

Complaint

IN THE MATTER OF

RECKITT & COLMAN PLC

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 C-3918; File No. 991 0306

Complaint, January 18, 2000--Decision, January 18, 2000

This consent order addresses respondent Reckitt & Colman plc's acquisition of the voting securities of Benckiser N.V. from NRV Vermögensverwaltung GmbH. Reckitt & Colman and Benckiser are two of the leading producers and marketers of a number of household cleaning products in the United States. The Consent Agreement requires Reckitt & Colman to divest Benckiser's Scrub Free[®] and Delicare[®] household cleaning product businesses -- which respectively market hard surface bathroom cleaners and fine fabric wash products -- to a third party. These assets include all Scrub Free[®] and Delicare[®] trademarks and related intellectual property, trade secrets, technical and manufacturing know-how, and customer and vendor lists and information. Reckitt & Colman will provide the purchaser with short-term integration assistance, including production planning and order and billing processing.

Participants

For the *Commission*: Michael Antalics, Molly Boast, Judith A. Cole, and Richard G. Parker.

For the *Respondents*: Charles E. Koob, Simpson Thacher.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that Respondent, Reckitt & Colman plc ("Reckitt & Colman"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire the voting securities of Benckiser N.V., an entity subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as

Complaint

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 in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent Reckitt & Colman is a corporation organized, existing, and doing business under and by virtue of the laws of England, with its principal place of business located at 67 Alma Road, Windsor, Berkshire SL4 3HD, United Kingdom.

2. Respondent is engaged in, among other things, the research, development, formulation, manufacture, marketing, and sale of Hard Surface Bathroom Cleaners and Fine Fabric Wash Products.

II. JURISDICTION

3. Respondent 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 ACQUIRED COMPANY

4. Benckiser N.V. ("Benckiser") is a corporation organized, existing, and doing business under and by virtue of the laws of The Netherlands, with its office and principal place of business located at World Trade Center, Amsterdam Airport, Tower C, Schipholboulevard 229, 1118 BH Schiphol Airport, The Netherlands; and includes, but is not limited to, Benckiser Consumer Products Inc., a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at Greenwich

Complaint

American Centre, 5 American Lane, Greenwich, Connecticut 06831-2513. Benckiser's ultimate parent is NRV Vermögensverwaltung GmbH ("Vermögensverwaltung"), a corporation organized, existing, and doing business under and by virtue of the laws of Germany.

5. Benckiser is engaged in, among other things, the research, development, formulation, manufacture, marketing, and sale of Hard Surface Bathroom Cleaners and of Fine Fabric Wash Products.

6. Benckiser 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.

IV. THE PROPOSED ACQUISITION

7. On July 27, 1999, Reckitt & Colman entered into a Merger Agreement to acquire up to 100 percent of the voting securities of Benckiser from Vermögensverwaltung for approximately \$2.7 billion (the "Acquisition").

V. THE RELEVANT MARKETS

8. A relevant line of commerce in which to analyze the effects of the Acquisition is the research, development, formulation, manufacture, marketing, and sale of Hard Surface Bathroom Cleaners.

9. Hard Surface Bathroom Cleaners are products used by consumers to remove from fixtures and cabinets the types of soil and stains that are found in the bathroom, such as built-up dirt, mineral deposits, soap scum, and residues from various personal

Complaint

care products like shampoo and toothpaste. Hard Surface Bathroom Cleaners generally are sold with a trigger or aerosol delivery system.

10. Hard Surface Bathroom Cleaners for consumer use primarily are differentiated through branding. Reckitt & Colman researches, develops, formulates and manufactures Hard Surface Bathroom Cleaners which it markets and sells under the Lysol® brand name. Benckiser researches, develops, formulates and manufactures Hard Surface Bathroom Cleaners which it markets and sells under the Scrub Free® brand name. Lysol® and Scrub Free® are two of the leading brands of Hard Surface Bathroom Cleaners.

11. Other types of household cleaners (including all purpose cleaners, which generally are pourables and dilutables used to clean large surfaces throughout the home; kitchen cleaners, which are formulated to remove greasy residues from kitchen appliances and other kitchen surfaces; and abrasive powders and creams, which generally are used to remove heavy deposits of rust or other stains in the sink) are not substitutes for Hard Surface Bathroom Cleaners.

12. Consumers are not likely to switch from Hard Surface Bathroom Cleaners to other types of household cleaners in response to a small but significant and nontransitory increase in price because of differences between those products and Hard Surface Bathroom Cleaners in terms of convenience, method of application, and efficacy.

13. Another relevant line of commerce in which to analyze the effects of the Acquisition is the research, development, formulation, manufacture, marketing, and sale of Fine Fabric Wash Products.

Complaint

14. Fine Fabric Wash Products are used by consumers to clean safely and to freshen delicate fabrics, such as silk, woolens, undergarments, sportswear and vibrantly colored articles of clothing.

15. Fine Fabric Wash Products primarily are differentiated through branding. Reckitt & Colman researches, develops, formulates and manufactures Fine Fabric Wash Products which it markets and sells under the Woolite® brand name. Benckiser researches, develops, formulates and manufactures Fine Fabric Wash Products which it markets and sells under the Delicare® brand name. These are the only two national brands of Fine Fabric Wash Products.

16. Detergents used to launder washable fabrics contain ingredients not found in Fine Fabric Wash Products. These ingredients are important to the ability of the detergent to remove stains and heavy soils from clothing but are harsh on fabrics. Consequently, detergents are likely to cause fading and delicate fabric fiber damage with continued use, and are not substitutes for Fine Fabric Wash Products.

17. Consumers are not likely to switch from Fine Fabric Wash Products to detergents in response to a small but significant and nontransitory increase in price because of the differences in product performance characteristics.

18. The United States is the relevant geographic area in which to analyze the effects of the Acquisition in the relevant lines of commerce because products sold exclusively outside the United States do not have brand acceptance among United States consumers, and because of the high costs associated with shipping relatively low-value products composed primarily of water.

Complaint

VI. STRUCTURE OF THE MARKETS

19. The market for the research, development, formulation, manufacture, marketing, and sale of Hard Surface Bathroom Cleaners is highly concentrated as measured by the Herfindahl-Hirschman Index ("HHI"). The post-merger HHI is approximately 2300 points, which is an increase of about 500 points over the premerger HHI level. Reckitt & Colman and Benckiser are two leading suppliers of Hard Surface Bathroom Cleaners in the United States.

20. Reckitt & Colman and Benckiser are actual competitors in the relevant market for the research, development, formulation, manufacture, marketing, and sale of Hard Surface Bathroom Cleaners in the United States.

21. The market for the research, development, formulation, manufacture, marketing, and sale of Fine Fabric Wash Products is highly concentrated as measured by the HHI. The post-merger HHI is approximately 8500 points, which is an increase of about 700 points over the premerger HHI level. Reckitt & Colman and Benckiser are the two leading suppliers of Fine Fabric Wash Products in the United States.

22. Reckitt & Colman and Benckiser are actual competitors in the relevant market for the research, development, formulation, manufacture, marketing and sale of Fine Fabric Wash Products in the United States.

VII. BARRIERS TO ENTRY

23. Entry into the relevant markets is unlikely and would not occur in a timely manner to deter or counteract the adverse competitive effects described in Paragraph 24 because of, among other things, the difficulty of developing a new product, gaining brand name recognition and customer acceptance, and establishing a network of retail distributors.

Complaint

VIII. EFFECTS OF THE ACQUISITION

24. The effects of the Acquisition, if consummated, may be substantially to lessen competition and to 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, in the following ways, among others:

- (a) by eliminating actual, direct, and substantial competition between Reckitt & Colman and Benckiser in the relevant markets;
- (b) by increasing the likelihood that Reckitt & Colman will unilaterally exercise market power in the relevant markets;
- (c) by increasing the likelihood of, or facilitating, collusion or coordinated interaction between Reckitt & Colman and the remaining competitors in Hard Surface Bathroom Cleaners; and
- (d) by increasing the likelihood that consumers of Hard Surface Bathroom Cleaners and Fine Fabric Wash Products would be forced to pay higher prices.

IX. VIOLATIONS CHARGED

25. The Merger Agreement described in Paragraph 7 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

26. The Acquisition described in Paragraph 7, if consummated, would constitute a 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.

Decision and Order

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eighteenth day of January, 2000, issues its Complaint against said Respondent.

By the Commission, Commissioner Leary recused.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition by Reckitt & Colman of 100 percent of the voting securities of Benckiser NV, and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the Respondent has violated the said Acts, and that a Complaint

Decision and Order

should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with 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 the following Order:

1. Respondent Reckitt & Colman plc is a public limited company organized, existing and doing business under and by virtue of the laws of England, with its office and principal place of business at 67 Alma Road, Windsor, Berkshire SL4 3HD, United Kingdom.
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, the following definitions shall apply:

- A. "Respondent" or "Reckitt & Colman" means Reckitt & Colman plc, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Reckitt & Colman plc, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. "Vermögensverwaltung" means NRV Vermögensverwaltung, a corporation organized, existing, and doing business under and by virtue of the

Decision and Order

laws of Germany, with its office and principal place of business located at Ludwig-Bertram Strasse 8+10, 67059 Ludwigshafen, Germany.

