP-p Divestiture Assets to PBI Gordon (including, but not limited to, entering into additional agreements or arrangements) as may be necessary to satisfy the requirements of this Order.

- B. Prior to completing the divestiture required by this Paragraph, Respondent shall obtain all third-party consents and satisfy all other conditions, to the extent necessary, required to facilitate the divestitures, or as otherwise required by Paragraph III. of this Order, including obtaining any consents or waivers of, or payments to, third parties required to access data or transfer assets.
- C. Respondent shall (and the Divestiture Agreements shall include provisions that, subject to the prior approval of the Commission, satisfy the following):
 - 1. Ensure that the Commission-approved Acquirer is not liable to the MCPP-p Task Force or to individual members of the MCPP-p Task Force for any past costs or expenses of the MCPP-p Task Force (including but not limited to data compensation, initiation fees, and other costs);
 - 2. Use best efforts to ensure that the Commission-approved Acquirer retains rights equivalent to the rights of the other members of the MCPP-p Task Force and that the Commission-approved Acquirer's rights cannot be reduced or restricted by future actions of the other members of the MCPP-p Task Force; and
 - 3. In order to enable the Commission-approved Acquirer of the MCPP-p Divestiture Assets to supply customers with MCPP-p at a similar quantity, in a similar manner, and of similar quality

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as Respondent was supplying customers with MCPP-p, provide MCPP-p to the Commission-approved Acquirer of the MCPP-p Divestiture Assets, at the option of the Commission-approved Acquirer, pursuant to terms and conditions subject to the prior approval of the Commission; *provided, however*, that Nufarm shall use best efforts to minimize its costs and to use its manufacturing plants in connection with the supply of MCPP-p in a manner that is intended to result in the greatest cost savings to the Commission-approved Acquirer.

- D. In connection with divestiture of the MCPP-p Divestiture Assets, subject to the approval of the Commission, Respondent shall provide to the Commission-approved Acquirer of the MCPP-p Divestiture Assets, at the Acquirer's option, for a period of up to three (3) years, a quantity of LCPA up to one-half of Respondent's annual capacity for the production of LCPA, for use only in the manufacture of MCPP-p, at no more than Respondent's Direct Cost, and for delivery on a schedule and terms that are consistent with usual and customary business practice; Respondent shall use best efforts to minimize its costs of providing LCPA and to use its manufacturing plants in connection with the supply of Product in a manner that is intended to result in the greatest cost savings to the Commission-approved Acquirer.
- E. Respondent shall:
1. waive all provisions in all contracts and agreements to which Respondent is a party that:
 - a. grant Respondent exclusive use of or access to LCib or LCib capacity, or
 - b. restrict the ability of the other parties to the contracts or agreements to supply the Commission-approved Acquirer of the MCPP-

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p Divestiture Assets with LCib for the manufacture or sale of MCPP-p; and

2. shall take no action to restrict the ability of purchasers of LCib to use LCib to produce MCPP-p or to have a third party use the LCib to produce MCPP-p on behalf of the purchaser.

F. The Divestiture Agreements 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 any Commission-approved Acquirer or to reduce any obligations of Respondent under such agreements, and each such agreement, if approved by the Commission as the Divestiture Agreement, shall be incorporated by reference into this Order and made a part hereof. Respondent shall comply with all terms of the Divestiture Agreements, and any breach by Respondent of any term of the Divestiture Agreements shall constitute a violation of this Order. If any term of the Divestiture Agreements varies from the terms of this Order (“Order Term”), then to the extent that Respondent cannot fully comply with both terms, the Order Term shall determine Respondent’s obligations under this Order. Any material modification of any Divestiture Agreement between the date the Commission approves the Divestiture Agreement and the Closing Date, without the prior approval of the Commission, or any failure to meet any material condition precedent to closing (whether waived or not), shall constitute a violation of this Order. Notwithstanding any paragraph, section, or other provision of the Divestiture Agreements, for a period of three (3) years after the relevant Closing Date, any modification of a Divestiture Agreement, without the approval of the Commission, shall constitute a failure to comply with this Order. Respondent shall provide written notice to the Commission not more than five (5) days after any modification (material or otherwise) of the Divestiture Agreement, or after any failure to

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meet any condition precedent (material or otherwise) to closing (whether waived or not).

