

Complaint

IN THE MATTER OF**BASF SE****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. 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.

Complaint

COMPLAINT**I. INTRODUCTION**

Whole Foods Market, Inc.'s ("Whole Foods") proposed acquisition of Wild Oats Markets, Inc. ("Wild Oats"), will substantially lessen competition and thereby cause significant harm to consumers. This merger, involving the two leading operators of premium natural and organic supermarkets, will increase prices and reduce quality and services in a number of geographic markets throughout the United States. Whole Foods' Chief Executive Officer John Mackey bluntly advised his Board of Directors of the purpose of this acquisition: "By buying [Wild Oats] we will . . . avoid nasty price wars in Portland (both Oregon and Maine), Boulder, Nashville, and several other cities which will harm [Whole Foods'] gross margins and profitability. By buying [Wild Oats] . . . we eliminate forever the possibility of Kroger, Super Value, or Safeway using their brand equity to launch a competing national natural/organic food chain to rival us. . . . [Wild Oats] may not be able to defeat us but they can still hurt us [Wild Oats] is the only existing company that has the brand and number of stores to be a meaningful springboard for another player to get into this space. Eliminating them means eliminating this threat forever, or almost forever."

To prevent this consumer harm, the Federal Trade Commission ("Commission"), pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, having reason to believe that Respondent Whole Foods and Respondent Wild Oats have entered into an agreement pursuant to which Whole Foods would acquire the voting securities of Wild Oats, that such agreement violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be

Complaint

in the public interest, hereby issues its complaint, stating its charges as follows:

II. THE PARTIES AND JURISDICTION**A. Whole Foods Market, Inc.**

1. Respondent Whole Foods is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 550 Bowie Street, Austin, Texas 78703.

2. Established in 1980, Whole Foods operates approximately 190 premium natural and organic supermarkets in more than 30 states and the District of Columbia.

3. Whole Foods is the largest operator of premium natural and organic supermarkets in the United States.

4. According to Whole Foods' Chief Executive Officer John Mackey, Whole Foods is "a company that is authentically committed to its mission of natural/organic/healthy foods. Its core customers recognize this authenticity and it creates a customer loyalty that will not be stolen away by conventional markets who sell the same products. Whole Foods has created a 'brand' that has real value for millions of people."

5. Whole Foods 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.

B. Wild Oats Markets, Inc.

6. Respondent Wild Oats is a corporation organized, existing, and doing business under and by virtue of the laws of the State of

Complaint

Delaware, with its office and principal place of business located at 1821 30th Street, Boulder, Colorado 80301.

7. Wild Oats is the second largest operator of premium natural and organic supermarkets in the United States, currently operating numerous premium natural and organic supermarkets throughout the United States.

8. Founded in 1987, Wild Oats provides a broad selection of natural, organic, and gourmet foods, environmentally friendly products, and natural vitamins, remedies, and body care products. The firm was built “on the vision of enhancing the lives of our customers and our people with products and education that support health and wellbeing.” As Wild Oats’ Vice President of Marketing Laura Coblenz has described: “Wild Oats is more than a retail chain – it’s about a lifestyle, and that’s how we market ourselves.”

9. Wild Oats 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.

III. THE ACQUISITION

10. On February 21, 2007, Whole Foods and Wild Oats executed an agreement whereby Whole Foods proposes to acquire all of the voting securities of Wild Oats through WFMI Merger Co., a wholly-owned subsidiary of Whole Foods (the “Acquisition”). The purchase will be effected through a tender offer for all shares of Wild Oats common stock. The total cost of the Acquisition is expected to be approximately \$671 million in cash and assumed debt.

11. Respondent Whole Foods intends to then merge Wild Oats into Whole Foods; to close numerous Wild Oats stores; to sell

Complaint

several Wild Oats stores; and to operate the remainder as Whole Foods stores.

12. On June 5, 2007, the Commission authorized the commencement of an action under Section 13(b) of the Federal Trade Commission Act to seek a temporary restraining order and a preliminary injunction barring the Acquisition during the pendency of administrative proceedings to be commenced by the Commission pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. _ 45(b).

13. In authorizing the commencement of this action, the Commission determined that a temporary restraining order and a preliminary injunction are in the public interest and that it has reason to believe that the Acquisition would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act because the Acquisition may substantially lessen competition in the relevant markets alleged in this Complaint.

14. On June 7, 2007, United States District Judge Paul L. Friedman of the United States District Court for the District of Columbia issued an Order granting the Commission's motion for a temporary restraining order. The closing of the Acquisition is currently prohibited only by the District Court's restraining order.

IV. NATURE OF COMPETITION

15. "Natural foods" are foods that are minimally processed and largely or completely free of artificial ingredients, preservatives, and other non-naturally occurring substances.

16. "Organic foods" are foods that are produced using: agricultural practices that promote healthy ecosystems; no genetically engineered seeds or crops, sewage sludge, long-lasting pesticides or fungicides; healthy and humane livestock management practices including use of organically grown feed, ample access to fresh air and the outdoors, and no antibiotics or growth hormones; and food processing that protects the healthfulness of the organic

Complaint

product, including the avoidance of irradiation, genetically modified organisms, and synthetic preservatives.

17. Pursuant to the United States Department of Agriculture's ("USDA") Organic Foods Production Act of 1990 (the "Organic Rule"), all products labeled "organic" must be certified by a federally accredited certifying agency as satisfying USDA standards for organic foods. The Organic Rule further requires that retailers of products labeled "organic" use handling, storage, and other practices to protect the integrity of organically-labeled products, including: preventing commingling of organic and non-organic ("conventional") products; protecting organic products from contact with prohibited substances; and maintaining records that document adherence to the USDA requirements.

18. Premium natural and organic supermarkets offer a distinct set of products and services to a distinct group of customers in a distinctive way, all of which significantly distinguish premium natural and organic supermarkets from conventional supermarkets and other retailers of food and grocery items ("Retailers").

19. Premium natural and organic supermarkets are not simply outlets for natural and organic foods. Whole Foods' Chief Executive Officer John Mackey acknowledged that "Whole Foods isn't primarily about organic foods. It never has been. Organic foods is only one part of its highly successful business model." In announcing its fourth quarter results for 2006, Whole Foods stated that "Whole Foods Market is about much more than just selling 'commodity' natural and organic products. We are a lifestyle retailer and have created a unique shopping environment built around satisfying and delighting our customers." Specifically, Mr. Mackey has said that "[s]uperior quality, superior service, superior perishable product, superior prepared foods, superior marketing, superior branding, and superior store experience working together are what makes Whole Foods so successful." "[P]eople who think organic foods are the key don't understand the business model. . . ."