- C. “Benckiser” means Benckiser N.V., a subsidiary controlled by Vermögensverwaltung, which is organized, existing, and doing business under and by virtue of the laws of The Netherlands, with its office and principal place of business located at World Trade Center, Amsterdam Airport, Tower C, Schipholboulevard 229, 1118 BH Schiphol Airport, The Netherlands, and includes, but is not limited to, Benckiser’s wholly-owned subsidiary, Benckiser Consumer Products Inc., a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at Greenwich American Centre, 5 American Lane, Greenwich, Connecticut 06831-2513.
- D. “Church & Dwight” means Church & Dwight Co., Inc., a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 469 North Harrison Street, Princeton, New Jersey 08543-5297.
- E. “Commission” means the Federal Trade Commission.
- F. “Acquisition” means the acquisition of Benckiser by Reckitt & Colman pursuant to a Merger Agreement dated July 27, 1999.
- G. “Acquirer” means either Church & Dwight, if Respondent divests pursuant to Paragraph II.A.1. of this Order, or such other entity to whom Respondent divests the Divested Assets pursuant to any other provision of this Order.

Decision and Order

- H. “Hard Surface Bathroom Cleaners” means products specially formulated, marketed, and used by consumers to remove built-up soils and stains from bathroom surfaces.
- I. “Fine Fabric Wash Products” means products specially formulated, marketed, and used by consumers to safely clean fine fabrics such as silks, woolens or other delicate fabrics.
- J. “Divested Assets” means all of Respondent’s rights, title, and interest, acquired from Vermögensverwaltung pursuant to the Acquisition, in assets and businesses relating to the research, development, manufacture, sale, and distribution of Hard Surface Bathroom Cleaners and Fine Fabric Wash Products (collectively the “Divested Products”), including, without limitation, the following:
1. the trade dress, brand and trademark, “Scrub Free,” and associated goodwill;
 2. the trade dress, brand and trademark, “Delicare,” and associated goodwill;
 3. all inventory, customer lists, vendor lists, supplier contact lists, price lists, catalogs, sales and promotion plans, materials and literature, advertising materials, cost and pricing information, marketing plans, information and materials, product development information, research materials, technical information, claims support, product liability claim files, business plans (including, but not limited to, actual plans currently in force for the top 20 accounts), trade secrets, technology, technical know-how, formulae,

Decision and Order

manufacturing processes, recipes, blue prints, research records, specifications, packaging designs (including product labels), artwork, drawings, and process and quality control data;

4. intellectual property rights (including, but not limited to, an assignment of all rights under a Patent and Know-How License Agreement (July 1, 1987) between Ecolab, Inc., and Joh. A. Benckiser GmbH, and the First Amendment to the Patent and Know-How Agreement (November 4, 1999) between Benckiser N.V. and Ecolab, Inc.), copyrights, trademarks, trade dress, trade names, and Universal Product Code Product Identifier Codes (but excluding Universal Product Code Company Identifier Codes);
 5. all rights, title and interest in and to the contracts entered into in the ordinary course of business with customers, retailers of Divested Products (including, but not limited to, letters of confirmation of trade promotions and slotting letters), suppliers, sales representatives, brokers, licensees, or any other person;
 6. all rights under warranties and guarantees, express or implied;
 7. all books, records, files, and supporting documents; and,
 8. all Environmental Protection Agency applications, registrations, permits, and the like, and all documents related thereto.
- K. "Divestiture Agreement" means each and all of the following:

Decision and Order

1. the agreement for the sale of the Divested Assets to Church & Dwight dated October 12, 1999, as amended by the First Amendment to the Asset Purchase Agreement (November 5, 1999);
 2. the Trademark Purchase Agreement between Benckiser and Church & Dwight dated October 12, 1999;
 3. the Transitional Services Agreement between Benckiser and Church & Dwight dated October 21, 1999; and,
 4. the Assignment and Assumption Agreement between Benckiser and Church & Dwight.
- L. “New Divestiture Agreement” means all agreements for the sale of the Divested Assets other than the Divestiture Agreement, and includes any divestiture agreements entered into by a trustee pursuant to Paragraph III of this Order.
- M. “Cost” means direct cash cost of raw materials, packaging and labor.
- N. “Non-Public Acquirer Information” means any information not in the public domain obtained by Respondent directly or indirectly from the Acquirer in the course of negotiation or performance of the Divestiture Agreement or the New Divestiture Agreement. Non-Public Acquirer Information shall not include information that falls within the public domain through no violation of this Order by Respondent.

Decision and Order

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

- A. 1. Respondent shall divest, absolutely and in good faith, the Divested Assets to Church & Dwight pursuant to the Divestiture Agreement (which agreement shall not be read to vary or contradict the terms of this Order), subsequently to the date upon which the Commission accepts the Consent Agreement for public comment, but on or before the date that Respondent consummates the Acquisition.
2. *Provided, however,* that if Respondent divests pursuant to Paragraph II.A.1., Respondent need divest only (a) such Divested Assets that are identified in Paragraph I.J.1. through I.J.8., and (b) such assets that are included in the Divestiture Agreement.
- B. *Provided, however,* that if the Commission determines to make the Order final, but notifies the Respondent either that Church & Dwight is not an acceptable acquirer, or that the Divestiture Agreement is not an acceptable manner of divestiture, then Respondent shall rescind the Divestiture Agreement and rescind any divestiture to Church & Dwight, and Respondent shall divest the Divested Assets, absolutely and in good faith, and at no minimum price, pursuant to a New Divestiture Agreement within ninety (90) days of the date the Order becomes final to an Acquirer or Acquirers that receive the prior approval of the Commission and in a manner that receives the prior approval of the Commission.
- C. Any New Divestiture Agreement shall require Respondent to:

Decision and Order

1. Indemnify, defend and hold the Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses arising from any manufacture or sale of the Hard Surface Bathroom Cleaners and/or Fine Fabric Wash Products supplied to the Acquirer by Respondent pursuant to the New Divestiture Agreement; *provided, however,* that the obligations of this Paragraph II.C.1. may be contingent upon the Acquirer's giving Respondent prompt, adequate notice of such claim, cooperating fully in the defense of such claim, and permitting Respondent to assume the sole control of all phases of the defense and/or settlement of such claim, including the selection of counsel; *and provided further* that the obligations of this Paragraph II.C.1. may not require Respondent to be liable for any negligent act or omission of the Acquirer or for any representations and warranties, express or implied, made by the Acquirer that exceed the representations and warranties made by Respondent to the Acquirer;
2. Make available to the Acquirer, upon reasonable notice and request by the Acquirer, for a period not to exceed eighteen (18) months from the date Respondent begins delivery of products pursuant the New Divestiture Agreement, all records kept in the normal course of business that relate to the Cost of manufacturing or supplying the Hard Surface Bathroom Cleaners and Fine Fabric Wash Products;
3. Make available to the Acquirer, upon reasonable notice and request by the Acquirer, for a period not to exceed eighteen (18) months from the date

Decision and Order

Respondent first provides assistance, personnel, or training to the Acquirer pursuant to the New Divestiture Agreement, all records kept in the normal course of business that relate to the Cost of providing such assistance, personnel, or training to the Acquirer.

- D. If Respondent or a trustee divests pursuant to Paragraph II.B. or Paragraph III. of this Order, Respondent shall, at the option of the Acquirer, enter into a contract:
1. To supply and deliver to the Acquirer in a timely manner and under reasonable terms and conditions, up to a twelve (12) month supply of any and all of the Hard Surface Bathroom Cleaners and Fine Fabric Wash Products at Cost, in such quantities as the Acquirer may request up to 110% of Benckiser's 1999 or 2000 production forecast, whichever is greater;
 2. To assign or otherwise convey to the Acquirer all of Respondent's right, title, and interest in any contract with any person relating to research, development, manufacture, marketing, sale, brokerage, or distribution of Hard Surface Bathroom Cleaners and/or Fine Fabric Wash Products; *provided that* if such assignment or conveyance may not be made or be made effective without the consent of any person, Respondent shall use its best efforts to obtain all necessary consents from such person and, failing such consent, shall enter into an agreement with the Acquirer to provide to the Acquirer all the benefits flowing to Respondent pursuant to such contract;

Decision and Order

3. To provide to the Acquirer, at Cost, for a period not to exceed six (6) months from the date of consummation of the New Divestiture Agreement, such assistance, personnel and training as requested by the Acquirer (including its agents and contractors) relating to:
 - (a) the research, development, manufacture, sale, and distribution of the Hard Surface Bathroom Cleaners and/or Fine Fabric Wash Products; and
 - (b) any Environmental Protection Agency applications, registrations, procedures, proceedings, or approvals related to the research, development, manufacture, sale and distribution of Hard Surface Bathroom Cleaners and Fine Fabric Wash Products in the United States;
4. To sell any capital equipment, fixtures, machines, buildings, structures, vehicles, real property, or other tangible assets (other than books and records) used in the research, development, manufacture, sale, or distribution of the Divested Products;

provided, however, that with respect to the assets that are to be divested and the contracts that are to be entered into pursuant to this Paragraph II.D. at the option of the Acquirer or Acquirers, Respondent need not divest such assets or enter into such contracts only if the Acquirer or Acquirers choose not to acquire such assets or enter such contracts and the Commission approves the divestiture without such assets or contracts.

Decision and Order

- E. Respondent shall comply with the terms of the Divestiture Agreement (if Respondent divests pursuant to Paragraph II.A. of this Order) or the New Divestiture Agreement (if Respondent, or a trustee, divests pursuant to Paragraph II.B. or Paragraph III. of this Order), which terms are incorporated by reference into this Order, and made a part hereof. Any failure by Respondent to comply with the Divestiture Agreement or the New Divestiture Agreement shall constitute a failure to comply with this Order.
- F. The purpose of the divestiture of the Divested Assets is to ensure the continued use of the Divested Assets in the same businesses in which the Divested Assets are engaged at the time of the Acquisition, and to remedy any lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.
- G. Respondent shall not provide, disclose or otherwise make available to any of its employees any Non-Public Acquirer Information, nor shall Respondent use any Non-Public Acquirer Information obtained or derived by Respondent in connection with the negotiation or performance of either the Divestiture Agreement or New Divestiture Agreement; *provided, however*, that Respondent may provide, disclose, or otherwise make available Non-Public Acquirer Information to its employees whose duties include negotiating, or performing Respondent's obligations under, the Divestiture Agreement or New Divestiture Agreement, and Respondent may use Non-Public Acquirer Information in connection with negotiating or performing the Divestiture Agreement or New Divestiture Agreement.
- H. Pending divestiture of the Divested Assets, Respondent shall take such actions as are necessary to maintain the viability, marketability and

Decision and Order

competitiveness of the Divested Assets, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Divested Assets.