- G. Until Respondent complies with Paragraph III. (or Paragraph VIII.) of this Order, Respondent shall continue to comply with the obligations of the July 15, 2009, asset maintenance agreement between counsel for Respondent and Commission staff, and Respondent shall take such actions as are necessary to maintain the viability, marketability, validity, and good-standing of Nufarm's and AHM's Task Force Seats and Registrations and to prevent the dissolution, revocation, withdrawal, impairment, or restriction of Nufarm' and AHM's MCPP-p Task Force Seats and Registrations.
- H. The purpose of the divestiture of the Divestiture Assets and the additional requirements in Paragraph III. is to remedy the lessening of competition in the manufacture and sale of each Product as alleged in the Commission's complaint and to ensure that divestiture of the Divestiture Assets: (a) vests an entrant with market access and regulatory positions at least identical to AHM; (b) includes the enumerated obligations (Paragraph III.C.); and (c) provides such additional accommodations reasonably required by the entrant to expeditiously enter and commence viable and sustainable participation in the markets as alleged in the Commission's complaint.

IV.

IT IS FURTHER ORDERED that Respondent shall allow each Nufarm Customer to terminate its Nufarm Customer Contract with respect to any or all of the Products, without penalty or charge, immediately upon request of the Nufarm Customer at any time from the date Respondent executes the Agreement Containing Consent Orders until eighteen (18) months after the latest of the Closing Dates:

- A. For Nufarm Customer Contracts with a Nufarm Customer in effect on the date Respondent executes

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the Agreement Containing Consent Orders, Respondent shall notify such Nufarm Customer of this requirement no later than thirty (30) days after execution of the Agreement Containing Consent Orders using the notice attached to this Order as Appendix A; and

- B. For Nufarm Customer Contracts entered into with a Nufarm Customer from the date Respondent executes the Agreement Containing Consent Orders until six (6) months after the latest of the Closing Dates, Respondent shall notify such Nufarm Customer of this requirement prior to execution of the Nufarm Customer Contract using the notice attached to this Order as Appendix A .

V.

IT IS FURTHER ORDERED that Respondent shall waive its rights to enforce, and shall not enforce, any provisions in contracts or agreements with competitors, customers, or other industry participants, and shall otherwise take no future actions, that:

- A. Impose or enforce any non-compete agreements between and among manufacturers of the Products;
- B. Prevent Dow, Aceto, or any other person from purchasing Products from the Commission-approved Acquirer or from entering, or sponsoring another's person's entry into the manufacture and sale of Products, subject to the requirement of V.G., below;
- C. Limit Dow's, Aceto's, or others' ability to resell Products, including placing limitations on the price at which Dow, Aceto, or others can resell the Products;
- D. Impose or enforce any requirement that Dow, Aceto, Albaugh, and/or PBI Gordon acquire all or a majority of its requirements of the Products from Nufarm, subject to the requirement of V.G., below;

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- E. Directly or indirectly result in the dissolution of any Task Force of the Products, or transfer to Respondent any right or interest in any Task Force of the Products or Registration without complying with the prior notice obligations of Paragraph VII. of this Order;
- F. Limit or restrict Aceto's ability to use its 2,4DB Task Force Seat or 2,4DB Registrations to develop alternative sources of 2,4DB and/or purchase 2,4DB for any purpose from these or other sources of 2,4DB; and
- G. Impose or enforce any requirement that Dow purchase more than 75% of its internal MCPA requirements from Respondent.

VI.

IT IS FURTHER ORDERED that Respondent shall:

- A. Fully and irrevocably terminate the Aceto/Nufarm Joint Venture no later than ten (10) days after Respondent executes the Agreement Containing Consent Orders; and
- B. Provide to Aceto, at the option of Aceto, 2,4DB at quantities and prices similar to that provided to Aceto under the Aceto/Nufarm Joint Venture, supply of 2,4DB at a similar quantity, in a similar manner, and of similar quality as Aceto was supplying customers with 2,4DB during the effective period of the Aceto/Nufarm Joint Venture, pursuant to terms and conditions subject to the approval of the Commission.

