

UNITED STATES OF AMERICA 0210100
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Timothy J. Muris, Chairman**
 Sheila F. Anthony
 Mozelle W. Thompson
 Orson Swindle
 Thomas B. Leary

In the Matter of)	
)	
DAINIPPON INK AND CHEMICALS,)	Docket No. C-4073
INCORPORATED,)	DECISION AND ORDER
)	
a corporation.)	
)	

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition by Respondent Dainippon Ink and Chemicals, Incorporated (“Dainippon”), hereinafter referred to as “Respondent,” of certain assets of Bayer Corporation (“Bayer”), and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said 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 Dainippon is a corporation organized, existing and doing business under and by virtue of the laws of Japan, with its office and principal place of business located at DIC Building 7-20 Nihonbashi 3-Chome, Chou-ku Tokyo 103 Japan.

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. “Dainippon” or “Respondent” means Dainippon Ink and Chemicals, Incorporated, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Dainippon Ink and Chemicals, Incorporated (including, but not limited to, Sun Chemical Group B.V. and Sun Chemical Corporation), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Bayer” means Bayer Corporation, a corporation organized, existing, and doing business under and by virtue of the laws of Indiana, with its offices and principal place of business located at 100 Bayer Road, Pittsburgh, Pennsylvania 15205; and joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Bayer Corporation.
- C. “Acquisition” means the proposed acquisition by Sun Chemical Corporation, a wholly-owned subsidiary of Dainippon, of certain assets of Bayer by means of an Asset Purchase Agreement dated as of February 15, 2002, by and between Bayer and Sun Chemical Corporation.
- D. “Commission” means the Federal Trade Commission.
- E. “Ciba” means, collectively, Ciba Specialty Chemicals Inc., a corporation organized, existing and doing business under and by virtue of the laws of Switzerland, with its offices and principal place of business located at Klybeckstrasse 141, 4057 Basel, Switzerland, and Ciba Specialty Chemicals Corporation, a corporation organized, existing and doing business under and by virtue

of the laws of the state of Delaware, with its offices and principal place of business located at 560 White Plains Road, Tarrytown, New York 10591-9005.

- F. “Agency(ies)” means any governmental regulatory authority or authorities in the world responsible for granting approval(s), clearance(s), qualification(s), license(s) or permit(s) for any aspect of the research, development, manufacture, marketing, distribution or sale of Perylenes.
- G. “Ciba Asset Purchase Agreement” means the Asset Purchase Agreement by and between Respondent as Seller, and Ciba as Purchaser, dated as of December 19, 2002, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Sun Perylene Assets to be divested to accomplish the requirements of this Order. The Ciba Asset Purchase Agreement is attached to this Order as non-public Appendix II.
- H. “Closing Date” means the date on which Respondent divests, licenses or otherwise conveys to the Commission-approved Acquirer the Sun Perylene Assets completely and as required by Paragraph II.A. of this Order.
- I. “Commission-approved Acquirer” means an entity approved by the Commission to acquire the Sun Perylene Assets, including Ciba if Ciba acquires the Sun Perylene Assets pursuant to Paragraph II.A. of this Order.
- J. “Costs” means all direct costs, including, but not limited to, direct labor, cost of raw materials, and depreciation of capital equipment, but “Costs” does not include general administrative or overhead expenses.
- K. “Divestiture Agreement” means any agreement between Respondent and a Commission-approved Acquirer (or between a trustee appointed pursuant to Paragraph IV.A. of this Order and a Commission-approved Acquirer), including the Ciba Asset Purchase Agreement, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Sun Perylene Assets intended to accomplish the requirements of this Order.
- L. “Divestiture Trustee” means the trustee appointed by the Commission pursuant to Paragraph IV.A. of this Order.
- M. “Effective Date” means the date the Acquisition is consummated.
- N. “Forth Technologies” means Forth Technologies Inc., a corporation organized, existing and doing business under and by virtue of the laws of Kentucky, with its offices and principal place of business at 600 Bergman Street, Louisville, Kentucky 40203; and joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Forth Technologies Inc.