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

- A. If Respondent fails to divest absolutely and in good faith the Divested Assets pursuant to Paragraph II. of this Order, the Commission may appoint a trustee to divest the Divested Assets. 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 trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a 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 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 trustee is appointed by the Commission or a court pursuant to Paragraph III.A. of this Order, Respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:
 - 1. The Commission shall select the trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in

Decision and Order

acquisitions and divestitures. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed trustee, Respondent shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to accomplish the divestiture described in Paragraph III.A. of the Order.
3. Within ten (10) days after appointment of the trustee, Respondent shall execute a trust agreement that, subject to the prior approval of the Commission, and in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this Order and to execute a New Divestiture Agreement on behalf of Respondent.
4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph III.B.3. to accomplish the divestiture, which shall be to an Acquirer or Acquirers who receive the prior approval of the Commission, and in a manner and pursuant to a New Divestiture Agreement that receive the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan for divestiture, or believes that the divestiture required by this Order can be achieved within a reasonable time, then the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court;

Decision and Order

provided, however, the Commission may extend the trustee's period for divestiture only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the Divested Assets or to any other relevant information, as the trustee may request. Respondent shall develop such financial or other information as the trustee may request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in any divestiture caused by Respondent shall extend the time for that divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.
6. The trustee shall use his or her 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 at no minimum price. The divestiture shall be made in a manner consistent with the terms of this Order; *provided, however,* if the 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 trustee shall divest to the acquiring entity or entities selected by Respondent from among those approved by the Commission; *provided further, however,* that Respondent shall select such entity within five (5) days of receiving notification of the Commission's approval.

Decision and Order

7. The 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 trustee shall have the authority to employ, at the cost and expense of Respondent, and at reasonable fees, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The 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 trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the Respondent, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's accomplishing the divestiture required by Paragraph III.A. of this Order.
8. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the 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 trustee.

Decision and Order

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in this Paragraph.
10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be reasonably necessary or appropriate to accomplish the divestiture required by this Order.
11. The trustee may divest such additional ancillary assets related to the Divested Assets and effect such ancillary arrangements as are necessary to satisfy the requirements or purposes of this Order.
12. The trustee shall have no obligation or authority to operate or maintain the Divested Assets.
13. The trustee shall report in writing to Respondent and the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestiture required by this Order.

IV.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order becomes final, and every thirty (30) days thereafter until Respondent has completed the divestiture of the Divested Assets and every ninety (90) days thereafter until Respondent has fully complied with the provisions of Paragraphs II. and III. of this Order, Respondent shall submit to the Commission verified written reports setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with the requirements of this Order. Respondent shall include in its compliance reports, among other things that are

Decision and Order

required from time to time, a full description of the efforts being made to comply with Paragraphs II. and III. of the Order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal documents (except privileged documents), and all reports and recommendations, concerning the divestiture.

V.

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.

VI.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, Respondent shall permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondent relating to any matters contained in 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.

Analysis to Aid Public Comment

VII.

IT IS FURTHER ORDERED that this order shall terminate five (5) years after the divestiture required in Paragraph II.A. of this order has been accomplished.

By the Commission, Commissioner Leary recused.

ANALYSIS OF AGREEMENT CONTAINING CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Order (“Consent Agreement”) from Reckitt & Colman plc (“Reckitt & Colman”), which is designed to remedy the anticompetitive effects resulting from Reckitt & Colman's acquisition of the voting securities of Benckiser N.V. from NRV Vermögensverwaltung GmbH (“Vermögensverwaltung”). Under the terms of the Decision & Order, Reckitt & Colman will be required to divest Benckiser's Scrub Free[®] and Delicare[®] businesses to Church & Dwight Co., Inc. (“Church & Dwight”) after the date upon which the Commission preliminarily accepts the Consent Agreement. Church & Dwight produces a number of household products under the Arm & Hammer[®] brand name.

The proposed Consent Agreement has been placed on the public record for thirty (30) days for reception of comments from interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the proposed Consent Agreement and the comments received, and will decide whether it should

Analysis to Aid Public Comment

withdraw from the proposed Consent Agreement or make final the Decision & Order.

On July 27, 1999, Reckitt & Colman and entities controlled by Vermögensverwaltung entered into a Merger Agreement under which Reckitt & Colman agreed to purchase all of the voting securities of Benckiser N.V. for approximately \$2.7 billion. The Commission's Complaint alleges that the merger, 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, in the markets for the research, development, formulation, manufacture, marketing and sale of hard surface bathroom cleaners and fine fabric wash products.

Hard surface bathroom cleaners are products specially formulated, sold and used by consumers to remove built-up soils and stains from bathroom surfaces. Reckitt & Colman, which sells Lysol,[®] and Benckiser, which sells Scrub Free,[®] are two significant U.S. suppliers of hard surface bathroom cleaners. Fine fabric wash products are specially formulated, sold and used by consumers to launder fine fabrics such as silks, woolens or other delicate fabrics. Reckitt & Colman, which sells Woolite,[®] and Benckiser, which sells Delicare,[®] are the two largest suppliers of fine fabric wash products.

The United States is the relevant geographic area in which to evaluate the effects of the proposed acquisition of Benckiser by Reckitt & Colman. It is unlikely that the competition eliminated by the proposed transaction would be replaced by foreign manufacturers of hard surface bathroom cleaners and fine fabric wash products. Foreign manufacturers of these products are unable to compete effectively in the U.S. because they lack the necessary brand recognition among U.S. consumers and face substantial transportation costs, which make importing their products into the U.S. uneconomical.

Analysis to Aid Public Comment

The hard surface bathroom cleaner and fine fabric wash markets are highly concentrated in the United States, and the proposed acquisition would substantially increase concentration in each market. In the hard surface bathroom cleaner market, the acquisition would result in an increase in the Herfindahl-Hirschman Index (“HHI”) to approximately 2300 points, which is an increase of about 500 points over the premerger HHI level. In the fine fabric wash market, the post-merger HHI would be approximately 8500 points, which is an increase of about 700 points over the premerger HHI level.

By eliminating competition between these competitors in these highly concentrated markets, the proposed acquisition could allow Reckitt & Colman unilaterally to exercise market power or could facilitate coordinated interaction among the remaining competitors in the hard surface bathroom cleaner market, and could allow Reckitt & Colman unilaterally to exercise market power in the fine fabric wash market, thereby increasing the likelihood that consumers of hard surface bathroom cleaners and fine fabric wash products would be forced to pay higher prices.

In addition, new entry would not deter or counteract the anticompetitive effects likely to flow from the proposed transaction. A new entrant into either the hard surface bathroom cleaner or fine fabric wash market would need to undertake the difficult, expensive and time-consuming process of developing a competitive product, creating brand recognition among U.S. consumers, and establishing a viable retail distribution network. Because of the difficulty of accomplishing these tasks, new entry into either market could not be accomplished in a timely manner. Moreover, because of the high sunk costs involved, it is not likely that new entry into either market would occur at all, even in response to a small, nontransitory increase in price in either market after the transaction. Similarly, entry through brand name product line extension is not likely. Large, vertically integrated manufacturers of household cleaners are set up for high volume

Analysis to Aid Public Comment

production and not for the production of small or individual stock keeping units for niche markets.

The Consent Agreement effectively remedies the acquisition's anticompetitive effects in the hard surface bathroom cleaner and fine fabric wash markets by requiring Reckitt & Colman to divest Benckiser's Scrub Free[®] and Delicare[®] businesses to a third party. These assets include all Scrub Free[®] and Delicare[®] trademarks and related intellectual property, trade secrets, technical and manufacturing know-how, and customer and vendor lists and information. Pursuant to the Consent Agreement, the Benckiser businesses must be divested to Church & Dwight after the Commission accepts this Consent Agreement for public comment, but on or before the date that Reckitt & Colman acquires Benckiser. Church & Dwight is a well established, financially viable company that offers value priced consumer cleaning products under established brands including Arm & Hammer[®], Parsons[®], Brillo[®], and Sno Bol[®]. In order to ensure an orderly transition, Reckitt & Colman will provide Church & Dwight with short-term integration assistance, including production planning and order and billing processing. In the event that these businesses are not divested to Church & Dwight, the Decision & Order contains a provision that requires Reckitt & Colman to divest Benckiser's Scrub Free[®] and Delicare[®] businesses to an alternative acquirer approved by the Commission within ninety (90) days of the date the Decision & Order becomes final. At the alternative acquirer's option, additional related assets may be divested including fixtures, machines, buildings, structures, vehicles, real property, or other tangible assets used in the research, development, formulation, manufacture, sale, or distribution of these businesses.

In the event that the Benckiser Scrub Free[®] and Delicare[®] businesses are not divested to Church & Dwight or to an alternative acquirer within 90 days of the date the Commission's Decision & Order becomes final, the Decision & Order provides that the Commission may appoint a trustee to divest these assets,

Analysis to Aid Public Comment

and, at the purchaser's option, to divest additional related assets to a Commission-approved purchaser.