Complaint

20. To begin with, premium natural and organic supermarkets focus on perishable products, offering a vast selection of very high quality fresh fruits and vegetables (including exotic and hard-to-find items) and other perishables. As Whole Foods stated in its 2006 annual report, “We believe our heavy emphasis on perishable products differentiates us from conventional supermarkets and helps us attract a broader customer base.” Whole Foods’ Chief Executive Officer John Mackey has also emphasized the importance of high quality perishable foods to Whole Foods’ business model: “This [produce, meat, seafood, bakery, prepared foods] is over 70% of Whole Foods total sales. Wal-Mart doesn’t sell high quality perishables and neither does Trader Joe’s while we are on the subject. That is why Whole Foods coexists so well with [Trader Joe’s] and it is also why Wal-Mart isn’t going to hurt Whole Foods.”

21. Relative to conventional supermarkets and most other Retailers, premium natural and organic supermarkets target shoppers who are, in the words of one of the respondents, “affluent, well educated, health oriented, quality food oriented people. . . .” The core shoppers of premium natural and organic supermarkets have a preference for natural and organic products, and premium natural and organic supermarkets offer an extensive selection of natural and organic products to enable those shoppers to purchase substantially all of their food and grocery requirements during a single shopping trip.

22. Premium natural and organic supermarkets are differentiated from other Retailers in that premium natural and organic supermarkets offer more amenities and service venues; higher levels of service and more knowledgeable service personnel; and special features such as in-store community centers.

23. Premium natural and organic supermarkets promote a lifestyle of health and ecological sustainability, to which a significant portion of their customers are committed. Through the blending together of these elements and others, premium natural and organic supermarkets strive to create a varied and dynamic experience for shoppers, inviting them to make the premium natural

Complaint

and organic supermarket a destination to which shoppers come not merely to shop, but to gather together, interact, and learn, often while enjoying shared eating and other experiences. Premium natural and organic supermarkets expend substantial resources on developing a brand identity that connotes this blend of elements, and especially the qualities of trustworthiness (*viz.*, that all products are natural, that products labeled “organic” are properly labeled, that the store’s suppliers practice humane animal husbandry, and that the store’s actions are ecologically sound) and qualitative superiority to other Retailers.

24. Relative to most other Retailers, premium natural and organic supermarkets’ products often are priced at a premium reflecting not only product quality and service, but the marketing of a lifestyle to which their customers aspire.

25. As Whole Foods’ Chief Executive Officer John Mackey has acknowledged, “Safeway and other conventional retailers will keep doing their thing – trying to be all things to all people . . . They can’t really effectively focus on Whole Foods Core Customers without abandoning 90% of their own customers. . . . Whole Foods core customers will not abandon them because Safeway has made their stores a bit nicer and is selling some organic foods. Whole Foods knows their core customers well and serves them far better than any of their potential competitors do.”

26. Mr. Mackey has also said that “[a]ll those [conventional supermarkets and club stores] you named have been selling organic foods for many years now. The only thing ‘new’ is that they are now beginning to sell private label organic foods for the first time. However, they’ve been selling organic produce and organic milk for many years now. Doing so has never hurt Whole Foods.”

27. Wild Oats’ most recent 10K filed with the Securities and Exchange Commission noted: “Despite the increase in natural foods sales within conventional supermarkets, [Wild Oats] believe[s] that conventional supermarkets still lack the concentration on a wide

Complaint

variety of natural and organic products, and emphasis on service and consumer education that our stores offer.”

28. Premium natural and organic supermarkets are also very different from mass-merchandisers, such as Wal-Mart and Target. According to Mr. Mackey, “Wal-Mart does a particularly poor job selling perishable foods. Whole Foods quality is better, its customer service is far superior, and the store ambience and experience it provides its customers is fun, entertaining and educational”

29. With respect to Trader Joe’s, Mr. Mackey stated: “TJ’s is a completely different concept than WFMI. WFMI’s business is all about perishables – fresh produce, fresh seafood, fresh meat, in store delis, juice bars, and bakeries. WFMI has stated that more than 50% of their sales are in these categories of products – categories which TJ’s doesn’t even have. TJ’s is primarily a discount private label company with a large wine selection.”

30. Unlike other natural and organic product retailers, premium natural and organic supermarkets offer an extensive selection of natural and organic products to enable shoppers to purchase substantially all of their food and grocery requirements during a single shopping trip. As a result, premium natural and organic supermarkets are appreciably larger than other natural and organic retailers in square footage, number of products offered, inventory for each product offered, and annual dollar sales.

31. Whole Foods and Wild Oats, respectively, are the largest and second largest operators of premium natural and organic supermarkets in the United States.

32. Whole Foods and Wild Oats are the only two nationwide operators of premium and natural organic supermarkets in the United States.

33. Consumers spent a combined total of \$6.5 billion in fiscal 2006 at Whole Foods and Wild Oats. Approximately 70% of that

Complaint

total was spent on perishable products, such as produce, meat, seafood, baked goods, and prepared foods.

34. Whole Foods and Wild Oats are one another's closest competitors in 21 geographic markets. Consumers in these markets have reaped price and non-price benefits of competition between Whole Foods and Wild Oats. The markets where the two compete head to head are: Albuquerque, NM; Medford, MA (suburban Boston); Saugus, MA (suburban Boston); Boulder, CO; Hinsdale, IL (suburban Chicago); Evanston, IL (suburban Chicago); Cleveland, OH; Denver, CO; Lakewood, CO; Ft. Collins, CO; West Hartford, CT; Henderson, NV; Indianapolis, IN; Kansas City-Overland Park, KS; Las Vegas, NV; Los Angeles-Santa Monica-Brentwood, CA; Louisville, KY; Omaha, NE; Pasadena, CA; Phoenix, AZ; Portland, ME; Portland, OR; St. Louis, MO; and Tualatin, OR.

35. Over the last five years, Whole foods has targeted markets for entry where, in Whole Foods' words, Wild Oats enjoyed a "monopoly." Consumers in those markets benefitted from the new competition in those markets.

36. There are other geographic markets in which only one or the other is present. In many of these markets, Wild Oats or Whole Foods plans, but for the proposed Acquisition, to enter and offer direct and unique competition to the other. Each has developed expansion plans that target the other's "monopoly" markets, as Whole Foods describes it. These markets include: Palo Alto, CA; Fairfield County, CT; Miami Beach, FL; Naples, FL; Nashville, TN; Reno, NV; and Salt Lake City, UT.

37. Whole Foods' Mr. Mackey has said that "Whole Foods has taken significant market share from OATS wherever they have opened competing stores – Boulder, Santa Fe, Denver, Boca Raton, Ft. Lauderdale, and St. Louis." Each of the parties, in anticipation of entry by the other, engages in aggressive price and non-price competition that conveys to shoppers benefits that go well beyond the benefits resulting from the presence or threatened entry in those

Complaint

geographic markets of other retailers. In addition, when Whole Foods or Wild Oats expects the other to enter one of its markets, it plans substantial improvements in quality, including renovations, expansions, and competitive pricing. As Mr. Mackey explained upon Whole Foods' entry into Nashville: "At least Wild Oats will likely improve their store there in anticipation of Whole Foods eventually opening and [customers will] benefit from that." Neither company responds in the same way to competition from conventional supermarkets or other Retailers.