- O. "Governmental Entity" means any Federal, state, local or non-U.S. government or any court, legislature, governmental agency or governmental commission or any judicial or regulatory authority of any government.
- P. "Interim Monitor" means any trustee appointed pursuant to Paragraph III of this Decision and Order or Paragraph III of the Order to Maintain Assets.
- Q. "Lobeco Products" means Lobeco Products Inc., a corporation organized, existing and doing business under and by virtue of the laws of South Carolina, with its offices and principal place of business at 23 John Meeks Way, Lobeco, South Carolina 29931; and joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Lobeco Products Inc.
- R. "Non-perylene Product" means any product researched, developed, manufactured, used or sold by Respondent other than Perylenes before the Effective Date.
- S. "Patents" means all patents, patent applications and statutory invention registrations, in each case possessed or owned by Respondent prior to the Effective Date, including all reissues, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, all rights therein provided by international treaties and conventions, and all rights to obtain and file for patents and registrations thereto in the world, related to the manufacture, use, sale, research and/or development of any Perylenes.
- T. "Perylenes" means organic pigments based on the perylene chemical structure and researched, developed, manufactured, or sold by Respondent before the Effective Date, including, but not limited to, the products of Respondent designated by the following code numbers: 229-0079, 229-1179, 229-2179, 229-2273, 229-3379, 229-3380, 229-4000, 229-9029, 429-0230, 429-3179, and 429-5079.
- U. "Perylene Assumed Contracts" means all contracts or agreements existing before the Effective Date to which Respondent is a party:
1. pursuant to which any third party purchases Perylenes from Respondent;
 2. pursuant to which Respondent purchases any materials from any third party for use in connection with the manufacture, use, sale, research and/or development of Perylenes, including, but not limited to, raw materials;
 3. relating to the manufacture and/or finishing of Perylenes, including, but not limited to, contracts or agreements with Lobeco Products and Forth Technologies;
 4. constituting confidentiality agreements involving Perylenes; or

5. involving any royalty, licensing or similar arrangement involving Perylenes.

V. “Perylene Intellectual Property” means all of the following possessed or owned by Respondent before the Effective Date and related to Perylenes:

1. Patents;
2. Perylene Manufacturing Technology;
3. Perylene Scientific and Regulatory Material;
4. Perylene Trade Dress;
5. Perylene Trademarks, including the goodwill of the business symbolized thereby and associated therewith; and
6. rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation or breach of any of the foregoing.

Provided, however, “Perylene Intellectual Property” does not include the names “Dainippon,” “Sun Chemical,” or “Sunfast.”

W. “Perylene Manufacturing Technology” means all technology, trade secrets, know-how, software, inventions, practices, methods and other confidential or proprietary information related to the formulation, manufacture, finishing, quality assurance and quality control, and packaging of Perylenes, in existence and in the possession of Respondent before the Effective Date, including, but not limited to, manufacturing records, sampling records, standard operating procedures and batch records related to the manufacturing process, and supplier lists.

X. “Perylene Scientific and Regulatory Material” means all technological, scientific, chemical, materials and information related to Perylenes, and all rights thereto, in any and all jurisdictions.

Y. “Perylene Trade Dress” means all trade dress of Perylenes distributed, marketed, or sold by or on behalf of Respondent before the Effective Date, including, but not limited to, product packaging associated with the sale of such Perylenes worldwide and the lettering of such Perylenes’ trade names or brand names.

Z. “Perylene Trademarks” means all trademarks, 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 Perylenes researched, developed, distributed, marketed, or sold by or on

behalf of Respondent before the Effective Date.