The Order also requires Reckitt & Colman to provide to the Commission a report of compliance with the divestiture provisions of the Decision & Order within thirty (30) days following the date the Decision & Order becomes final, every thirty (30) days thereafter until Reckitt & Colman has completed the required divestiture, and every ninety (90) days thereafter until Reckitt & Colman has completed its divestiture obligations under the Order.

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

Complaint

IN THE MATTER OF

**MACDERMID, INC. AND POLYFIBRON
TECHNOLOGIES, 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 C-3911; File No. 991 0167**Complaint, December 21, 1999--Decision, February 4, 2000*

This consent order addresses the proposed acquisition by respondent MacDermid, Inc. of Polyfibron Technologies, Inc. Under the terms of the consent order, respondents are required to divest Polyfibron's North American liquid photopolymer business. The consent order requires that respondents divest to a Commission-approved acquirer all trade secrets, know-how, trademarks and trade names, and intangible and tangible assets, including equipment, supply contracts, and business information relating to Polyfibron's liquid photopolymer business. The consent order also requires that respondents provide incentives to certain employees identified by the acquirer as important to the continued competitiveness and viability of the liquid photopolymer business and that they facilitate of know-how to the acquirer. The respondents are also required to terminate their distribution agreements with BASF and Asahi. The Order to Maintain Assets requires that respondents preserve the Polyfibron liquid photopolymer business as a viable and competitive business until it is transferred to the Commission-approved acquirer. The respondents are obligated to maintain a sufficient inventory of liquid photopolymers to ensure there is no shortage during the transition of the liquid photopolymer business to the Commission-approved acquirer.

Participants

For the Commission: *Michael Antalics, Morris Bloom, Randall Conner, Daniel P. Ducore, Timothy J. Feighery, Erica S. Mintzer, and Jacqueline Tapp.*

For the Respondents: *Robert C. Jones and Phil Proger, Jones, Day, Reavis & Pogue; Suzanne L. Glassburn and Neil Motenko, Nutter, McClennen & Fish, LLP.*

Complaint

COMPLAINT

The Federal Trade Commission (“Commission”), having reason to believe that MacDermid, Inc. has agreed to acquire Polyfibron Technologies, Inc., both corporations subject to the jurisdiction of the Commission, 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. RESPONDENTS

1. Respondent MacDermid, Inc. (“MacDermid”) is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Connecticut, with its executive offices located at 245 Freight Street, Waterbury, Connecticut 06702.

2. Respondent Polyfibron Technologies, Inc. (“Polyfibron”) is a corporation 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 900 Middlesex Turnpike, Building 2, Billerica, Massachusetts 01821-3946.

3. For purposes of this proceeding, Respondents are, and at all times relevant herein have been, engaged in commerce as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and are corporations whose businesses are in or affecting commerce as “commerce” is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

Complaint

II. THE ACQUISITION

4. Pursuant to a Plan and Agreement of Merger dated February 18, 1999, MacDermid will acquire all of the voting securities of Polyfibron for approximately \$299 million (“the Acquisition”).

III. THE RELEVANT MARKETS

5. One relevant line of commerce in which to analyze the likely effects of the proposed Acquisition is the research, development, manufacture and sale of liquid photopolymers for use in the production of printing plates for the packaging industry (“Liquid Photopolymers”). Printing plates made from Liquid Photopolymers are essential to the printing of relatively simple graphics on packaging materials, such as, for example, graphics that identify the kind, source and weight of particular goods contained in multi-wall bags and corrugated containers. Liquid Photopolymers provide customers with an inexpensive, flexible and environmentally safe material for manufacturing printing plates for printing on packaging materials. There are no economic substitutes for Liquid Photopolymers to which customers would switch in response to a small but significant price increase in Liquid Photopolymers.

6. Another relevant line of commerce within which to analyze the likely effects of the proposed transaction is the research, development and sale of solid sheet photopolymers for use in the production of printing plates for the packaging industry (“Sheet Photopolymers”). Printing plates made from Sheet Photopolymers are essential to the printing of sophisticated graphics on packaging materials, such as, for example, the printing of multi-colored designs, logos and photograph-quality prints on folding cartons for consumer products, as well as multi-wall bags and corrugated containers. Sheet Photopolymers provide customers with a consistently high quality, inexpensive material for printing sophisticated graphics on packaging materials. There are no economic substitutes for Sheet

Complaint

Photopolymers to which customers would switch in response to a small but significant price increase in Sheet Photopolymers.

7. For purposes of this Complaint, the relevant geographic area in which to analyze the effects of the proposed Acquisition on competition in Liquid Photopolymers and Sheet Photopolymers is North America. Liquid Photopolymers and Sheet Photopolymers produced outside North America are not economic substitutes because of customers' need for local sales and technical service support, because the delays and uncertainties inherent in long-distance shipping are unacceptable to customers in an industry that requires just in time delivery, and, in the case of Liquid Photopolymers, because of the high shipping costs associated with a relatively low-value product consisting largely of water. There are no significant sources of imports of Liquid Photopolymers or Sheet Photopolymers, and no substantial import or export response to exchange rate fluctuations.

IV. MARKET STRUCTURE

8. The Liquid Photopolymer market is very highly concentrated, whether measured by the Herfindahl-Hirschman Index ("HHI") or by two-firm concentration ratios. MacDermid and Polyfibron are the two largest sellers of Liquid Photopolymers in North America, controlling approximately 99 percent North American sales. The proposed Acquisition thus represents a virtual merger to monopoly.

9. The Sheet Photopolymer market is very highly concentrated, whether measured by the HHI or two-firm concentration ratios, with Polyfibron and E.I. du Pont de Nemours and Company ("DuPont") together controlling over 90 percent of North American sales. Polyfibron's share of the North American market includes sales of its own manufactured Sheet Photopolymers, as well as its sales of Sheet Photopolymers manufactured by BASF Drucksysteme GmbH ("BASF," formerly

Complaint

known as BASF Lacke + Farben AG), pursuant to a distribution agreement dated August 25, 1995 between BASF and NAPP Systems, Inc., a subsidiary of Polyfibron. While MacDermid does not manufacture Sheet Photopolymers, it has the exclusive right, under a December 14, 1998 agreement with Asahi Chemical Industry Co., Ltd. ("Asahi"), to distribute Asahi's Sheet Photopolymers in North America. Along with DuPont, Polyfibron and BASF, Asahi is one of the major producers of Sheet Photopolymers in the world.

10. Entry into the relevant markets requires significant sunk costs and would not be timely, likely and sufficient to deter or counteract the adverse competitive effects described in Paragraphs 11 - 12 because of, among other things: the length of time and expense necessary to build appropriate chemical production facilities; the difficulty of acquiring the technical expertise necessary to produce commercial-quality polymers at the quantities and consistency required by customers; the difficulty of acquiring research and development capabilities necessary to be able to offer customers continuing innovation; the need to offer to customers plate-making equipment on a consignment or lease basis; and the difficulty of gaining recognition in a marketplace in which customers are reluctant to change from proven suppliers. Furthermore, most customers in the market are engaged in long-term equipment lease and material supply contracts with either MacDermid or Polyfibron, further reducing the market available to a new entrant at any given time. Thus, it is unlikely that a new entrant could enter successfully so as to counteract a small but significant price increase.

IV. EFFECTS OF THE ACQUISITION

11. The effect of the Acquisition may be substantially to lessen competition and to 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, in the following ways, among others:

Complaint

- a. It will eliminate actual, direct and substantial competition between Polyfibron and MacDermid in the relevant market for Liquid Photopolymers;
- b. It will substantially increase the level of concentration, to the point of creating a monopoly, in the relevant market for Liquid Photopolymers;
- c. It will increase the likelihood that the firm created by the merger of MacDermid and Polyfibron will unilaterally exercise market power in the relevant market for Liquid Photopolymers;
- d. It will increase the likelihood that purchasers of Liquid Photopolymers in the relevant market will be forced to pay higher prices;
- e. It will increase the likelihood that technical and sales services provided to purchasers of Liquid Photopolymers in the relevant market will be reduced;
- f. It will increase the likelihood that innovation in the development of Liquid Photopolymers will be reduced;
- g. It will eliminate the strong potential for direct and substantial competition between and among Polyfibron, BASF and Asahi in the relevant market for Sheet Photopolymers due to the exclusive distribution agreements between Polyfibron and BASF and between MacDermid and Asahi, and thereby further entrench the existing duopoly;

Complaint

- h. It will significantly enhance the likelihood of coordinated interaction in the relevant market among the competitors in the production and sale of Sheet Photopolymers; and
- i. It will increase barriers to entry in the relevant markets.

12. All of the above increase the likelihood that the Acquisition would result in increased prices, reduced innovation, or reduced services in the near future and in the long term in the relevant markets.

V. ANTICOMPETITIVE CONDUCT

13. In 1972, Hercules, Inc. ("Hercules"), entered into a licensing arrangement with Asahi for the manufacture of Liquid Photopolymers, which license was fully paid up and expired in 1989. The applicable Asahi patents expired in or about 1990, and Hercules was free thereafter to manufacture Liquid Photopolymers pursuant to the Asahi technology without restriction. In 1995, MacDermid acquired the printing business of Hercules, and continued to produce Liquid Photopolymers, without any transfer or sharing of technology with Asahi. In 1995, shortly after MacDermid's acquisition of Hercules' printing business, Asahi expressed to MacDermid's Business Director its interest in maintaining its understandings with MacDermid, as the acquirer of the Hercules liquid photopolymer business.