38. Consumers have benefitted directly from the price and quality competition between Whole Foods and Wild Oats. If the Acquisition occurs, these benefits will be lost in the markets where the two currently compete and they will not occur in those markets where each is planning to expand.

V. RELEVANT MARKETS

39. A relevant product market in which to analyze the effects of the proposed Acquisition is the operation of premium natural and organic supermarkets.

40. A relevant geographic market in which to analyze the effects of the proposed Acquisition is an area as small as approximately five or six miles in radius from premium natural and organic supermarkets or as large as a metropolitan area.

VI. ENTRY CONDITIONS

41. Entry or repositioning into the operation of premium natural and organic supermarkets is time-consuming, costly, and difficult. As a result, entry or repositioning into the operation of premium natural and organic supermarkets in the relevant geographic markets is unlikely to occur or to be timely or sufficient to prevent or defeat the anticompetitive effects of the proposed Acquisition.

Complaint

VII. ANTICOMPETITIVE EFFECTS

42. The relevant markets are highly concentrated and would become significantly more concentrated after the proposed Acquisition. Premium natural and organic supermarkets' primary competitors are other premium natural and organic supermarkets. Shoppers with preferences for premium natural and organic supermarkets are not likely to switch to other retailers in response to a small but significant non-transitory increase in premium natural and organic supermarket prices.

43. The proposed Acquisition may substantially lessen competition in the following ways, among others:

a. the proposed Acquisition will eliminate one of only two or three premium natural and organic supermarkets and substantially increase concentration in the operation of premium natural and organic supermarkets in the relevant geographic markets, each of which already is highly concentrated;

b. the proposed Acquisition will eliminate substantial and effective price and non-price competition between Whole Foods and Wild Oats in the operation of premium natural and organic supermarkets in the relevant geographic markets, substantially reducing or eliminating competition in the operation of premium natural and organic supermarkets in each of those geographic areas;

c. the proposed Acquisition will eliminate one of only two or three premium natural and organic supermarkets in each of the relevant geographic markets, tending to create a monopoly in the operation of premium natural and organic supermarkets in each of those geographic areas;

d. the proposed Acquisition will eliminate the only existing company that can serve as a meaningful springboard for a conventional supermarket operator to enter the market for premium natural and organic supermarkets in each of the

Complaint

relevant geographic markets, tending to create a monopoly in the operation of premium natural and organic supermarkets in each of those geographic areas;

e. the proposed Acquisition will eliminate Whole Foods' closest competitor in geographic and product space in each of the relevant geographic areas, resulting in the loss of direct and unique price and non-price competition that conveys to shoppers benefits that go well beyond the benefits resulting from the presence or threatened entry of other retailers;

f. the proposed Acquisition will result in the closing of numerous Wild Oats stores, reducing or eliminating consumer choice in premium natural and organic supermarkets;

g. the proposed Acquisition will enable the combined Whole Foods/Wild Oats to exercise market power unilaterally; and

h. the proposed Acquisition will eliminate potential competition in numerous parts of the United States.

VIII. VIOLATIONS CHARGED**COUNT I – ILLEGAL ACQUISITION**

44. The allegations contained in paragraphs 1-45 are repeated and realleged as though fully set forth here.

45. Whole Foods' proposed acquisition of Wild Oats, if consummated, would substantially lessen competition 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 Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

Complaint

COUNT II – ILLEGAL ACQUISITION AGREEMENT

46. The allegations contained in paragraphs 1-45 are repeated and realleged as though fully set forth here.

47. Whole Foods and Wild Oats, through the Agreement described in paragraph 10, have engaged in unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

NOTICE

Notice is hereby given to the Respondents that the twenty-seventh day of September, 2007, at 10 a.m., or such later date as determined by the Commission or by an Administrative Law Judge of the Commission, is hereby fixed as the time and Federal Trade Commission offices, 600 Pennsylvania Ave., N.W., Washington, D.C. 20580, as the place when and where a hearing will be had on the charges set forth in this Complaint, at which time and place you will have the right under the Federal Trade Commission Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

Pending further order of the Commission, the Commission will retain adjudicative responsibility for this matter. *See* § 3.42(a) of the Commission's Rules of Practice for Adjudicative Proceedings. The Commission hereby allows you 20 days from the date of service of this Complaint upon you to file either an answer or a dispositive motion. If you file a dispositive motion within that time, your time for filing an answer is extended until 10 days after service of the Commission's order on such motion. If you do not file a dispositive motion within that time, you must file an answer.

An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are

Complaint

without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission or the Administrative Law Judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under §3.46 of the Commission's Rules of Practice for Adjudicative Proceedings and the right to appeal the initial decision to the Commission under §3.52 of said Rules.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the Commission or the Administrative Law Judge, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions, and order.

An initial prehearing scheduling conference will be scheduled no later than 14 days after the last answer is filed by any party named as a respondent in the complaint. Unless otherwise directed, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Ave., N.W. Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within 5 days of receiving a respondent's answer, to make certain initial disclosures without awaiting a formal discovery request.

Complaint

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the acquisition of Whole Foods by Wild Oats, or any other transaction that combines them, challenged in this proceeding violates Section 7 of the Clayton Act, as amended, the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. An order preventing Whole Foods from acquiring Wild Oats, if the acquisition has not occurred at the time of the Commission's decision;
2. The divestiture of Wild Oats and any other associated or necessary assets in a manner that restores Wild Oats as a viable, independent competitor in the relevant markets, with the ability to offer such services as Wild Oats is now offering and planning to offer, if the acquisition has occurred at the time of the Commission's decision;
3. A prohibition against any transaction between Whole Foods and Wild Oats that combines their operations in the relevant markets except as may be approved by the Commission;
4. A requirement that, for a period of time, Whole Foods provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of its operations with any other company providing the operation of premium and natural organic supermarkets;
5. A requirement for Whole Foods to file periodic compliance reports with the Commission; and
6. Any other relief appropriate to correct or remedy the anticompetitive effects of the transaction or to restore Wild Oats as a viable, independent competitor in the relevant market.

Order to Maintain Assets

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by the Secretary and its official seal to be affixed hereto, at Washington, D.C., this twenty-seventh day of June, 2007.

By the Commission.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (“Commission”) having heretofore issued its complaint charging Whole Foods Market, Inc. (“Whole Foods” or “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 having been served with a copy of that complaint, together with a notice of contemplated relief, and Respondent having answered the complaint denying said charges but admitting the jurisdictional allegations set forth therein; and

The Respondent, its attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid 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 Secretary of the Commission having thereafter withdrawn the matter from adjudication in accordance with § 3.25(c) of its Rules; and

Order to Maintain Assets

The Commission having thereafter considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in conformity with the procedure prescribed in § 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following Order: to Maintain Assets:

1. Whole Foods is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its offices and principal place of business located at 550 Bowie Street, Austin, Texas 78703.