VII.

IT IS FURTHER ORDERED that, for a period of five (5) years from the date this Order becomes final, Respondent shall not, without providing advance written notification to the Commission in the manner described in this Paragraph:

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- A. Acquire, directly or indirectly, any right or interest in any Registration or any Product's Task Force; or
- B. Enter into any agreements with any
 - 1. member of any Product's Task Force,
 - 2. holder of a Registration, or
 - 3. person that purchases more than 20 percent of Nufarm's U.S. sales of technical grade materials of any Product,

which agreements:

- 4. relate to any Registrations or any Product's Task Force,
- 5. contain non-compete clauses or joint marketing agreements relating to any or all of the Products, or
- 6. otherwise contain provisions that limit competition among manufacturers or sellers of, or restrict the ability of persons to enter into the manufacture or sale of any or all of the Products.

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"), 16 C.F.R. § 803 App., 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 and not of any other party to the transaction. Respondent shall provide the Notification to the Commission at least thirty (30) days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of

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the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondent shall not consummate the transaction or make the agreement effective, until thirty (30) days after submitting such additional information or documentary material.

In addition to the information required by the Notification, Respondent shall also submit with the Notification complete copies of all agreements and, at the request of Commission staff, all documents relating to the negotiations of such agreements, including, but not limited to, management's assessments and evaluations of the agreements.

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.

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

- A. If Respondent has not fully complied with the obligations to divest the MCPA Divestiture Assets or the MCPP-p Divestiture Assets as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to divest the MCPA Divestiture Assets (if the MCPA Divestiture Assets have not been divested) or the MCPP-p Divestiture Assets (if the MCPP-p Divestiture Assets have not been divested) pursuant to Paragraph II. or Paragraph III. of this Order, as applicable, and effectuate the other obligations of Paragraph II. or Paragraph III. of this Order, as applicable, in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action

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pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondent shall consent to the appointment of a Divestiture Trustee in such action to divest the required assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed 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 to comply with this Order.

- .
 - B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Divestiture Trustee, Respondent 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 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 effectuate the divestitures and satisfy the additional obligations required by Paragraph II. or Paragraph III, as applicable, of this Order.
 - D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondent shall consent to the following terms and

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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 effectuate the divestitures and satisfy the additional obligations required by Paragraph II. or Paragraph III, as applicable, of this Order.
2. The Divestiture Trustee shall have twelve (12) months after the date the Commission approves the trust agreement described herein to accomplish the divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the Divestiture Trustee has submitted a plan to satisfy the obligations of Paragraph II. or Paragraph III., as applicable, or believes that such can be achieved within a reasonable time, the period may be extended by the Commission, or, in the case of a court-appointed Divestiture Trustee, by the court; *provided, however*, the Commission may extend the 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 assigned, granted, licensed, divested, delivered or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondent shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestitures. Any delays caused by Respondent shall extend the time under this Paragraph in an amount equal to the delay, as

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determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

4. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestitures 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, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity or entities selected by Respondent from among those approved by the Commission; *provided further, however*, that Respondent 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, 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, 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 divestitures and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondent, and the Divestiture Trustee's power

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shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestitures of all of the relevant assets that are required to be divested by this Order.

6. Respondent 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 malfeasance, gross negligence, 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 granted, licensed, transferred, delivered or otherwise conveyed by this Order.
 8. The Divestiture Trustee shall report in writing to Respondent and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestitures.
 9. Respondent 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 Divestiture Trustee from providing any information to the Commission.
- 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

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Trustee in the same manner as provided in this Paragraph.

- 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 divestitures required by this Order.