14. From 1995 through December 1998, MacDermid and Asahi engaged in continuing discussions and correspondence which repeatedly confirmed the parties' understanding that Asahi would not compete in the sale of Liquid Photopolymers in North America while MacDermid would not compete in the sale of Liquid Photopolymers in Japan. Since the expiration of the Asahi/Hercules license agreement in 1989, Asahi has in fact not competed in the sale of Liquid Photopolymers in North America, while MacDermid has not competed with Asahi in the sale of

Complaint

Liquid Photopolymers in Japan. Although the earlier licensing agreement between Hercules and Asahi may have been justified as a reasonable agreement to transfer technology, the continued understanding between MacDermid and Asahi had the purpose and effect of allocating or dividing territories or markets for the manufacture and sale of Liquid Photopolymers, and restricting competition, including price competition, between MacDermid and Asahi.

15. Also from 1995 through 1998, Polyfibron engaged in continuing discussions with Asahi. Correspondence between the two companies, and internal Polyfibron memoranda, identify the goal of such discussions as an agreement that Polyfibron not enter the Japanese markets for the sale of Liquid Photopolymers and Sheet Photopolymers, and that Asahi not enter the North American markets for the sale of Liquid Photopolymers and Sheet Photopolymers. In the course of the discussions that took place between Polyfibron and Asahi during 1997, Polyfibron, on several occasions, invited Asahi to agree not to compete in the sale of Sheet Photopolymers and Liquid Photopolymers in North America in return for Polyfibron's agreement not to compete in the sale of Liquid Photopolymers and Sheet Photopolymers in Japan. These invitations, if consummated, would have had the purpose and effect of allocating or dividing markets for the manufacture and sale of Liquid Photopolymers and Sheet Photopolymers, and restricting competition, including price competition, between Polyfibron and Asahi.

VI. VIOLATIONS CHARGED

16. The acquisition agreement described in Paragraph 4 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

Decision and Order

17. The Acquisition described in Paragraph 4, if consummated, would constitute a 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.

18. The agreement between MacDermid and Asahi described in Paragraphs 13 and 14 violates Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

19. The acts and practices of Polyfibron described in Paragraph 15 constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this Complaint to be signed by the Secretary and its official seal to be affixed, at Washington, D.C. this twenty-first day of December, 1999.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition by the Respondent MacDermid, Incorporated, of the Respondent Polyfibron Technologies, Inc., hereinafter referred to as "Respondents," and the Respondents having been furnished thereafter with a copy of a draft of the Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge the Respondents 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

Decision and Order

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by the Respondents of all of the jurisdictional facts set forth in the aforesaid draft of the Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by the Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than the 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 the Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and its Order to Maintain Assets and accepted the executed Consent Agreement and placed such 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 Order:

1. Respondent MacDermid is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut, with its executive offices located at 245 Freight Street, Waterbury, Connecticut 06702.
2. Respondent Polyfibron is a corporation 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 900 Middlesex

Decision and Order

Turnpike, Building 2, Billerica, Massachusetts 01821-3946.

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

ORDER**I.**

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

- A. “MacDermid” means MacDermid, Incorporated, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by MacDermid, Incorporated, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Polyfibron” means Polyfibron Technologies, Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Polyfibron Technologies, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Commission” means the Federal Trade Commission.
- D. “Respondents” means MacDermid and Polyfibron, individually and collectively.

Decision and Order

E. "Acquisition" means MacDermid's proposed acquisition of the common stock of Polyfibron pursuant to the Plan and Agreement of Merger dated February 18, 1999, as amended on July 27, 1999; September 23, 1999; and October 29, 1999.

F. "Assets To Be Divested" means:

all rights, title, and interest in all equipment, machinery, tools, furniture and other tangible property listed in Schedule A to this Decision and Order and any additional equipment, machinery, tools, furniture and other tangible property, identified by the Commission-approved acquirer within six months of the date of closing as set forth in the agreement to transfer such assets to the Commission-approved acquirer, listed in Schedule B to this Decision and Order;

all rights, title, and interest in and to Patents relating to the research, design, development, manufacture, distribution, marketing, or sale of Polyfibron Liquid Photopolymer Products in North America, including, but not limited to, those patents listed in Schedule C to this Decision and Order, provided that Respondents may negotiate licenses from the Commission-approved acquirer to enable Respondents to operate the Polyfibron Sheet Photopolymer Business and the Polyfibron International Liquid Photopolymer Business;

all rights, titles, and interest in and to Intellectual Property, other than Patents, relating to the research, design, development, manufacture, distribution, marketing, or sale of Polyfibron Liquid Photopolymer Products in North America, provided that Respondents

Decision and Order

may retain a non-exclusive right to such of the foregoing Intellectual Property as may be required to operate and for the purposes of operating the Polyfibron Sheet Photopolymer Business and the Polyfibron International Liquid Photopolymer Business;

all rights, title, and interest in and to inventories of products, raw materials (to the extent requested by the Commission-approved acquirer), supplies and parts, including work-in-process and finished goods, relating to the research, design, manufacture, development, marketing, or sale of Polyfibron Liquid Photopolymer Products in North America, listed and described in Schedule D to this Decision and Order;

all rights, title, and interest in and to agreements, express or implied, relating to the research, design, development, manufacture, distribution, marketing, or sale of Polyfibron Liquid Photopolymer Products in North America, regardless of whether such agreements relate exclusively to such purposes, including, but not limited to, warranties, guarantees, and contracts with joint venture partners, suppliers, including plate-making equipment suppliers, personal property lessors, personal property lessees, licensors, licensees, consignors, consignees, and customers; provided that Respondents may retain a non-exclusive right to such agreements as may be required to operate and for the purposes of operating the Polyfibron Sheet Photopolymer Business and the Polyfibron International Liquid Photopolymer Business;

all rights, title and interest in and to Permits and Approvals relating to the research, design, development, manufacture, distribution, marketing, or sale of Polyfibron Liquid Photopolymer Products in North America, regardless of whether such Permits

Decision and Order

and Approvals relate exclusively to such purposes, to the extent such Permits and Approvals are transferrable; and

all customer and vendor lists, catalogs, sales promotion literature and advertising materials relating to the research, design, development, manufacture, distribution, marketing, or sale of Polyfibron Liquid Photopolymer Products in North America.

provided, however, the Assets To Be Divested do not include those assets of Polyfibron that relate exclusively to the Polyfibron Sheet Photopolymer Business or the Polyfibron International Liquid Photopolymer Business.

- G. “Capability to Manufacture the Polyfibron Liquid Photopolymer Resins” means the ability of the Commission-approved acquirer to manufacture each of the Polyfibron Liquid Photopolymer Resins manufactured by Polyfibron since January 1, 1999, used to produce printing plates for the printing of packaging materials to specifications identical to the Polyfibron Liquid Photopolymer Resins produced by Polyfibron, which ability shall be determined using an infra red spectrometer and verified by both Polyfibron and the Commission-approved acquirer, and that the equipment, materials, tools, furniture and other tangible property listed in Schedule A to this Decision and Order have been relocated to the facilities of the Commission-approved acquirer and are fully operational.
- H. “Chemence” means Chemence Incorporated, a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio,

Decision and Order

with its office and principal place of business located at 185 Bluegrass Parkway, Alpharetta, Georgia 30005.

- I. “Chemence Agreement” means the Agreement of Purchase and Sale dated November 29, 1999 by and between Chemence and Polyfibron.
- J. “Intellectual Property” means any form of intellectual property, including, but not limited to, trademarks, Patents, trade secrets, research materials, technical information, management information systems, software, inventions, test data, technological know-how, licenses, registrations, submissions, approvals, technology, specifications, designs, drawings, processes, recipes, protocols, formulas, customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, quality control data, books, records, and files.
- K. “Liquid Photopolymers” means liquid photopolymer resins used to produce printing plates for any printing application.
- L. “Non-Technical Documents” means documents that do not contain any technical information concerning Polyfibron Liquid Photopolymer Products.
- M. “North America” means the United States, Canada and Mexico.
- N. “Patents” means any patents and patent rights, patent applications, patents of addition, re-examinations, reissues, extensions, granted supplementary protection certificates, substitutions, confirmations, registrations, revalidations, revisions, additions and the like, of or to said patents and patent rights and any and all continuations and continuations-in-part and divisionals.

Decision and Order

- O. “Permits and Approvals” means licenses, permits, registrations or other governmental approvals.
- P. “Photopolymer Products” means liquid photopolymer resins or solid sheet photopolymers used to produce printing plates for any printing application.
- Q. “Polyfibron Atlanta Facility” means the facility of Polyfibron located at 5210 Phillip Lee Drive, Atlanta, Georgia.
- R. “Polyfibron International Liquid Photopolymer Business” means the business of Polyfibron of researching, designing, developing, manufacturing, distributing, marketing and selling: (1) liquid photopolymer printing plate products and equipment for customers outside North America; and (2) liquid photopolymer printing plate products and equipment for publishing, including newspapers, newspaper inserts, and books, anywhere in the world.
- S. “Polyfibron Liquid Photopolymer Business” means the business of Polyfibron of researching, designing, developing, manufacturing, distributing, marketing and selling the Polyfibron Liquid Photopolymer Products.
- T. “Polyfibron Liquid Photopolymer Products” means:
- any liquid photopolymer resins used to produce printing plates,
- any plate-backing and cover films used in conjunction with liquid photopolymer resins in the production of photopolymer printing plates,

Decision and Order

any chemicals and related products used in conjunction with liquid photopolymer resins in the production of photopolymer printing plates, and

any equipment, agreements relating to equipment, or rights in or to equipment, used to produce photopolymer printing plates from liquid photopolymer resins,

that have been manufactured, distributed, leased or sold by Polyfibrion, or have been the subject of research or development by Polyfibrion, in North America.

- U. “Polyfibrion Liquid Photopolymer Resins” means all of the kinds and types of liquid photopolymer resins manufactured by Polyfibrion used to produce photopolymer printing plates.
- V. “Polyfibrion Sheet Photopolymer Business” means the business of Polyfibrion of researching, designing, developing, manufacturing, distributing, marketing and selling solid sheet photopolymer printing plate products and equipment for any printing applications anywhere in the world.