- AA. “Perylene Registrations” means all registrations, permits, licenses, consents, authorizations and other approvals, and pending applications and requests therefor, required by applicable Agencies related to the research, development, manufacture, distribution, finishing, packaging, marketing or sale of Perylenes worldwide.
- BB. “Sun Perylene Assets” means all of Respondent’s rights, title and interest held before the Effective date, in and to all assets related to Perylenes to the extent legally transferable, including the research, development, manufacture, use, finishing, distribution, marketing or sale of Perylenes including, without limitation, the following:
1. all Perylene Intellectual Property;
 2. Perylene Registrations;
 3. the existing lists of all customers of Perylenes during the period from January 1, 1999, to the Effective Date and detailed information as to the pricing, product mix, and other terms (including, but not limited to, supply or rebate agreements) of Perylenes for such customers;
 4. at the Commission-approved Acquirer’s option, each of the Perylene Assumed Contracts;
 5. all unfilled customer orders for Perylenes existing before the Effective Date (a list of such orders is to be provided to the Commission-approved Acquirer within two (2) days after the Closing Date);
 6. at the Commission-approved Acquirer’s option, all inventories of Perylenes in existence before the Effective Date, including, but not limited to, raw materials, goods in process, and finished goods; and
 7. all documents (including, but not limited to, computer files, electronic mail, and written, recorded, and graphic materials) related to the foregoing, including, but not limited to, the following specified documents: the Perylene Registrations; reports relating to the research and development of Perylenes or of any materials used in the research, development, manufacture, marketing or sale of Perylenes; all market research data and market intelligence reports; customer information; all records relating to employees that accept employment with the Commission-approved Acquirer (excluding any personnel records the transfer of which is prohibited by applicable law); all records, including customer lists, sales force call activity reports, vendor lists, sales data, reimbursement data, manufacturing records, manufacturing processes, and supplier lists; all data contained in laboratory notebooks relating to Perylenes; all analytical and quality control data; and all correspondence with Agencies relating to

Perylenes.

- CC. “Sun Perylene Employees” means the employees of Respondent identified in non-public Appendix I attached to this Order.

II.

IT IS FURTHER ORDERED that:

- A. Not later than ten (10) days after the Effective Date, Respondent shall divest the Sun Perylene Assets as an ongoing business to Ciba pursuant to and in accordance with the Ciba Asset Purchase Agreement (which agreement 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 Ciba or to reduce any obligations of Respondent under such agreement), and such agreement is incorporated by reference into this Order and made part hereof as non-public Appendix II.

Provided, however, that to the extent Respondent uses any of the Perylene Intellectual Property in connection with the research, development, manufacture, use, or finishing of Non-perylene Products, Respondent shall have the right to obtain from the Commission-approved Acquirer a license to use such Perylene Intellectual Property to make, have made, use, and sell such Non-perylene Products.

Provided further, that if Respondent divests the Sun Perylene Assets to Ciba pursuant to this Order, Respondent may obtain from Ciba a license to manufacture, use, and sell the Perylene designated by product code number 229-2273.

Provided further, that to the extent Respondent is required by this Order to assign Perylene Assumed Contracts to the Commission-approved Acquirer, where any such Perylene Assumed Contract also relates to Non-perylene Product(s), Respondent shall assign the Commission-approved Acquirer all such rights under the contract or agreement as are related to Perylenes, but concurrently may retain similar rights as are related to the Non-perylene Product(s). After the Closing Date, Respondent may not have Perylenes manufactured or finished for it by either Forth Technologies or Lobeco Products for a period of five (5) years.

Provided further, that in cases in which documents or other materials included in the Sun Perylene Assets contain information that (i) relates both to Perylenes and to Non-perylene Product(s), and (ii) cannot be segregated in a manner that preserves the usefulness of the information as it relates to Perylenes, Respondent shall be required only to provide copies of the documents and materials containing this information. In instances where such copies are

provided to the Commission-approved Acquirer, the Commission-approved Acquirer shall have access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes.

Provided further, that if Respondent has divested the Sun Perylene Assets to Ciba prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondent that Ciba is not an acceptable acquirer of the Sun Perylene Assets or that the manner in which the divestiture was accomplished is not acceptable, then Respondent shall immediately rescind the transaction with Ciba and shall divest the Sun Perylene Assets within ninety (90) days of rescission to a Commission-approved Acquirer in a manner that satisfies the requirements of Paragraph II of this Order.