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

- A. Within thirty (30) days after the date this Order becomes final, and every ninety (90) days thereafter until the last Closing Date for the MCPA Divestiture Assets and the MCPP-p Divestiture Assets, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order. Respondent shall include in its reports, among other things that are required from time to time:
1. A full description of the efforts being made to divest the assets required to be divested; and
 2. A description of all substantive contacts or negotiations related to the divestitures and the identity of all parties contacted and copies of all written communications to and from such parties, and all reports and recommendations concerning completing its obligations pursuant to Paragraph II. and Paragraph III. of this Order.
- B. Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with:

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1. Paragraph II.C.3. and Paragraph III.C.3. of the Order, no later than three (3) months after the Order becomes final, and every six (6) months thereafter for the term of the obligation contained therein; and
2. The remainder of the Order, annually on the anniversary date of the date the Order became final for the term of the Order.

X.

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

- A. Any proposed dissolution of the Respondent;
- B. Any acquisition, merger or consolidation of Respondent; or
- C. Any other change in the Respondent, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change may 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) days' notice to Respondent, Respondent shall, without restraint or interference, permit any duly authorized representative(s) of the Commission:

- A. Access, during business office hours of the Respondent and in the presence of counsel, to all facilities and access to inspect and copy all non-privileged books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of the Respondent related to compliance with this Order, which copying

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services shall be provided by the Respondent at their expense; and

- B. To interview officers, directors, or employees of the Respondent, who may have counsel present, regarding such matters.

XII.

IT IS FURTHER ORDERED that this Order shall terminate on September 7, 2015.

By the Commission, Commissioner Ramirez recused.

Decision and Order

APPENDIX A**NOTICE**

To settle concerns arising from Nufarm's acquisition of A. H. Marks, on [insert date of consent agreement] Nufarm agreed with the staff of the Federal Trade to allow those of its customers that purchase MCPA, MCPP-p or 2,4DB ("the Products") from Nufarm to terminate its contracts with respect to any or all of the Products, at the option of the customer, without penalty or charge, immediately upon request of the customer at any time from the [insert date Respondent executes the Agreement Containing Consent Orders] until [insert date eighteen (18) months after the latest of the Closing Dates]. The Commission issued its Order incorporating that settlement on [insert date of final order].

You are being sent this notice because you are a current Nufarm customer that purchases Products from Nufarm. You may read and download a copy of the Order from the FTC at its web site at [web link to Order] as well as other documents relating to the settlement. Nufarm's obligations with respect to contract termination are set out in Paragraph IV. of the Order. Capitalized terms used in the Order are defined in Paragraph I. of the Order, listed in alphabetical order.

If you wish to terminate your contract with respect to any or all of the Products you purchase from Nufarm, please contact Brett Sutherland, Global Phenoxy Product Manager, Nufarm Ltd., 103-105 Pipe Road, Laverton North, Victoria 3026, Australia, Tel: +61-3-9282-1000, Email: brett.sutherland@au.nufarm.com. If you have any questions or concerns about these obligations, you may contact the staff of the Compliance Division, Bureau of Competition, Federal Trade Commission, Washington, D.C., Tel: 202 326 2152.

Analysis to Aid Public Comment

**ANALYSIS OF AGREEMENT CONTAINING CONSENT
ORDER TO AID PUBLIC COMMENT****I. Introduction**

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Order (“Consent Agreement”) from Nufarm Limited (“Nufarm” or “Respondent”) to remedy the anticompetitive effects stemming from Nufarm’s acquisition of A.H. Marks Holding Limited (“A. H. Marks”). Under the terms of the Consent Agreement, Nufarm is required to divest to Commission-approved buyers certain A. H. Marks assets, including regulatory permits and intellectual property, and take certain additional measures to restore competition in the markets for three phenoxy herbicide products: MCPA, MCPP-p, and 2,4DB.

On March 5, 2008, Nufarm acquired A. H. Marks. Both parties held, or had access to, regulatory approvals from the United States Environmental Protection Agency (“EPA”) to sell MCPA, MCPP-p, and 2,4DB in the United States. The Commission’s complaint alleges that the acquisition and acquisition agreement violated 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 United States markets for the sale of the phenoxy herbicides: MCPA, MCPP-P, and 2,4DB.

The Consent Agreement has been placed on the public record for thirty (30) days for receipt of 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.