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

- A. Respondents shall divest, absolutely and in good faith, the Assets To Be Divested, to Chemence, in accordance with the Chemence Agreement (which agreement is appended hereto and which shall not be read to vary or contradict the terms of this Decision and Order), no later than twenty (20) days from the date on which this Decision and Order becomes final. The purpose of the divestiture is to ensure the continued use of the Assets To Be Divested in the

Decision and Order

research, design, development, manufacture, distribution, marketing and sale of the Polyfibron Liquid Photopolymer Products;

Provided, however, the physical transfer of the Assets To Be Divested located at the Polyfibron Atlanta Facility to a facility owned by Chemence pursuant to the Chemence Agreement shall not occur until after this Decision and Order becomes final;

Provided further, however, that if the Respondents consummate the Chemence Agreement prior to the date this Decision and Order becomes final, and if the Commission determines to issue this Decision and Order and notifies Respondents that Chemence is not an acceptable acquirer or that the Chemence Agreement is not an acceptable manner of divestiture, the Respondents shall divest the Assets To Be Divested within three (3) months of the date this Decision and Order becomes final, absolutely and in good faith, at no minimum price, to an acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission.

- B. During the pendency of any Patent dispute that: (1) challenges or seeks to render invalid any of the Patents divested pursuant to this Decision and Order; and (2) could affect the manufacture or sale of the Polyfibron Liquid Photopolymer Products, Respondents shall cooperate in the defense of rights they have transferred to the Commission-approved acquirer. This cooperation shall be at Respondents' own expense during the first three (3) years following the date on which this Decision and Order becomes final.

Decision and Order

- C. At the time of execution of a purchase agreement with a proposed acquirer, Respondents shall provide the proposed acquirer with a complete list of all non-clerical employees, attached at Schedule E to this Decision and Order, who have been engaged in the research, development or sale of Polyfibron Liquid Photopolymer Products at any time during the period from January 1, 1999, until the date of such purchase agreement. Such list shall state each such individual's name and position.
- D. For a period of six (6) months following the divestiture pursuant to this Decision and Order, Respondents shall provide the Commission-approved acquirer the opportunity to enter into employment contracts with the individuals listed in Schedule E to this Decision and Order, or Schedule F if the Commission-approved acquirer is Chemence.
- E. For a period of six (6) months following the divestiture pursuant to this Decision and Order, Respondents shall provide the Commission-approved acquirer with an opportunity to inspect the personnel files and other documentation relating to all non-clerical employees, attached at Schedule E to this Decision and Order, who have been engaged in the research, development or sale of Polyfibron Liquid Photopolymer Products, to the extent permissible under applicable laws, at the request of the Commission-approved acquirer at any time after the execution of the related purchase agreement.
- F. Respondents shall, directly or through agreement with the Commission-approved acquirer, provide the individuals identified in Schedule F of this Decision and Order with financial incentives to continue in their employment positions during the period covered by the Order to Maintain Assets in this matter and to accept

Decision and Order

employment with the Commission-approved acquirer at the time of the divestiture. Such incentives shall consist of:

vesting of all pension benefits under the Polyfibron pension plan and Polyfibron's 401(k) Employees Savings and Investment Plan;

continuation of all employee benefits offered by Polyfibron until the divestiture is completed;

a bonus equal to twenty (20) percent of the employee's annual salary (including any other bonuses) as of the date the Order to Maintain Assets becomes final for any individual who agrees to accept an offer of employment from the Commission-approved acquirer, payable by Respondents, directly or through agreement with the Commission-approved acquirer, as follows: 1) ten (10) percent bonus upon the beginning of the employee's employment with the Commission-approved acquirer; and 2) ten (10) percent upon the employee's completion of one (1) year of employment with the Commission-approved acquirer; and

a severance payment if, less than twelve (12) months after the date on which such employee commences employment with the Commission-approved acquirer, the Commission-approved acquirer terminates the employment of such employee for reasons other than cause. The amount of such severance payment shall be equal to the payment that such employee would have received had he or she remained in the employ of Polyfibron and been terminated at such time, less any severance payment actually paid by the Commission-approved acquirer.

Decision and Order

- G. For a period of one (1) year from the date of the divestiture pursuant to this Decision and Order, Respondents shall not employ or make offers of employment to any individual listed in Schedule E, or Schedule F if the Commission-approved acquirer is Chemence, who has been offered employment with the Commission-approved acquirer, unless the individual has been granted a release by the Commission-approved acquirer to permit the individual to be employed by Respondents.
- H. Respondents shall not interfere with the employment by the Commission-approved acquirer of the individuals listed in Schedule E, or Schedule F if the Commission-approved acquirer is Chemence; shall not offer any incentive to such employees to decline employment with the Commission-approved acquirer or to accept other employment with the Respondents; shall remove any impediments that may deter such employees from accepting employment with the Commission-approved acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with the Respondents that would affect the ability of those individuals to be employed by the Commission-approved acquirer; provided that Respondents may continue to enforce such provisions with respect to the Polyfibron International Liquid Photopolymer Business and the Polyfibron Sheet Photopolymer Business.
- I. For a period of ninety (90) days from the date of the divestiture required by this Decision and Order, or until the Commission-approved acquirer has achieved the Capability to Manufacture the Polyfibron Liquid Photopolymer Resins, whichever is earlier, Respondents shall not solicit, induce or attempt to solicit or induce the Liquid Photopolymer business of

Decision and Order

any customer or client of the Commission-approved acquirer, including Liquid Photopolymer customers or clients of Polyfibrion and customers or clients of distributors that have purchased Polyfibrion Liquid Photopolymer Products; provided, however, that nothing in this paragraph shall be interpreted as restricting Respondents from (a) providing any product or service to any customer of the Commission-approved acquirer that solicits such purchases from Respondents; (b) engaging in general price reductions, increasing their general level of rebates, or improving generally the level of quality or service with respect to any products; (c) general advertising or engaging in general promotion of any product consistent with their prior business practice; or (d) continuing to solicit customers of the Polyfibrion International Liquid Photopolymer Business or the Polyfibrion Sheet Photopolymer Business.

- J. Pending the divestiture pursuant to this Decision and Order, Respondents shall take such actions as are necessary to maintain the viability, competitiveness, and marketability of the Polyfibrion Liquid Photopolymer Business and the Assets To Be Divested; shall not sell, transfer, or encumber the Assets To Be Divested or other assets related to the Polyfibrion Liquid Photopolymer Business, other than the sale of parts and finished goods inventory in the ordinary course of business; and shall not cause or permit the destruction, removal, wasting, or deterioration, or otherwise impair the viability, competitiveness, or marketability of the Assets To Be Divested or other assets related to the Polyfibrion Liquid Photopolymer Business, except for ordinary wear and tear.

Decision and Order

- K. Except as required by law; except to the extent necessary information is exchanged in the course of evaluating the Acquisition, defending investigations or litigation, obtaining legal advice, negotiating agreements to divest assets, or complying with this Decision and Order or the Order to Maintain Assets; or except as necessary to operate the Polyfibrion International Liquid Photopolymer Business and the Polyfibrion Sheet Photopolymer Business, MacDermid shall not receive or have access to any competitively sensitive or proprietary information, including, but not limited to, customer lists, price lists, marketing methods, patents, technologies, processes or other trade secrets, not independently known to MacDermid from sources other than Polyfibrion and that relate to the Assets To Be Divested.

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

- A. If Respondents have not divested, absolutely and in good faith, the Assets To Be Divested in accordance with Paragraph II.A. of this Decision and Order, the Commission may appoint a trustee to divest the Assets To Be Divested. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a 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 trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by

Decision and Order

the Respondents to comply with this Decision and Order.

- B. If a trustee is appointed by the Commission or a court pursuant to Paragraph III.A. of this Decision and Order, Respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

The Commission shall select the trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after receipt of written notice by the staff of the Commission to Respondents of the identity of any proposed trustee, Respondents shall be deemed to have consented to the selection of the proposed trustee.

Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Assets To Be Divested.

Within ten (10) days after appointment of the trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this Decision and Order.

The trustee shall have twelve (12) months from the date the Commission approves or the court approves the trust agreement described in Paragraph III.B.3. to

Decision and Order

accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the applicable twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, such divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this twelve (12) month period for no more than two (2) additional such periods.

The trustee shall have full and complete access to the personnel, books, records and facilities related to the Assets To Be Divested or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents 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 trustee, by the court.

The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously at no minimum price. The divestiture shall be made in a manner that receives the prior approval of the Commission and to an acquirer that receives the prior approval of the Commission; provided, however, if the trustee receives bona fide offers for the Assets To Be Divested from more than one (1) acquiring entity, and if the Commission determines to approve more than one (1) such acquiring entity, the trustee shall divest to the

Decision and Order

acquiring entity selected by Respondents from among those approved by the Commission; provided further, however, that Respondents shall select such entity within five (5) business days of receiving notification of the Commission's approval.

The trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of the Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The 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 trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Respondents, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Assets To Be Divested.

Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the 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

Decision and Order

misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in Paragraph III.A. of this Decision and Order.

The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Decision and Order.

In the event that the trustee determines that he or she is unable to divest the Assets To Be Divested in a manner that preserves their marketability, viability and competitiveness and ensures their continued use in the research, design, development, manufacture, distribution, marketing and sale of the Polyfibron Liquid Photopolymer Products, the trustee may divest such additional assets related to the Assets To Be Divested of the Respondents and effect such arrangements as are necessary to satisfy the requirements of this Decision and Order.

The trustee shall have no obligation or authority to operate or maintain the Assets To Be Divested.