- B. Any failure to comply with the terms of the Ciba Asset Purchase Agreement (or any other Divestiture Agreement) shall constitute a failure to comply with this Order. Any Divestiture Agreement between Respondent (or a Divestiture Trustee) and a Commission-approved Acquirer of the Sun Perylene Assets shall be deemed incorporated by reference into this Order, and any failure by Respondent to comply with the terms of such Divestiture Agreement shall constitute a failure to comply with this Order.
- C. Respondent shall include in any Divestiture Agreement related to the Sun Perylene Assets the following provisions, and Respondent shall commit that, upon reasonable notice and at the request of the Commission-approved Acquirer to the Respondent, Respondent shall promptly:
 - 1. provide assistance and advice to enable the Commission-approved Acquirer to obtain all necessary permits and approvals from any Agency or Governmental Entity to manufacture and sell Perylenes;
 - 2. provide such personnel, assistance, and training at a facility chosen by the Commission-approved Acquirer as the Commission-approved Acquirer might need to manufacture Perylenes, including, but not limited to, technical assistance relating to process and finishing technology, formulation information, quality assurance, and quality control, and shall continue providing such assistance and training until the Commission-approved Acquirer is reasonably satisfied that it can manufacture Perylenes in substantially the same manner and quality employed or achieved by or on behalf of Respondent, but no longer than eighteen (18) months following the Closing Date;
 - 3. provide the Commission-approved Acquirer with access to any equipment used in the formulation, manufacture, finishing, quality assurance or quality control of Perylenes that is owned or controlled by Respondent and located at any contract manufacturer, including, but not limited to, Forth Technologies and Lobeco Products, for use in the formulation, manufacture, finishing, quality assurance or quality control of Perylenes after the Closing Date.

Such access shall be sufficient to allow the Commission-approved Acquirer to have made its full demand for Perylenes, and the Commission-approved Acquirer's access to such equipment shall take precedence over Respondent's use of the equipment. Respondent may charge the Commission-approved Acquirer for such access an amount that does not exceed the Costs to Respondent of acquiring and operating such equipment, and such Costs shall be apportioned between the Respondent and the Commission-approved Acquirer according to the percentage of time devoted to the products of each company; and

4. divest any additional, incidental assets of Respondent and make any further arrangements for transitional services within the first twelve (12) months after divestiture that may be reasonably necessary to assure the viability and competitiveness of the Sun Perylene Assets.

For the services listed above in Paragraphs II.C.1. and II.C.2., Respondent shall charge the Commission-approved Acquirer a rate no greater than the Costs incurred by Respondent in rendering such services. Moreover, to the extent Respondent outsources any of the services listed in Paragraphs II.C.1. and II.C.2. to a third party, Respondent shall charge the Commission-approved Acquirer a rate no greater than the Costs Respondent would have incurred had Respondent provided such services directly.

- D. Respondent shall provide the Commission-approved Acquirer with the opportunity to enter into employment contracts with the Sun Perylene Employees for a period of six (6) months from the Closing Date ("the Access Period"), provided that such contracts are contingent upon the Commission's approval of the Divestiture Agreement.
- E. Respondent shall provide the Commission-approved Acquirer an opportunity to inspect the personnel files and other documentation related to the Sun Perylene Employees to the extent permissible under applicable laws, at the request of the Commission-approved Acquirer, at any time after execution of the Divestiture Agreement until the end of the Access Period.
- F. During the Access Period, Respondent shall not interfere with the hiring or employing by the Commission-approved Acquirer of Sun Perylene Employees, and shall remove any impediments 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. In addition, Respondent shall not make any counteroffer to a Sun Perylene Employee who receives a written offer of employment from the Commission-approved Acquirer.

Provided, however, that this Paragraph II.F. does not prohibit Respondent from making offers of employment to or employing any Sun Perylene Employee during the Access Period where the Commission-approved Acquirer has notified Respondent in writing that the Commission-approved

Acquirer does not intend to make an offer of employment to that employee.

Provided further, however, that this Paragraph II.F. does not prohibit Respondent from maintaining an existing (or concluding a new) non-disclosure provision of employment with the Sun Perylene Employees that is limited to Non-perylene Products.

- G. Respondent shall provide all Sun Perylene Employees with reasonable financial incentives to continue in their positions until the Closing Date. Such incentives shall include a continuation of all employee benefits offered by Respondent until the Closing Date for the divestiture of the Sun Perylene Assets has occurred, including regularly scheduled raises and bonuses, and a vesting of all pension benefits (as permitted by law). In addition to the foregoing, Respondent shall provide to each Sun Perylene Employee who accepts employment with the Commission-approved Acquirer, an incentive equal to three (3) months of such employee's base annual salary to be paid upon the employee's completion of one (1) year of employment with the Commission-approved Acquirer.

Provided further, that if Ciba enters into an employment contract with one or more Sun Perylene Employee(s) of its choice before the Commission accepts the Consent Agreement, Respondent divests the Sun Perylene assets to Ciba pursuant to Paragraph II, and Respondent is not required to rescind the transaction with Ciba pursuant to Paragraph II.A., then Respondent shall be deemed to have satisfied the requirements of Paragraph II.G. of this Order.

- H. For a period of one (1) year following the date the divestiture is accomplished, Respondent shall not, directly or indirectly, solicit or otherwise attempt to induce any employees of the Commission-approved Acquirer with any amount of responsibility related to Perylenes to terminate their employment relationship with the Commission-approved Acquirer; *provided, however,* a violation of this provision will not occur if: (i) Respondent advertises for employees in newspapers, trade publications or other media not targeted specifically at the employees, or (ii) Respondent hires employees who apply for employment with Respondent, as long as such employees were not solicited by Respondent in violation of this paragraph.
- I. Respondent shall secure, prior to divestiture, all consents and waivers from all private entities that are necessary for the divestiture of the Sun Perylene Assets to the Commission-approved Acquirer, or for the continued research, development, manufacture, sale, marketing or distribution of Perylenes by the Commission-approved Acquirer.
- J. Pending divestiture of the Sun Perylene Assets, Respondent shall take such actions as are necessary to maintain the viability and marketability of the Sun Perylene Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Sun Perylene Assets except for ordinary wear and tear.

K. Counsel for Respondent (including in-house counsel under appropriate confidentiality arrangements) may retain unredacted copies of all documents or other materials provided to the Commission-approved Acquirer and may have access to original documents (under circumstances where copies of documents are insufficient or otherwise unavailable) provided to the Commission-approved Acquirer in order to:

1. comply with any Divestiture Agreement, this Order, any law (including, without limitation, any requirement to obtain regulatory licenses or approvals), any data retention requirement of any applicable Governmental Entity, or any taxation requirements; or
2. defend against, respond to, or otherwise participate in any pending litigation, investigation, audit, process, subpoena or other proceeding relating to the divestiture or any other aspect of the Sun Perylene Assets or Perylene business; *provided, however*, that Respondent may disclose such information only as necessary for the purposes set forth in this Paragraph pursuant to an appropriate confidentiality order, agreement or arrangement.

Provided further, however:

1. Respondent shall require those who view such unredacted documents or other materials to enter into confidentiality agreements with the Commission-approved Acquirer; *provided, however*, that Respondent shall not be deemed to have violated this Paragraph if the Commission-approved Acquirer withholds such agreement unreasonably; and
 2. Respondent shall use its best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.
- L. The purpose of the divestiture of the Sun Perylene Assets is to ensure the continued use of the Sun Perylene Assets in the same business in which the Sun Perylene Assets were engaged at the time of the announcement of the Acquisition, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

- A. At any time after Respondent signs the Consent Agreement, the Commission may appoint an Interim Monitor to assure that Respondent expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order and by the Order to Maintain Assets (collectively, "the Orders").

- B. If an Interim Monitor is appointed pursuant to this Paragraph or pursuant to Paragraph III.A. of the Order to Maintain Assets in this matter, Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:
1. 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 receipt of written 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.
 2. The Interim Monitor shall have the power and authority to monitor Respondent's compliance with the terms of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission.
 3. Within ten (10) days after appointment of the Interim Monitor, Respondent shall execute a trust 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 terms of the Orders in a manner consistent with the purposes of the Orders.
 4. The Interim Monitor shall serve until the later of:
 - a. when the Sun Perylene Assets have been divested in a manner that fully satisfies the requirements of the Orders and the Commission-approved Acquirer is fully capable of, independently of Respondent, producing Perylenes acquired pursuant to a Divestiture Agreement; or
 - b. when all the obligations under the Orders pertaining to the Interim Monitor's service have been fully performed.

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

5. Subject to any demonstrated legally recognized privilege of Respondent, 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 Respondent's compliance with its obligations under the Orders, including, but not limited to, its obligations related to the Sun Perylene 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 the Orders.

6. The Interim Monitor shall serve, without bond or other security, at the expense of Respondent, or as set out in the Ciba Asset Purchase Agreement, on such reasonable and customary terms and conditions as the 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. The Interim Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission. The Commission may, among other things, require the Interim Monitor and each of the 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.
7. 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 misfeasance, gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.
8. 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 in the same manner as provided in this Paragraph or Paragraph III.A. of the Order to Maintain Assets in this matter.
9. 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 the Orders.
10. Respondent shall report to the Interim Monitor in accordance with the requirements of Paragraph V 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 the Orders or the Divestiture Agreement. Within one (1) month from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning compliance by Respondent with the provisions of the Orders.
11. 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*, that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.

- C. The Interim Monitor appointed pursuant to Paragraph III.A. of this Order or Paragraph III.A. of the Order to Maintain Assets in this matter may be the same person appointed as Divestiture Trustee pursuant to Paragraph IV.A. of this Order.

IV.

IT IS FURTHER ORDERED that:

- A. If Respondent has not divested the Sun Perylene Assets within the time required by Paragraph II.A. of this Order, the Commission may appoint a Divestiture Trustee to divest the Sun Perylene Assets in a manner that satisfies the requirements of Paragraph II. 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 shall consent to the appointment of a Divestiture Trustee in such action to divest the relevant assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondent to comply with this Order.
- B. If a Divestiture Trustee is appointed by the Commission or a court pursuant to Paragraph IV.A. of this Order, Respondent shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
 - 1. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Divestiture Trustee, Respondent shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
 - 2. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest the assets that are required by this Order to be divested.

3. Within ten (10) days after appointment of the Divestiture Trustee, Respondent shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed Divestiture Trustee, of the court, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by the Order.
4. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph IV.B.3. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed Divestiture Trustee, by the court; *provided, however*, the Commission may extend the divestiture period only two (2) times.
5. 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 shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delay in accomplishing the 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 or, for a court-appointed Divestiture Trustee, by the court.
6. 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'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, 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 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.
7. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to

carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of the 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 contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

8. 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 misfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.
 9. If the Divestiture Trustee ceases to act or fails to act diligently, a substitute Divestiture Trustee shall be appointed in the same manner as provided in Paragraph IV.A. of this Order.
 10. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.
 11. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.
 12. The Divestiture Trustee shall report in writing to Respondent and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
 13. 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.
- C. The Divestiture Trustee appointed pursuant to Paragraph IV.A. of this Order may be the same Person appointed as Interim Monitor pursuant to Paragraph III.A. of this Order or Paragraph III.A. of the Order to Maintain Assets in this matter.

V.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order becomes final, and every sixty (60) days thereafter until Respondent has fully complied with Paragraphs II.A. through II.I. of this Order, 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.

VI.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondent such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of the Order.

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent made to its counsel's principal United States offices, Respondent shall permit any duly authorized representative of the Commission:

- A. Access, during office hours of 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 Respondent related to compliance with this Order; and
- B. Upon five (5) days' notice to Respondent and without restraint or interference from Respondent, to interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

By the Commission.

Donald S. Clark
Secretary

SEAL

ISSUED: March 13, 2003

**CONFIDENTIAL APPENDICES I AND II REDACTED
FROM PUBLIC RECORD VERSION**