Analysis to Aid Public Comment

II. The Products and Structure of the Markets

With its acquisition of A.H. Marks, Nufarm obtained monopoly positions in the United States markets for two phenoxy herbicide markets (MCPA and MCPP-p) and reduced a third phenoxy herbicide market (2,4DB) to a duopoly. Phenoxy herbicides are post-emergent selective broadleaf herbicides which are designed to act on full or partially grown weeds without damaging surrounding plants. They are used widely in the turf, lawn care, and agriculture industries to eliminate existing broadleaf weeds safely and cheaply. Nufarm and A.H. Marks sold these herbicides to agricultural and turf and lawn care formulators in their raw form as “technical” ingredients for their formulated herbicide products. Agricultural formulators generally purchase MCPA for use on cereal crops, such as wheat and barley, and 2,4DB for peanut and alfalfa crops. Turf and lawn care formulators purchase MCPP-p for turf care products used by landscape professionals or consumers. Each of the three herbicides is a highly cost-effective herbicide for its intended use with no equivalent substitutes. More expensive herbicides are generally used as complements and combined with phenoxy herbicides such as MCPA, MCPP-p, or 2,4DB, to increase the effectiveness of formulated herbicide products.

III. Entry

Entry into the markets for MCPA, MCPP-p and 2,4DB would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects of the acquisition. In order to obtain approval to sell herbicides for use on crops, turf, or lawns in the United States, the Environmental Protection Agency (“EPA”) requires manufacturers to submit extensive environmental and toxicology testing data. Herbicide manufacturers often generate such data by forming industry task forces to share the costs of testing. Later entrants are often required to compensate members of the task force to obtain intellectual property rights to existing testing data by either purchasing the rights to the data or obtaining a seat on the task force. The costs associated with obtaining either the testing data or a task force seat to enter the markets for MCPA, MCPP-p, and 2,4DB are high compared to the limited potential sales revenues available to an entrant in each of these markets. Additionally, obtaining EPA approval for the

Analysis to Aid Public Comment

manufacture and sale of each of the relevant products can take several years due to the presence of regulatory barriers. As a result, entry into each relevant market would require substantial sunk costs that would make entry unattractive. In addition, prior to the acquisition, Nufarm had entered into contracts with several of its task force members which posed barriers to entry by these firms. Therefore, the prospect of entry into the relevant markets is very limited and does not alleviate the concerns about the adverse competitive effects of the acquisition.

IV. Effects of the Acquisition

The acquisition is likely to cause significant competitive harm to consumers in the relevant U.S. markets for MCPA, MCPP-p, and 2,4DB by eliminating the direct and substantial competition between Nufarm and A.H. Marks. There is evidence that Nufarm acquired A.H. Marks with the expectation that it would be able to increase prices as a result of the merger. In addition, the evidence indicated that in some instances Nufarm may have increased its prices for the three herbicides following the merger. As a result, the transaction increased the likelihood that Nufarm could unilaterally exercise market power and raise prices in each of the relevant markets.

V. Terms of the Proposed Decision and Order

The Consent Agreement preserves competition in each of the relevant markets alleged in the complaint by requiring that Nufarm divest certain A.H. Marks assets to new entrants and take additional measures to restore competition in the markets for MCPA, MCPP-p, and 2,4DB. Specifically, Nufarm has agreed to sell A.H. Marks' EPA registration and task force seat for MCPA to Albaugh Inc., and A.H. Marks' EPA registration and task force seat for MCPP-p to PBI Gordon Corp. Nufarm has also agreed to modify its contractual agreements with Dow and Aceto relating to MCPA and 2,4-DB, which restricted these firms' competitive activities in the markets for MCPA and 2,4-DB. Staff has evaluated the proposed divestitures and modifications and concluded that these measures are sufficient to remedy the anticompetitive effects resulting from the transaction.

Analysis to Aid Public Comment

For both MCPA and MCPP-p, the purchase of a task force seat and EPA registration will permit each divestiture purchaser to enter and compete in these markets. By acquiring A.H. Mark's task force seat and EPA registration, the divestiture purchasers will obtain EPA approval to distribute the herbicide in the United States and certify additional manufacturing sources of the herbicides. In addition to the task force seat and EPA registration, Nufarm is required to enter into supply agreements with each divestiture purchaser to permit these purchasers to compete with Nufarm as wholesale suppliers of the herbicides while new manufacturing sources are developed.