The trustee shall report in writing to Respondents and to the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestiture required by this Decision and Order.

Decision and Order

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

- A. Within ninety (90) days of the date this Decision and Order becomes final, Respondents shall terminate any distribution agreements entered into with any other manufacturer of Photopolymer Products, including, but not limited to, the Distribution Agreement between NAPP Systems, Inc. and BASF Lacke + Farben AG dated August 25, 1995, and the Distribution Agreement entered into between MacDermid and Asahi Chemical Industry Co., Ltd. dated December 14, 1998.
- B. Respondents cease and desist from, directly, indirectly, or through any corporate or other device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, inviting, entering into, attempting to enter into, organizing, attempting to organize, implementing, attempting to implement, continuing, attempting to continue, soliciting, or otherwise facilitating any combination, agreement, or understanding, either express or implied, with any producer of Photopolymer Products to allocate or divide markets, customers, contracts, or geographic territories for Photopolymer Products.
- C. One year from the date this Decision and Order becomes final and annually thereafter for nine (9) years on the anniversary of the date of which this Decision and Order became final, Respondents shall file with the Secretary of the Commission a verified written report of their compliance with this Paragraph.

Decision and Order

V.

IT IS FURTHER ORDERED that within thirty (30) days of the date this Decision and Order is issued and every thirty (30) days thereafter until Respondents have fully complied with the provisions of Paragraphs II. or III. of this Decision and Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Paragraphs II. and III. of this Decision and Order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II. and III. of this Decision and Order, including a description of all substantive contacts or negotiations for divestiture and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

VI.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Decision and Order, upon written request, Respondents shall permit any duly authorized representatives of the Commission:

- A. Access, during office hours and in the presence of counsel, to all facilities and to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondents, relating to any matters contained in this Decision and Order; and
- B. Upon five (5) days' notice to Respondents, and without restraint or interference from Respondents, to interview officers, directors, or employees of

Decision and Order

Respondents, who may have counsel present, regarding any such matters.

VII.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondents, 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 this Decision and Order.

VIII.

IT IS FURTHER ORDERED that this Decision and Order shall terminate on February 4, 2020.

By the Commission.

Schedules A - F

Schedule A

(1.1(a) of Chémence Agreement)

SCHEDULE 1.1(a)**ATLANTA - LIQUID PHOTOPOLYMER PRINTING PLATES
MACHINERY AND EQUIPMENT SOLD TO BUYER**

PTI Tag #	Description:
	<u>PRODUCTION AREA:</u>
	<u>Reactor No. 1:</u>
247	Reactor No. 1 including hoses
248	Disconnect Switch
249	Drum Holst
250	Vacuum Trap
252	Floor Scale
253	Discharge line and scale
254	Reactor Scale
255	Electrical Panel
256	Drum Scale
257	Gram Scale
258	Reactor solvent cleaning pump system
259	High viscosity pump
260	Myers mixer
261	Dip tube and drum pump No. 1
262	Dip tube and drum pump No. 2
263	Box stapler
353	Water Bath No. 3
	<u>Reactor No. 3:</u>
246	Reactor No. 3 including hoses
246	Flexo Polymer Process System
246	Agitator Shaft
246	Reactor Access
354	Water Bath No. 4
266	Discharge line and scale
267	Electrical panel
268	Reactor scale
269	Drum scale
270	Table scale
271	Pail sealer
272	Floor scale
273	Air sparge system
274	Vacuum trap
	<u>Miscellaneous Auxiliary Equipment:</u>
347	Reactor Cleaning Wand
352	Water Bath Control Panel
366	Air Dryer & Inlet Filter
395	Walden Air Operated Diaphragm Pump
	<u>Storage Tanks:</u>
279	5,200 gallon used recycle tank
280	2,500 gallon clean solvent tank
385	TDI Concentration Meter
388	Alarm System Panel for Solvent Tanks

Schedules A - F

SCHEDULE 1.1(a)**ATLANTA - LIQUID PHOTOPOLYMER PRINTING PLATES
MACHINERY AND EQUIPMENT SOLD TO BUYER**

PTI Tag #	Description:
	<u>Warehouse:</u>
287	Floor scrubber and charger
288	Pallet jack
289	Storage racks in yard (20)
289	Warehouse racks (in yard)
275	Fork lift No. 1
276	Drum hoist
278	Fork lift charger
406	Manual Pallet Jack
407	Manual Pallet Jack
377	Extension Boom for Forklift
	<u>Q C Wet Lab:</u>
290	Fisher Scientific Iso Temp Water Bath
291	Neslab Refrigerated Bath Circulator
465	Thermoseal Unit
466	Thermoseal Unit
315	RVT Viscometer
317	LVT Viscometer
295	Analytical Balance
296	Aqua Star V-5000 Moisture Analyzer
297	Top loading balance
298	Oven No. 1
299	Oven No. 2
300	Bench top Ultrasonic cleaners
301	Fisher APHA Color test system
302	Flammable cabinet
420	Brookfield Viscometer
424	Titration Stand
435	Titration Stand
444	VariSpeed Mixer Controller
445	VariSpeed Mixer Controller
467	Motor Mixer
446	Lab Mixer
	<u>Q C Instrument Lab:</u>
303	IR Spectrometer
304	FTIR Dell Computer
305	Monitor
306	Printer
309	Autotitrator
310	Table top micrometer
311	Resiliometer
312	Punch press

Schedules A - F

SCHEDULE 1.1(a)**ATLANTA - LIQUID PHOTOPOLYMER PRINTING PLATES
MACHINERY AND EQUIPMENT SOLD TO BUYER**

<u>PTI Tag #</u>	<u>Description:</u>
	<u>Boxcor/LF Substrate Lab:</u>
318	Amergraph Cure Unit
319	Computer labeling system printer
320	Monitor
	<u>Letterflex Machine Lab:</u>
321	Letterflex IIIA System - exposure unit
322	Post expose 'pizza' oven
323	Merigraph exposure unit
324	Roll / Drum washout unit
325	Post exposure unit
326	Drying oven
	<u>Customer Demonstration Room:</u>
327	Letterflex 30 x 50 Exposure Unit
328	30 x 50 PDS Serial # TGE 247A
329	30 x 50 PDS Serial # TGE 247B
330	Letterflex 30 x 50 processor
331	Heavy duty shear
332	Light Box
469	Guillotine
470	Lab Bench
471	Precision Oven
473	Bench
475	Desk
476	Substrate Cabinet
477	Negative cabinet 1
478	Negative cabinet 2
480	Cabinet
	<u>Platemaking Room:</u>
333	LFX 42 x 60 Processor
334	LFX 42 x 60 exposure unit
335	PDS system Serial # 420008
	<u>Upstairs Labs:</u>
454	Blue M Oven
455	Blue M Oven
456	Blue M Oven
457	Blue M Oven
	<u>Other:</u>
No tag	Colorite Software

Schedules A - F

Schedule B

(1.3(a) of Chémence Agreement)

Schedules A - F

SCHEDULE 1.3(a)**ATLANTA - LIQUID PHOTOPOLYMER PRINTING PLATES
ADDITIONAL MACHINERY AND EQUIPMENT AVAILABLE TO BUYER
FOR SIX MONTHS FOLLOWING CLOSING**

PTI Tag #	Description:
	<u>PRODUCTION AREA:</u>
	<u>Reactor No. 2:</u>
339	Flow meters for 3 bulk tanks
	<u>Miscellaneous Auxiliary Equipment:</u>
367	Vacuum Tank
	<u>Storage Tanks:</u>
283	7,500 gallon raw material tank
284	7,500 gallon rinse water tank
285	Scale for rinse water tank
286	Scale for raw material tank
383	Inlet Filter Assembly for Bulk Tanks
359	Air Dryer for Storage Tanks incl. Manifold Control
	<u>Warehouse:</u>
412	Battery Charger (Crown)
371	Battery Charger for Forklift (Toyota)
	<u>Q C Wet Lab:</u>
292	Perkin-Elmer 1310 Infrared Spectrophotometer
	<u>Q C Instrument Lab:</u>
314	Instron
	<u>Customer Demonstration Room:</u>
479	Square work bench
no tag	Six pictures on wall

ts - 11/4/99 9:43 AM Chemence_fixed_assets2.xls

Schedule C

(1.1(b) of Chémence Agreement)

Schedules A - F

Schedule 1.1 (b)

I. PATENTS¹

U.S. patent No. 5,147,761 dated September 15, 1992 entitled METHOD FOR PREPARING RELIEF IMAGE PRINTING PLATES. Serial No. 535,819 filed June 11, 1990.

II. TRADEMARKS AND OTHER INTELLECTUAL PROPERTY**A. North America License**

Buyer shall be granted a royalty free license for use in North America only of formulations, equipment designs, patents and trademarks related to Liquid Flexo photopolymers marketed to the North American packaging industry as more specifically defined below.

NON-EXCLUSIVE LICENSE**Trademarks²**

LETTERFLEX U.S. registration No. 855,774 dated 9/3/68
LETTERFLEX Logo U.S. registration No. 871,571 dated 6/24/69
LETTERFLEX U.S. registration No. 881,546 dated 12/2/69
LETTERFLEX Logo U.S. registration No. 882,364 dated 12/16/69

Formulations

All non-Claim product formulations contained within "Book 1" to be delivered under separate cover at closing.

Equipment Designs

All packaging LETTERFLEX machine drawings in the custody of Photo-Meca as listed in "Book 1" to be delivered under separate cover at closing.

¹ Subject to Patent Assignment and Patent License Agreement (Section 4.8).

² Subject to additional restrictions contained in Transitional Services Agreement (Section 4.6).