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

ORDER**I.**

IT IS ORDERED that, as used in this Order to Maintain Assets, the definitions used in the Consent Agreement and the attached Decision and Order shall apply. In addition, “Store To Be Maintained” means any operating store or closed store location identified as a part of the Assets To Be Divested or any operating store listed in Confidential Appendix D to the Decision and Order.

II.

IT IS FURTHER ORDERED that:

A. Respondent shall maintain the viability, marketability, and competitiveness of the Assets To Be Divested, and shall not cause the wasting or deterioration of the Assets To Be Divested, nor shall it cause the Assets To Be Divested to be operated in a manner inconsistent with applicable laws, nor shall it sell, transfer, encumber or otherwise impair the

Order to Maintain Assets

viability, marketability or competitiveness of the Assets To Be Divested. Respondent shall comply with the terms of this Paragraph until such time as Respondent has divested the Assets To Be Divested pursuant to the terms of the attached Decision and Order. Respondent shall conduct or cause to be conducted the business of the Assets To Be Divested in the regular and ordinary course and in accordance with past practice (including regular repair and maintenance efforts) and shall use reasonable best efforts to preserve the existing relationships with landlords, suppliers, customers, employees, and others having business relations with the Assets To Be Divested in the ordinary course of business and in accordance with past practice. Respondent shall exercise any option it has to extend the lease for any Store To Be Maintained whose lease would otherwise expire.

- B. Respondent shall not terminate the operation of any Store To Be Maintained. Respondent shall continue to maintain the inventory of each Store To Be Maintained at levels and selections (*e.g.*, stock-keeping units) consistent with those maintained by such Respondent at such Store in the ordinary course of business consistent with past practice. Respondent shall use best efforts to keep the organization and properties of each Store To Be Maintained intact, including current business operations, physical facilities, working conditions, and a work force of equivalent size, training, and expertise associated with the Store in a manner consistent with past practice. Included in the above obligations, Respondents shall, without limitation:
1. maintain operations and departments, and not reduce hours, at each Store To Be Maintained in a manner consistent with past practice;
 2. not transfer inventory from any Store To Be Maintained, other than in the ordinary course of business consistent with past practice;

Order to Maintain Assets

3. make any payment required to be paid under any contract or lease when due, and otherwise pay all liabilities and satisfy all obligations associated with any Store To Be Maintained, in each case in a manner consistent with past practice;
4. maintain the books and records of each Store To Be Maintained in a manner consistent with past practice;
5. not display, prior to the Commission's approval of the acquirer for a Store To Be Maintained, any signs or conduct any advertising (*e.g.*, direct mailing, point-of-purchase coupons, media advertisements) that indicates that Respondent is moving its operations at such Store To Be Maintained to another location, or that indicates such Store To Be Maintained will close;
6. not conduct, prior to the Commission's approval of the acquirer for a Store To Be Maintained, any "going out of business," "close-out," "liquidation" or similar sales or promotions at or relating to such Store To Be Maintained; and
7. not change, prior to the Commission's approval of the acquirer for a Store To Be Maintained, or modify in any material respect the existing advertising practices, programs and policies for such Store To Be Maintained, other than changes in the ordinary course of business consistent with past practice for locations of the Respondent not being closed or relocated.

Provided, however, that nothing in this Order shall require Respondent to resume the operations of any Store To Be Maintained that was not being operated by Respondent on the date Respondent signed the Agreement Containing Consent Orders.

III.

Order to Maintain Assets

IT IS FURTHER ORDERED that:

- A. At any time after Respondent signs the Consent Agreement in this matter, the Commission may appoint a monitor (“Interim Monitor”) to assure that Respondent expeditiously complies with all of its obligations and perform all of its responsibilities as required by Paragraph II of this Order and the Divestiture Agreement(s).
- B. The Commission shall select the Interim Monitor, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Interim Monitor, Respondent shall be deemed to have consented to the selection of the proposed Interim Monitor.
- C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondent shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondent’s compliance with the relevant requirements of this Order in a manner consistent with the purposes of this Order.
- D. If an Interim Monitor is appointed, Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:
 - 1. The Interim Monitor shall have the power and authority to monitor Respondent’s compliance with the divestiture and asset maintenance obligations and related requirements of this Order, and shall exercise such power and authority and carry out the duties and

Order to Maintain Assets

responsibilities of the Interim Monitor in a manner consistent with the purposes of this Order and in consultation with the Commission.

2. The Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission.
3. The Interim Monitor shall serve until the later of:
 - a. the completion by Respondent of the divestiture of all the Assets To Be Divested; or
 - b. the completion by Respondent of the last obligation under this Order pertaining to the Interim Monitor's service;

provided, however, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of this Order.

4. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondent's personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to the Assets To Be Divested and Respondent's compliance with its obligations under this Order, including, but not limited to, its obligations related to the relevant assets. Respondent shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondent's compliance with this Order.
5. The Interim Monitor shall serve, without bond or other security, at the expense of Respondent on such reasonable and customary terms and conditions as the

Order to Maintain Assets

Commission may set. The Interim Monitor shall have authority to employ, at the expense of the Respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.

6. Respondent shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim 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 from malfeasance, gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.
7. Respondent shall report to the Interim Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondent, and any reports submitted by the Commission-approved Acquirer with respect to the performance of Respondent's obligations under this Order or the Remedial Agreement. Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondent of its obligations under this Order.
8. Respondent may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,*

Order to Maintain Assets

that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.

- E. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.
- F. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor. The Commission shall select the Interim Monitor, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Interim Monitor, Respondent shall be deemed to have consented to the selection of the proposed Interim Monitor.
- G. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.
- H. The Interim Monitor appointed pursuant to this Order shall not be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of the Decision and Order.

IV.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed (1)

Order to Maintain Assets

dissolution of the Respondent, (2) acquisition, merger or consolidation of Respondent, or (3) any other change in the Respondent that may affect compliance obligations arising out of this Order To Maintain Assets, including, but not limited to, assignment, the creation or dissolution of subsidiaries, or any other change in Respondent.

V.

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 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 services shall be provided by the Respondent at its expense; and
- B. to interview officers, directors, or employees of the Respondent, who may have counsel present, regarding such matters.

Decision and Order

VI.

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

- A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. With respect to each Store To Be Maintained, the day after Respondent's completion of the divestiture of Assets to Be Divested related to such Store To Be Maintained, as described in and required by the Decision and Order, or the expiration of the trustee's authority to divest such Store To Be Maintained.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having heretofore issued its complaint charging Whole Foods Market, Inc. ("Whole Foods" or "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 having been served with a copy of that complaint, together with a notice of contemplated relief, and Respondent having answered the complaint denying said charges but admitting the jurisdictional allegations set forth therein; and

The Respondent, its attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by

Decision and Order

Respondent of all the jurisdictional facts set forth in the aforesaid 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 Secretary of the Commission having thereafter withdrawn the matter from adjudication in accordance with § 3.25(c) of its Rules; and

The Commission having thereafter considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, and having duly considered the comments filed by interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, now in conformity with the procedure prescribed in § 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following Order:

1. Whole Foods is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its offices and principal place of business located at 550 Bowie Street, Austin, Texas 78703.
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.

Decision and Order

ORDER**I.**

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

- A. “Whole Foods” or “Respondent” means Whole Foods Market, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Whole Foods Market, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Wild Oats” means the former corporation Wild Oats Markets, Inc., which was organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1821 30th Street, Boulder, Colorado 80301, and which was acquired by Respondent Whole Foods.
- C. “Commission” means the Federal Trade Commission.
- D. “Closing Date” means the date on which Respondent (or the Divestiture Trustee) and a Commission-approved Acquirer consummate a transaction to divest any Asset To Be Divested pursuant to this Order.
- E. “Commission-approved Acquirer” means an entity that receives the prior approval of the Commission to acquire particular assets that the Respondent is required to divest pursuant to this Order.
- F. “Divestiture Trustee” means a trustee appointed by the Commission pursuant to the relevant provisions of this Order to effectuate the divestitures required by this Order [as distinguished from interim monitor].

Decision and Order

- G. “Assets To Be Divested” means:
1. The name “WILD OATS,” all trademarks, trade dress, service marks, trade names, and other Wild Oats intellectual property associated with the Wild Oats stores (all hereinafter collectively “Wild Oats Associated Intellectual Property”);
 2. The store locations listed on Appendix A of this Order;
 3. The store locations listed on Appendix B of this Order; and
 4. All assets, leases, fixtures, properties, government permits (to the extent transferable), tangible and intangible, related to or used in the stores operated at these locations at the Closing Date, but shall not include those assets consisting of or pertaining to any of Respondent’s other (non “WILD OATS”) trademarks, trade dress, service marks, or trade names, or any inventory, books and records, financial information, supplies or packaging related to or used in the stores operated at these locations.
- H. “Divestiture Agreement” means any agreement between the Divestiture Trustee and a Commission-approved Acquirer and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Assets To Be Divested that have been approved by the Commission to accomplish the requirements of this Order.
- I. “Interim Monitor” means a monitor appointed by the Commission pursuant to the Order to Maintain Assets in this matter.
- J. “Store Employees” means all employees of Whole Foods currently working at the store locations listed on Appendix A of this Order, or who have, within the past six (6) months,

Decision and Order

worked at any store location listed on Appendix A or Appendix B of this Order.

- K. “Third Party Consents” means all consents and waivers from any person other than the Respondent, including all landlords, that are necessary to effect the complete divestiture of the Assets To Be Divested to the Commission-approved Acquirer(s) and that are necessary for the continued operation of the stores by the Commission-approved Acquirer(s).

II.

IT IS FURTHER ORDERED that:

- A. Respondent shall divest the Assets To Be Divested, at a price from each Commission-approved Acquirer not less than zero dollars, absolutely and in good faith, in a manner that receives the prior approval of the Commission and solely to an acquirer (or acquirers) that receives the prior approval of the Commission. Such divestiture (or divestitures) shall be accomplished exclusively by the Divestiture Trustee pursuant to Paragraph II of this Order.
- B. The Commission hereby appoints The Food Partners LLC as Divestiture Trustee to divest the Assets To Be Divested. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondent shall execute a trustee 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 divestiture required by this Order.
- C. Respondent shall consent to the following terms and conditions regarding the Divestiture Trustee’s powers, duties, authority, and responsibilities:

Decision and Order

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest the Assets To Be Divested and to assure that Respondent has completed all of its obligations under Paragraph II.H. of this Order for any Asset To Be Divested.
2. The Divestiture Trustee shall have six (6) months from the date the Commission approves the trustee agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the six (6) month period, the Divestiture Trustee has received a good faith offer or offers for a particular store or stores, the divestiture period may be extended by the Commission as to such store(s) to allow the Divestiture Trustee to continue negotiations with such potential acquirer(s); *provided however*, the Commission may extend the divestiture period for any such store(s) only for a maximum of six (6) months; *provided further, however*, that if the Divestiture Trustee submits any proposed Divestiture Agreement(s) and proposed acquirer(s) to the Commission for approval before the end of the divestiture period for the particular store(s), as may be extended by the Commission, and if the Commission has not acted on such Divestiture Agreement(s), or the Closing Date has not occurred, by the end of the divestiture period, then the divestiture period for the store(s) covered by such Divestiture Agreement(s) shall automatically extend until the day after the Commission rejects such Divestiture Agreement(s) or the Closing Date(s) has occurred, whichever is the case; *provided further, however*, that the Divestiture Trustee's authority shall extend for such time until Respondent has completed all of its obligations under Paragraph II.H. of this Order for any particular Asset To Be Divested.

Decision and Order

3. The divestiture of the Assets To Be Divested may be made to one or more Commission-approved Acquirers, *provided, however,* that the Wild Oats Associated Intellectual Property shall be divested to only a single Commission-approved Acquirer; *provided further, however,* that any Commission-approved Acquirer of the Wild Oats Associated Intellectual Property may license, at its sole option, any other person(s) to use the Wild Oats Associated Intellectual Property at any location in any place in the United States.
4. Respondent shall provide to the Divestiture Trustee the information listed in Appendix C within ten (10) days of the date the Commission approves the trustee agreement. The Divestiture Trustee shall have reasonable access to the facilities listed in Appendix A and Appendix B. Subject to any demonstrated legally recognized privilege, Respondent shall provide any additional information requested by the Divestiture Trustee that is directly related to the Assets To Be Divested and shall cooperate with the Divestiture Trustee, *provided however,* that Respondent shall not be required to provide income statement and balance sheet financial information (other than as listed in Appendix C and updated quarterly gross sales data by store); other information related to Whole Foods' operation of the store(s); vendor information; any sku-level data; and team member (employee) information and files related to human resources, payroll or benefits. Respondent shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission.
5. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price

Decision and Order

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 a price from each Commission-approved Acquirer not less than zero dollars. Each divestiture shall be made in the manner and to a Commission-approved Acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity for a particular location listed on Appendix A or Appendix B of this Order, and if the Commission determines to approve more than one such acquiring entity for such location, the Divestiture Trustee shall divest to the acquiring entity 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.

6. 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 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 divestiture 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 shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement

Decision and Order

contingent on the divestiture of the relevant assets that are required to be divested by this Order.