With respect to MCPA, Nufarm would divest AH Mark's MCPA Task Force Seat and EPA registrations relating to MCPA to Albaugh. Albaugh is a qualified divestiture candidate that is uniquely situated to use the A.H. Marks assets and supply contract to compete with Nufarm in the market for MCPA. Albaugh is the largest privately-owned formulator of crop protection products. Albaugh is headquartered in Ankeny, Iowa and sells exclusively in the United States. Within the crop protection industry, Albaugh has extensive relationships with firms at every level of distribution. Given Albaugh's position, commitment, and experience in the MCPA market, staff believes that divestiture of A.H. Marks' MCPA assets will enable Albaugh to restore the competition lost as a result of the transaction.

With respect to MCPP-p, Nufarm would divest A.H. Mark's MCPP-p Task Force Seat and EPA registrations relating to MCPP-p to PBI Gordon and enter a three-year supply arrangement. PBI Gordon, headquartered in Kansas City, Missouri, is a privately held company founded in 1947. PBI Gordon is a long-standing player in the turf care industry. Its primary business is the development, manufacture, and marketing of herbicides, pest management, and related products to the lawn, garden, professional turf, and specialty agricultural markets. It has an extensive distribution network and a wide customer base. PBI Gordon's presence in the market, combined with its expertise with herbicides, will ensure it will use the assets to compete with Nufarm in the market for MCPP-p.

The Consent Agreement also addresses concerns regarding Nufarm's agreements with Dow and Aceto by preventing Nufarm

Analysis to Aid Public Comment

from enforcing agreements which may limit or restrict competitive entry in the MCPA and 2,4DB markets. Pursuant to Section V of the proposed Decision and Order, Nufarm agreed not to enforce any provision, or otherwise take any future action, restricting competition in the manufacture or sale of MCPA, 2,4DB or MCPP-p. Nufarm's compliance with these provisions will enable Dow and Aceto to enter these respective markets, as manufacturers and/or wholesalers, and compete with Nufarm for sales. Equally important, Dow and Aceto will be able to use their task force seats and registrations to sponsor new entrants to the United States markets for these herbicides. The resulting entry, or threat of entry, is likely to serve as an additional competitive constraint in both the MCPA and 2,4DB markets. Lastly the Consent Agreement contains several other significant provisions. Section IV of the proposed Order permits Nufarm's customers to terminate their contracts with Nufarm with respect to the products. Section VII requires Nufarm to notify the Commission if it: (a) acquires any task force seat or registration with respect to the products or (b) enters into any agreements with task force members or registrants that contain non-compete, joint-marketing or other provisions restricting competition. Section VIII requires Nufarm to divest the MCPA and MCPP-p assets to a trustee in the event Nufarm fails to comply with the divestiture obligations for these assets in the proposed Order.

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

THE DUN & BRADSTREET CORPORATIONCONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE
COMMISSION ACT

Docket No. D-9342; File No. 091 0081
Filed May 6, 2010 — Decision, September 10, 2010

In May 2010, the Commission issued an administrative complaint, alleging that the acquisition by The Dun & Bradstreet Corporation (“Dun & Bradstreet”) of Quality Education Data (“QED”) would substantially lessen competition in the market for K-12 educational marketing data. The consent order requires Dun & Bradstreet to divest to MCH Inc. an updated K-12 educational marketing database, the QED name, and certain associated intellectual property. The consent order further requires Dun & Bradstreet to provide MCH Inc. with technical assistance for up to one year. The order further permits the Commission to appoint a trustee to monitor compliance with the order’s requirements.

Participants

For the *Commission*: Joseph S. Brownman, William H. Efron,
Alan B. Loughnan, Jonathan W. Platt, and Gerald A. Stein.

For the *Respondents*: Darrell Prescott, Baker McKenzie LLP;
and Wayne Dale Collins and Lisl Dunlop, Shearman & Sterling
LLP.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Respondent The Dun & Bradstreet Corporation’s (“D&B”) acquisition of the assets of Quality Education Data, (“QED”), a division of Scholastic, Inc. (“Scholastic”), violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, 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: