

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

**COMMISSIONERS: Jon Leibowitz, Chairman
Pamela Jones Harbour
William E. Kovacic
J. Thomas Rosch**

In the Matter of

**BASF SE,
a corporation.**

Docket No. C-4253

**ORDER TO MAINTAIN ASSETS
[Public Record Version]**

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 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.
- 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.
- 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:
 - 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 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;

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 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.

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 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.
- 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 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 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 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.
 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 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.

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.

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.

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.

Donald S. Clark
Secretary

SEAL
ISSUED: April 1, 2009

CONFIDENTIAL EXHIBIT A
MONITOR AGREEMENT

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