7. 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.
8. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Assets To Be Divested.
9. The Divestiture Trustee shall report in writing to Respondent and to the Commission every thirty (30) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
10. The Divestiture Trustee shall notify Respondent immediately upon signing any letter of intent or other significant event relating to the sale of the Assets To Be Divested that is required to be revealed by Respondent to accurately reflect its financial statements.
11. 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.

Decision and Order

- D. 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. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of a 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.
- E. Any Divestiture Agreement that has been approved by the Commission between the Divestiture Trustee and a Commission-approved Acquirer shall be deemed incorporated into this Order, and any failure by Respondent to comply with any term of such Divestiture Agreement shall constitute a failure to comply with this Order.
- F. Respondent shall:
1. from the date any Divestiture Agreement is signed, not interfere with the hiring or employing by each Commission-approved Acquirer of Store Employees, and shall remove any impediments or incentives within the control of Respondent that may deter these employees from accepting employment with the Commission-approved Acquirer, including, but not limited to, any non-compete provisions of employment or other contracts with Respondent that would affect the ability or incentive of those individuals to be employed by the Commission-approved Acquirer; *provided, however*, that nothing in this Order shall be construed to require Respondent to terminate the employment of any employee or prevent Respondent from continuing the employment of any employee; *provided further, however*, that nothing in this Order shall be construed to

Decision and Order

prohibit Respondent from providing any notice required by law or contract to any Store Employee who Respondent may transfer to another of Respondent's stores; and

2. provide all Store Employees with reasonable financial incentives to continue in their positions until the Closing Date. Such incentives shall include, but are not limited to, a continuation, until the Closing Date, of all employee benefits, including regularly scheduled raises, bonuses and vesting of pension benefits (as permitted by law and for those Store Employees covered by a pension plan), offered by Respondent.

- G. Prior to the each Closing Date, Respondent shall secure all Third Party Consents.

Provided however, that, if within twelve (12) months of the date the Commission approves the trustee agreement described herein, Respondent certifies to the Commission that a landlord is unreasonably withholding its consent to a transfer or assignment of the lease of a particular store location, then the divestiture period is tolled while the Commission reviews the matter. If Respondent demonstrates to the Commission's satisfaction that a landlord is unreasonably withholding its consent to a transfer or assignment of the lease of a particular store location, then, and only then, Respondent may remove that location from the definition of Assets To Be Divested and may substitute a store location to the definition of Assets To Be Divested from the list contained on Confidential Appendix D. Any substitutions of locations shall be made in the order in which the stores appear in Confidential Appendix D. If a substitution is made pursuant to this Paragraph, then the Divestiture Trustee shall have six (6) months from the date Respondent notifies the Divestiture Trustee of the substitution to accomplish the divestiture of the substituted store location, which shall be subject to the prior approval of

Decision and Order

the Commission. The Divestiture Trustee's period may be extended in the same manner as provided in Paragraph II.C.2.

Provided further, however, that Respondent may seek substitution for store locations only up to the number of stores contained in Confidential Appendix D;

Provided further, however, that Respondent may not seek further substitution for any store that has been added to the Assets To Be Divested from Confidential Appendix D;

Provided further, however, that Respondent shall notify the Divestiture Trustee of any substitution within three (3) days of Respondent's receipt from the Commission of the Commission's acceptance of such substitution;

Provided further, however, that all of Respondent's obligations as to the Assets To Be Divested, including its obligations under Paragraph II.C.4., shall apply to the substitute store as of the date Respondent notifies the Divestiture Trustee of the substitution.

- H. Respondent shall make all commercially reasonable efforts to remove as soon as practicable any of Respondent's trademarks, trade dress, service marks, trade names, inventory, and all other proprietary information from the store locations listed in Appendix A of this Order after the Closing Date for each such location, during which time the location will not be open for business, pursuant to the following terms:
1. For a period of not more than ten (10) days after the Closing Date, Respondent shall have exclusive access to the store, during which period Respondent shall use all commercially reasonable efforts to remove as soon as practicable all confidential business information, including all information technology and operating

Decision and Order

systems, all human resources, payroll and benefits records, all accounting and financial records, all company policies and directives, and all purchasing information. This exclusive access period shall end when Respondent has removed all confidential business information from the store. *Provided, however,* that Respondent shall also use commercially reasonable efforts to remove as soon as practicable any of Respondent's trademarks, trade dress, service marks, trade names, inventory, and all other proprietary information from the store during such exclusive access period.

2. For a period of not more than twenty (20) days after Respondent has removed the confidential business information from the store, Respondent shall have non-exclusive access to the store, during which period Respondent shall use all commercially reasonable efforts to remove as soon as practicable any remaining trademarks, trade dress, service marks, trade names, inventory, and all other proprietary information from the store. Respondent shall cooperate fully with the Commission-approved Acquirer to coordinate its removal efforts with the Commission-approved Acquirer's efforts to prepare the location for reopening.

Provided, however, that Respondent shall be responsible for all lease and utility costs associated with such store until it has completely removed its assets from such store.

Provided further, however, that Respondent shall not remove any of the Wild Oats Associated Intellectual Property identified in Paragraph I.G.1. of this order.

- I. The purpose of the divestiture of the Assets To Be Divested is to ensure the viable and competitive operation of the Assets To Be Divested in the same business and in the same manner in which the Assets To Be Divested were engaged at

Decision and Order

the time of the announcement of the proposed acquisition of Wild Oats by Whole Foods and to remedy the lessening of competition alleged in the Commission's complaint.

III.

IT IS FURTHER ORDERED that:

- A. Within thirty (30) days after the date this Order becomes final, and every thirty (30) Days thereafter until Respondent has fully complied with Paragraphs II.A., through II.H, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. Respondent shall submit at the same time a copy of its report concerning compliance with this Order to the Interim Monitor, if any Interim Monitor has been appointed and to the Divestiture Trustee. Respondent shall include in its reports, 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 this Order.

IV.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed (1) dissolution of the Respondent, (2) acquisition, merger or consolidation of Respondent, or (3) any other change in the Respondent that may affect compliance obligations arising out of this Order, including, but not limited to, assignment, the creation or dissolution of subsidiaries, or any other change in Respondent.

Decision and Order

V.

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 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 services shall be provided by the Respondent at its expense; and
- B. to interview officers, directors, or employees of the Respondent, who may have counsel present, regarding such matters.

VI.

IT IS FURTHER ORDERED that this Order shall terminate on May 28, 2019.

By the Commission.

Decision and Order

APPENDIX A

**APPENDIX A
OPERATING LOCATIONS**

Wild Oats Market
2584 Baseline Rd.
Boulder, CO 80305

Alfalfa's
1651 Broadway St.
Boulder, CO 80302

Whole Foods Market
3180 New Center Point
Colorado Springs, CO 80922

Wild Oats Market
4301 Main St.
Kansas City, MO 64111

Whole Foods Market
7250 W. Lake Mead Blvd.
Las Vegas, NV 89128

Wild Oats Market
5910 S. University Blvd.
Littleton, CO 80121

Whole Foods Market
6930 S. Highland Dr.
Cotton Wood Heights, UT 84121

Wild Oats Market
1090 St. Francis Dr.
Santa Fe, NM 87505

Whole Foods Market
8688 East Raintree Drive
Scottsdale, AZ 85260

Whole Foods Market
19440 NW Cornell Rd.
Hillsboro, OR 97124

Whole Foods Market
7133 N. Oracle Rd.
Tucson, AZ 85704

Whole Foods Market
340 N. Main St.
West Hartford, CT 06117

Whole Foods Market
9229 N. Sheridan Blvd.
Westminster, CO 80031

FEDERAL TRADE COMMISSION DECISIONS
VOLUME 147

Decision and Order

APPENDIX B**APPENDIX B
CLOSED LOCATIONS**

200 W. Foothills Pkwy. Fort Collins, CO 80525	13823 N. Tatum Blvd. Phoenix, AZ 85032
1422 N. Cooper Road Gilbert, AZ 85233	87 Marginal Way Portland, ME 04101
874 E. Warner Road Gilbert, AZ 85296	2077 NE Burnside St. Gresham, OR 97030
5350 W. Bell Road Glendale, AZ 85308	5695 S. Virginia Street Reno, NV 89502
517 N. Stephanie St. Henderson, NV 89014	4979 S. Virginia Street Reno, NV 89502
17711 Jean Way Lake Oswego, OR 97035	4600 Shelbyville Road St. Matthews, KY 40207
8194 S. Kipling Parkway Littleton, CO 80127	15569 W. Bell Road Surprise, AZ 85374
6424 Naples Blvd. Naples, FL 34109	3736 W. Center Park Drive West Jordan, UT 84084
7831 Dodge St. Omaha, NE 68114	8819-8833 Ladue Rd. St. Louis, MO 63124
9028 W. Union Hills Peoria, AZ 85382	

Decision and Order

APPENDIX C

APPENDIX C

INFORMATION TO BE PROVIDED TO THE DIVESTITURE TRUSTEE

For each store listed in Appendix A and Appendix B:

Store number, banner, name, address, city, state, zip code and county

Total square footage and selling space square footage

Date store opened and closed (if applicable)

Indication whether store is freestanding or in a shopping center

Indication whether store has equipment (yes or no answer within ten (10) days of approval of trustee agreement, full list of fixtures and equipment to be provided later upon the request of the Divestiture Trustee

Total gross sales for the (1) 2008 fiscal year, (2) first quarter 2009 fiscal year, and (3) first quarter 2008 fiscal year

Occupancy expenses (segmented by minimum annual rent, percentage rent, common area maintenance expenses, insurance, taxes and utilities) during the last full fiscal year

Lease and lease abstract indicating lease commencement date, base lease expiration, remaining renewal options, minimum annual rent, percentage rent and threshold, rent adjustments, recapture rights/operating covenants, and use restrictions

Any required contractual obligations to be assumed related to occupancy

Fixture (basic floor plan layout) and site plans (e.g., ingress and egress into shopping center, etc.) to the extent they exist

Aerial, exterior and interior photographs to the extent they exist

Maps of the customer draw area and customer spotting surveys and supporting data, to the extent they exist, to be provided on the Closing Date for the particular store

For the Wild Oats Associated Intellectual Property:

A detailed list of all assets that constitute the Wild Oats Associated Intellectual Property

All registrations for all trademarks, trade dress, service marks and trade names

Decision and Order

CONFIDENTIAL APPENDIX D

CONFIDENTIAL APPENDIX D

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

Analysis to Aid Public Comment

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 Whole Foods Market, Inc. (“Whole Foods”). The purpose of the proposed Consent Agreement is to remedy the competitive harm resulting from Whole Foods’ acquisition of Wild Oats Markets, Inc. (“Wild Oats”), completed on or about August 28, 2007. Under the terms of the proposed Consent Agreement, Whole Foods is required to maintain and subsequently divest a significant portion of the Wild Oats assets at issue in this matter.

The proposed Consent Agreement has been placed on the public record for thirty days to solicit comments from interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission again will review the proposed Consent Agreement and the comments received, and decide whether it should withdraw the Consent Agreement or make it final.

The sole purpose of this analysis is to facilitate public comment on the Consent Agreement; it is not intended to constitute an official interpretation of the Consent Agreement or modify its terms in any way.

II. BACKGROUND

On February 21, 2007, Whole Foods and Wild Oats publicly announced that they had executed a merger agreement pursuant to which Whole Foods would acquire Wild Oats in a transaction valued at about \$700 million. At the time of the merger announcement, Whole Foods (headquartered in Austin, Texas) and Wild Oats (headquartered in Boulder, Colorado) were the only national operators of premium natural and organic supermarkets (“PNOS”) in

Analysis to Aid Public Comment

the United States. Whole Foods operated 194 stores in more than 37 states and the District of Columbia as well as the United Kingdom, and Wild Oats maintained 74 PNOS stores in 24 states.¹

Wild Oats and Whole Foods offered a unique selection of natural and organic products, amenities, and high levels of customer service that differentiated them from conventional supermarkets, mass merchants, and other categories of food retailers. The combination of Whole Foods and Wild Oats would provide Whole Foods with market power post-acquisition in the PNOS market, leading to significant anticompetitive effects. Staff's investigation confirmed that repositioning by existing competitors or new entry would be inadequate to deter or counteract this harm to competition.

Having reason to believe the proposed transaction would result in competitive harm, the Commission authorized staff to seek a temporary restraining order ("TRO") and preliminary injunctive relief in federal district court and to commence an administrative trial under Part 3 of the Commission's Rules of Practice. 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.

III. LITIGATION HISTORY

On June 6, 2007, the Commission filed an action in the U.S. District Court for the District of Columbia to seek a TRO and a preliminary injunction against the acquisition. The court granted the TRO on June 7, 2007. On June 28, 2007, the Commission issued an administrative complaint pursuant to Part 3 of its Rules. Given the proceedings in the collateral federal district court case, the Commission, as a matter of discretion, stayed the Part 3 action in an order issued on August 7, 2007.

¹ Wild Oats also operated stores under the Henry's Farmers Market banner (in Southern California), the Sun Harvest banner (in Texas), and the Capers Community Market banner (in British Columbia, Canada).

