



**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

PUBLIC VERSION

In the Matter of

Bayer CropScience AG,
a corporation

and

BASF Aktiengesellschaft,
a corporation.

**PETITION OF BAYERCROPSCIENCE AG FOR APPROVAL
OF PROPOSED LICENSE BACK AGREEMENT**

BayerCropScience AG (“BCS”) hereby seeks the Federal Trade Commission’s approval to amend the Sale and Purchase Agreement (“the SPA”)¹ between BCS and BASF Aktiengesellschaft (“BASF”) to permit an exclusive license back to BCS for Agricultural Use² of

¹ The amendment would alter the language of Section 2.1.12(a) of the SPA, which currently grants a license back for the use of Fipronil for Non-Agricultural Use in Latin America (except Brazil and Mexico) and Asia, except for uses of Fipronil for termite applications and liquid formulations, which were excluded from the license back and retained by BASF. Sale and Purchase Agreement By and Between Bayer CropScience AG and BASF Aktiengesellschaft § 2.1.12(a) (Oct. 28, 2002). A copy of a draft of the proposed amendment, Amendment Agreement No. 3 to the Sale and Purchase Agreement dated 28 October 2002 by and between Bayer CropScience AG and BASF Aktiengesellschaft, is attached as a Confidential Appendix.

² “Agricultural Use” is defined as “all uses of products with an intended efficacy as insecticide, herbicide, or fungicide with a registered application in professional agriculture (including Seed Treatment Uses), including the use of Formulations and Mixture Products sold by the Bayer Group for home and garden uses which are substantially similar to Existing

Fipronil (including the registration rights, intellectual property rights, and know-how) in Latin America (except Brazil and Mexico) (collectively, "the Latin American Countries") and the following countries in Asia: India, South Korea, North Korea, Taiwan, Vietnam, Malaysia and Pakistan (collectively, "the Asian Countries"). The license back would not include the United States. BCS makes this application under Paragraph XV of the Decision and Order entered by the Commission in this matter on May 30, 2002 (the "Decision and Order"). The license back will not frustrate the purpose of the Decision and Order.

BCS divested the Fipronil Business to BASF in accordance with the Decision and Order. BCS and BASF entered into an SPA on October 28, 2002; and the Commission approved the divestiture on February 11, 2003. With the Commission's approval, BCS received a license back from BASF to market Fipronil for Non-Agricultural Use in Latin America (except Brazil and Mexico) and Asia, except for termite applications and liquid formulations.

I. Nature of the License Back Agreement and Overview

Under the proposed license back agreement, BCS will have the exclusive right to sell Fipronil in the Latin American and Asian Countries, as well as the right to develop new products containing Fipronil to sell in those countries. BCS will manufacture its supply of Fipronil at its existing plant in Hangzhou, China. BCS will, however, purchase from BASF an intermediate for Fipronil, Disulfure, until 2008. The Fipronil patents expire in most countries in 2008 and 2009. In exchange for the license back, BCS will pay BASF a lump sum of [].

The license back agreement makes business sense because BASF does not have the sales and marketing infrastructure necessary to maximize the value of the Fipronil Business in the Latin American and Asian Countries. BASF's limited organization in these regions is focused

Formulations and Existing Mixture Products for use in professional agriculture divested in the Divested Businesses." SPA § 1.

on selling other types of chemicals, not insecticide products. To market crop protection products such as Fipronil effectively, a supplier needs a dedicated marketing and sales force that is experienced in working with growers and providing technical assistance.

BCS, by contrast, has a substantial presence in the crop protection business in these regions and is well equipped effectively to market Fipronil there. BCS also has the right to formulate, develop, import, export, and distribute Fipronil for Non-Agricultural Use directly in the Latin American and Asian Countries; it has several formulation, production, and repackaging facilities in those countries and has extensive field support resources in many of them. No other firm is better situated efficiently to distribute Fipronil for Agricultural Use in the license back countries because Bayer is the most well established firm in the crop science and insecticide businesses in these countries.

Because the license back agreement will maximize the potential of the Fipronil Business in the Latin American and Asian Countries, it will enable BASF to maximize the value it can realize from its existing Fipronil assets. The agreement will also enable BASF to focus its investment in the Fipronil Business on researching and developing new products for, and marketing in, other regions that are more important and valuable to it, including the United States, Canada, Europe, and countries in Latin America and Asia that are not subject to the license back.

II. The License Back Agreement for Latin America and Asia Will Not Impair BASF's Fipronil Business in the United States

The license back agreement will not impair BASF's Fipronil business in the United States, and will thus not undermine the purpose of the FTC's Decision and Order. The license back agreement will not directly impair BASF's Fipronil business in the United States because it

will not restrict in any way BASF's rights to develop and market Fipronil products in the United States.

Nor will the agreement impair BASF's United States Fipronil business indirectly. It will neither decrease BASF's incentives to invest in research and development and marketing for the Fipronil Business nor cause BASF's production of Fipronil to fall below efficient scale. This is so for two reasons. First, the countries subject to the license back account for only [] of BASF's Fipronil revenues. BASF will retain the right to the remaining []—the vast majority of its worldwide Fipronil revenues, including the largest and most lucrative markets for Fipronil for Agricultural Use.³ The retained business will be more than enough to enable BASF to operate its plant and any related research endeavors at efficient scale.

Second, because BASF will retain exclusive rights to Fipronil in the largest and most important markets, including the United States, which together account for nearly [] of its Fipronil revenues, the agreement will not reduce its incentives to exploit its Fipronil Business or to invest in the development of new Fipronil-based products. Indeed, because the agreement will enable BASF to maximize the value it can obtain from its Fipronil assets in the Latin American and Asian Countries covered by the agreement, where BASF is ill-equipped to exploit the Fipronil business, it will actually increase the resources available to BASF for investment in new Fipronil products.

In addition, the Fipronil-based products that BCS will market in the Latin American or the Asian Countries are sold in other markets as well. Accordingly, BASF will not lose access to any Fipronil-based agricultural products. It will be able to maintain its full range of products for

³ This [] figure is based on the forecasted sales for license back countries as a percentage of BASF's overall Fipronil sales for Agricultural Use.

sale in markets—including the United States—that are not subject to the license back and will be well positioned to meet current and future demand for all of them.

III. BASF Lacks the Presence Necessary to Maximize the Value of the Fipronil Business in Latin America and Asia

BASF lacks the infrastructure necessary to maximize the value of the Fipronil Business in the Latin American and Asian Countries. BASF's current organization in these countries is focused on chemicals other than insecticides. To market Fipronil-based crop protection products effectively in these countries, BASF would need to develop in-country staff with detailed knowledge of the products and experience in educating growers to use the products effectively and safely. BASF has no such infrastructure in most of the countries subject to the license back.

Given the small size of the markets for Fipronil-based products in the countries subject to the license back, it would not be economical for BASF to invest in the marketing infrastructure that would be necessary effectively to market Fipronil-based crop protection products in those countries. In Latin America, the 15 countries included in the proposed license back account for a total of only about [] in annual sales of Fipronil-based crop protection products. By contrast, BASF expects to achieve about [] in sales of Fipronil-based crop protection products in Brazil and Mexico, the two Latin American countries in which it will continue to sell Fipronil.

The situation is similar in Asia. For example, in two of the license back countries that are expected to represent the largest markets for Fipronil-based crop protection products, Vietnam and Korea, BASF lacks the business infrastructure necessary to market the products.

Furthermore, the potential market for BASF Fipronil-based products is limited in many of these countries because competitors are already selling generic Fipronil equivalents.

It would make no sense for BASF to make the very substantial investment necessary efficiently to sell Fipronil-based crop protection products in the countries where it proposes to license back to BCS. The potential Fipronil revenues in these countries, even combined, constitute only a very small portion of the overall Fipronil Business for Agricultural Use. BASF has made the investments necessary efficiently to sell Fipronil-based products in those countries where demand is large enough and where it thus makes business sense for BASF to make the investments—including the United States, Europe, the largest markets in Latin America (Brazil and Mexico) and major markets such as Japan in Asia—and those countries will not be subject to the license back. Licensing BCS to market Fipronil products for Agricultural Use will enable BASF to maximize the value of the Fipronil Business in the remaining countries in Latin America and Asia.

IV. BCS Is the Most Appropriate Licensee

A license back to BCS will maximize the value of the Fipronil Business because BCS is best positioned to sell Fipronil-based products for Agricultural Use in the countries subject to the license back. BCS already has an established crop protection infrastructure throughout Asia and Latin America. It is uniquely experienced, among agribusinesses in these regions, in dealing with insecticides that have toxicity issues like that of Fipronil. It has, moreover, specific experience selling and supporting Fipronil-based products in all of the countries subject to the license back.

In many of the Latin American countries, BCS already has direct distribution, formulation, and repackaging plants and managers who will bring strong stewardship for Fipronil-based products. For example, in Colombia, BCS owns two formulation and

repackaging plants, more than any other agribusiness; and in Central America, it owns a formulation facility and has distribution channels through all of the countries.

In Asia, BCS has production facilities, extensive field support, and large distribution and sales networks. For example, in Vietnam, BCS has its own production facility, a prerequisite for direct sales in the region; and its field support staff has more than seven years of experience in the market. And in Korea, BCS has a separate legal entity with rights to formulate, import, export, and distribute agrichemicals throughout the region.

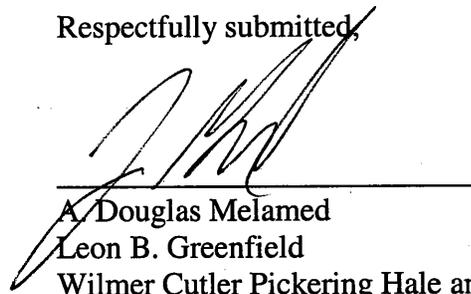
Although BCS does not have a full-fledged organization dedicated to crop protection products in every country in Latin America and Asia, it will be able to provide an effective and efficient production, sales, and distribution network in all countries subject to the license back in those regions because of the scale and scope of its overall presence in the regions. Although the markets in many of the countries subject to the license back are too small to warrant substantial investment in business infrastructure for Fipronil-based products for Agricultural Use in their own right, BCS will be able to realize economies by integrating these countries into its regional network. We know of no other company that has either the region-wide crop science presence of BCS or comparable experience in the distribution and marketing of Fipronil-based products. None, therefore, is as well positioned as BCS to enable BASF to realize the value of its Fipronil assets in these countries.

BCS does not sell products that compete with BASF's Fipronil-based products for Agricultural Use in any of the countries subject to the license back. Accordingly, BCS will have undiminished incentives to maximize the success of those products for Agricultural Use.

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For the reasons set forth in this petition, and in the presentation that BASF gave to the Commission's Staff on July 14, 2004, BCS respectfully requests that the Commission approve the agreement between BASF and BCS for the license back to BCS of Fipronil for Agricultural Use in the Latin American and Asian Countries.

Respectfully submitted,



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