Analysis to Aid Public Comment

After a two-day hearing on July 31 and August 1, 2007, the district court denied the Commission's motion for a preliminary injunction on August 16, 2007. On August 17, 2007, the Commission filed with the U.S. Court of Appeals for the D.C. Circuit a notice of appeal and an emergency motion for an injunction pending appeal. Although the D.C. Circuit initially denied the Commission's emergency motion for an injunction pending appeal, on July 29, 2008, the court of appeals reversed the district court's opinion and found that the Commission had demonstrated the requisite likelihood of success in the preliminary injunction proceeding, and remanded the matter to the district court to address the equities and, if necessary, fashion appropriate relief.² Approximately one week later, on August 8, 2008, the Commission lifted the stay of the Part 3 proceedings, and the Commission issued an amended administrative complaint on September 8, 2008. The amended complaint alleged anticompetitive effects in 22 overlap markets (in which Whole Foods and Wild Oats competed head-to-head) and seven potential competition markets (in which Whole Foods had planned to enter but for the merger).

On January 8, 2009, the district court issued a written order and opinion holding that the issue of likelihood of success had been fully resolved in the Commission's favor by the court of appeals, and confirming that all that remained was to weigh the equities and impose relief, if necessary.

On January 26, 2009, Whole Foods filed a motion to withdraw the matter from administrative litigation, together with a settlement agreement. The Commission granted Whole Foods' motion on January 29, 2009, and temporarily withdrew the matter from administrative adjudication. The withdrawal was subsequently

² Following Whole Foods' August 26, 2008 petition for rehearing *en banc* in the court of appeals, the D.C. Circuit denied the petition and reissued the court's judgment on November 21, 2008. The two judges of the panel majority reissued opinions that reiterated their respective rationales for concluding that the Commission had carried its burden of showing a likelihood of success on the merits and that the district court should conduct an equities analysis to determine whether an injunction should issue.

Analysis to Aid Public Comment

extended until March 6, 2009, as Whole Foods and Commission staff negotiated a remedy in settlement of the ongoing litigation.

IV. POST-ACQUISITION INTEGRATION

The acquired Wild Oats assets included stores operating under the Wild Oats banner as well as a number of leases for Wild Oats stores that were closed prior to the acquisition.³ After the district court's August 16, 2007 decision denying the Commission's request for a preliminary injunction, Whole Foods consummated its acquisition of Wild Oats and began integrating certain of the acquired Wild Oats assets, rebranding Wild Oats stores, closing other Wild Oats locations, and terminating certain leases.

In the 18 months since the close of the transaction, Whole Foods has closed a number of Wild Oats stores. Whole Foods has maintained leases and physical assets relating to some, but not all, of the closed Wild Oats locations. Within the 29 geographic markets alleged in the complaint, Whole Foods is currently operating 31 former Wild Oats stores and is maintaining control of 19 formerly operating Wild Oats stores.

V. THE PROPOSED CONSENT AGREEMENT

In order to remedy, to a significant degree, the anticompetitive effects of the transaction, the Commission has entered into the attached Consent Agreement with Whole Foods, which requires the divestiture of 32 stores, along with associated Wild Oats intellectual property and related assets, leases, properties, and government permits.⁴ The Order to Maintain Assets will require Whole Foods to maintain the operating status of the open stores, and maintain all

³ Immediately following the closing, on September, 30, 2007, Whole Foods sold the Henry's and Sun Harvest stores that Wild Oats had been operating to Smart & Final Inc., a Los Angeles-based food retailer.

⁴ Of the 32 stores, 13 are live stores and 19 are "dark" stores. Dark stores are former Wild Oats stores that are not presently operating, but are under the control of Whole Foods.

Analysis to Aid Public Comment

leases (open and dark stores) until divestiture is complete. *See* Appendix A.

The inclusion of the Wild Oats intellectual property is an important component of the package. The intellectual property includes the use, without restriction, of the Wild Oats name. Even months after the acquisition, the Wild Oats brand name retains significant brand equity that has been developed over the past 20 years.

As shown in Appendices A & B of the Decision and Order, Whole Foods is required to divest a significant portion of the acquired and currently operating stores, and all of the formerly operating stores for which leases still exist. These planned divestitures will offer relief in 17 of the 29 geographic markets alleged in the amended administrative complaint, eliminating Whole Foods' monopoly position in these markets, and permitting consumers to once again enjoy the benefits of competition between PNOS operators. These stores also could provide a springboard from which the acquirer(s) can expand into additional geographic markets.

The proposed order provides that the responsibility for the marketing and sale of the assets to be divested will immediately be put in the hands of the divestiture trustee.⁵ The trustee will have six months within which to divest the stores and related assets to a buyer or buyers approved by the Commission. If the trustee has received good faith offers from potential acquirers for certain stores within the initial six-month divestiture period, the Commission may extend the divestiture period for those stores for up to an additional six months. The requirement that any potential acquirer be approved by the Commission is designed to ensure that the potential acquirer(s) intends to put the divested assets, including the stores

⁵ Pursuant to the proposed Consent Agreement, although the divestiture of the stores may be made to one or more Commission-approved buyers, the Wild Oats-associated intellectual property may be divested to only a single buyer.

Analysis to Aid Public Comment

and the Wild Oats brand, to use in the relevant product market in competition with Whole Foods.

VI. OTHER PROVISIONS OF THE CONSENT AGREEMENT

The Consent Agreement contains several additional provisions designed to ensure that competition is, in fact, replicated in the targeted geographic markets. As referenced above, the Consent Agreement requires appointment of a divestiture trustee to oversee the process for divesting the Wild Oats assets. The Food Partners (“TFP”) has been appointed to fill this role. TFP is one of the leading investment banking firms in the food retailing industry, with particular expertise in mergers, acquisition, and divestiture services. TFP has advised on a number of supermarket sales and acquisitions, including divesting packages of geographically dispersed national chain supermarkets. For these reasons, TFP is well-suited to serve as divestiture trustee in this matter.

The Consent Agreement also includes an Order to Maintain Assets (“OMA”), which requires Whole Foods to continue to operate the Wild Oats stores until a buyer is identified and approved by the Commission and final closing of the purchase occurs. Because of concerns about possible deterioration of the stores during the divestiture period, the OMA further provides for the appointment of an interim monitor to ensure that Whole Foods maintains the viability, marketability, and competitiveness of the assets and does not terminate the operation of any store included in the divestiture package.

VII. POST-CONSUMMATION RELIEF

The absence of pre-consummation relief from the district court, and Whole Foods’ subsequent integration activities, have made it more difficult for the Commission to obtain complete relief in this matter. However, the proposed Consent Agreement will provide substantial relief to consumers in 17 geographic markets across the United States. Moreover, acceptance of the proposed Consent Agreement will bring immediate, certain relief and avoid the

Analysis to Aid Public Comment

expense and uncertainty inherent in continued litigation. Reestablishing a PNOS competitor in these markets under the Wild Oats banner will reintroduce direct price, quality, and service competition in these areas, restoring to a substantial degree the competition that was eliminated by the acquisition, providing important benefits to consumers, and perhaps creating a springboard for broader competition nationwide.