EXCLUSIVE LICENSE**Trademark**³

ACCLAIM U.S. application no. 636,787 dated 2/8/99

Formulations

All ACCLAIM product formulations contained within "Book 1" to be delivered under separate cover at closing.

B. Worldwide License

Buyer shall also be granted a non-exclusive, worldwide royalty free right and license to use ACCLAIM product formulations contained within "Book 1" to be delivered under separate cover at closing.

#143025

³ Rights granted to Buyer with respect to the ACCLAIM trademark and the ACCLAIM product formulations are subject to terms and conditions contained in the License Agreement (Section 4.7).

Schedules A - F

CONFIDENTIAL

SCHEDULE “D”

REDACTED

Schedule D

(1.1(c) of Chémence Agreement

FEDERAL TRADE COMMISSION DECISIONS
VOLUME 129

Schedules A - F

Schedule E

(1.10A of Chémence Agreement)

Polyfibrion Technologies, Inc.

Schedule E

(a/k/a Schedule 1.10A to Purchase & Sale Agreement)

Active Employees

Name	Title	Name	Title
Ansaldò, Eric J.	R & D Technician II	Gavin, Thomas	Executive Vice President
Baklini, Leonard	Production Supervisor II	Gaudry, Gerard U.	Process Dev Group Leader
Beckerman, David	President & CEO	Golden, B. C.	Product Manager I
Benham, Douglas F.	Technical Services Rep III	Goss, William K.	R&D Manager
Berthiaume, Stephan	Technical Sales Rep I	Gray, Gary D.	National Sales Mgr II
Bishop, Thomas L.	Technical Sales Rep I	Griffin, Patricia R.	Marketing Services Coordinatc
Blair, Harold	Lab Technician II	Hall, Gerald E.	Marketing & Tech Service Mgr
Boaz, Edward A.	Technical Sales Rep II	Haller, Wanda J.	Supervisor, Order Proc I
Bowman, Christopher H	Sr Sales Correspondent	Hamedany, Tony	Group Leader II
Boyce, Carrie E.	Secretary II	Hennessy, James	Engineering Manager
Brothers, Ellen B.	Supervisor, Order Proc I	Holton, Robin L.	Executive Secretary IV
Bryant, Laurie A.	Product Manager I	Howell, Stephen P.	Sales Representative II
Caplinger, Thomas R.	Sales/Mktg Mgr. - L.A.	Hruska, John D.	Central Regional Manager
Capriotti, Bruce W.	Product Analyst	Jenson, Steven R.	SA - Tech/Sales Rep
Carlsen, Chris A.	Systems Engineer I	Johnson, Deborah L.	Q C Supervisor
Carswell, Victor E.	Systems Engineer I	Kanga, Rustom S.	Research Associate
Cassano, Thomas J.	Technical Services Rep III	Keran, Scott E.	Technical Sales Rep I
Cathcart, Patricia A.	Technical Sales Rep III	King, Melanie D.	Accounting Associate
Chen, Jinghong	Sr Chemist I	Krafft, Bettylyn O.	Technical Services Rep II
Cheng, Antony K.	Mgr. Mkt Forec. Fin Rep. Acctg	Kumpfmiller, Ronald J.	Research Chemist I
Cook, Brian R.	Technical Services Rep II	Lepis, Mary Lou S.	Secretary II
Corley, Jeffrey L.	Technical Services Rep II	Loose, Kevin P.	Sales Representative II
Dancer, Jeff W.	Technical Sales Rep I	Lyons-Michaud, Sally A.	Marketing Assistant II
Davis, Henry R.	Technical Sales Rep I	Marks, Martin J.	Technical Services Rep II
De Angelo, Janice	Secretary III	McAfee, Jerry	Chief Engineer
Duke, J. W.	Lab Technician III	McKenzie, Richard D.	Sr Systems Engineer II
Durham, Jeffrey S.	Sr Sales Representative	Morrison, Jean	Temporary Secretary/Off Asst
Emmerling, Richard A.	Technical Support Manager	Mullaney, Patrick J	Eastern Regional Sales Mgr
Farmer, Gerald W.	Sr Systems Engineer II	Murphy, Edward T.	VP General Mgr Plates/Americ
Favors, Michael H.	Systems Engineer I	Ordonez, Ruben	Technical Service - L.A.
Fino, James	Technical Sales Rep II	Owenby, Dan A.	Sr Field Test Engineer
Formwalt, Donald B.	Technical Sales Rep II	Paris, Linda P.	Secretary II
Galliers, Philip G.	Sales Representative II	Philmon, William W.	Sr Systems Engineer II

Schedules A - F

Active Employees

Name	Title
Pina, Nicholas	Sr Systems Engineer III
Prater, Shannon C.	Sales Representative II
Puckhaber, Kurt D.	Financial Analyst I
Randall, Alvin V.	Technical Services Rep
Recchia, David A.	Printing Process Specialist
Richards, Marshall	Mechanical Design Engineer
Roberts, Kevin J.	National Accounts Mgr-Plates
Rosen, Daniel	Product Manager III
Shradel, Jan M.	Technical Service Lab Manager
Taylor, Robert O.	Technical Services Rep II
Tsao, Jung H.	Prod Development Group Ldr
Ventola, Joan	Engineering Purchasing Coordii
Vest, Ryan W.	Research Chemist I
Vincent, David E.	Field Service Manager
Warren, Brian	Project Engineer
Weaver, Keisha N.	Chem/Research Technician
Weglewski, Linda L.	Regulatory Affairs Manager
Wilson, Billy J.	Plant Manager I
Winkle, Jean E.	Sr Sales Correspondent
Wyman, James V.	Western Regional Sales Mgr
Yang, Michael W.	Research Fellow

Terminated Employees

Name	Title
Black, Regina	Receptionist I
Dennison, Sarah	Chem/Research Technician
Dobrev, Bisser	Sr Network Analyst
Ellington, Erica	R & D Technician II
Gardner, Kevin	Technical Services Rep II
Hall, Cathy	Secretary III
Hannah, Mark	Chem/Research Technician
Ritch, Robert	Information Systems Specialis
Valerio, Frank	Sales Correspondent III
Yu, Jason	Research Specialist I

Production Workers	
Name	Title
Barboza, Miguel	Chemical Operator
Hatmaker, Jeffrey	Maint I
Jackson, Robert	Chemical Operator
Lee, Leon	Waste Handler
Riley, Odell	Material Handler
Sanchez, Rogelio	Lead Chemical Operator
Shipp, Jeffrey	Chemical Operator
Stone, Willie	Shipper/Receiver

Schedules A - F

Schedule F**SCHEDULE F**

1	Baklani, Len
2	Boaz, Alan
3	Davis, Ricky
4	Durham, Jeff
5	Fornwalt, Brent
6	Howell, Stephen
7	Karen, Scott
8	Marks, Martin
9	Owenby, Dan
10	Pena, Nick
11	Philmon, Bill
12	Barboza, Miguel
13	Hatmaker, Jeffrey
14	Jackson, Robert
15	Lee, Leon
16	Riley, Odell
17	Sanchez, Rogelio
18	Shipp, Jeffrey
19	Stone, Willie

Order to Maintain Assets

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission having initiated an investigation of the proposed acquisition by the Respondent MacDermid, Incorporated of the Respondent Polyfibrion Technologies, Inc., hereinafter referred to as "Respondents," and the Respondents having been furnished thereafter with a copy of a draft of the Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge the Respondents 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

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by the Respondents of all of the jurisdictional facts set forth in the aforesaid draft of the Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by the Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than the 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 has reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having determined to accept the executed Agreement Containing Consent Orders and to place such Agreement on the public record for a period of thirty (30) days, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Maintain Assets:

Order to Maintain Assets

1. MacDermid is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut, with its executive offices located at 245 Freight Street, Waterbury, Connecticut 06702.
2. Polyfibron is a corporation 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 900 Middlesex Turnpike, Building 2, Billerica, Massachusetts 01821-3946.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents, 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 shall apply:

- A. "MacDermid" means MacDermid, Incorporated, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by MacDermid, Incorporated, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. "Polyfibron" means Polyfibron Technologies, Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Polyfibron Technologies, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

Order to Maintain Assets

- C. "Commission" means the Federal Trade Commission.
- D. "Acquisition" means MacDermid's proposed acquisition of the common stock of Polyfibron pursuant to the Plan and Agreement of Merger dated February 18, 1999, as amended on July 27, 1999; September 23, 1999; and October 29, 1999.
- E. "Assets To Be Divested" means:
1. all rights, title, and interest in all equipment, machinery, tools, furniture and other tangible property listed in Schedule A to the related Decision and Order and any additional equipment, machinery, tools, furniture and other tangible property, identified by the Commission-approved acquirer within six months of the date of closing as set forth in the agreement to transfer such assets to the Commission-approved acquirer, listed in Schedule B to the related Decision and Order;
 2. all rights, title, and interest in and to Patents relating to the research, design, development, manufacture, distribution, marketing, or sale of Polyfibron Liquid Photopolymer Products in North America, including, but not limited to, those patents listed in Schedule C to the related Decision and Order, provided that Respondents may negotiate licenses from the Commission-approved acquirer to enable Respondents to operate the Polyfibron Sheet Photopolymer Business and the Polyfibron International Liquid Photopolymer Business;

Order to Maintain Assets

3. all rights, titles, and interest in and to Intellectual Property, other than Patents, relating to the research, design, development, manufacture, distribution, marketing, or sale of Polyfibron Liquid Photopolymer Products in North America, provided that Respondents may retain a non-exclusive right to such of the foregoing Intellectual Property as may be required to operate and for the purposes of operating the Polyfibron Sheet Photopolymer Business and the Polyfibron International Liquid Photopolymer Business;
4. all rights, title, and interest in and to inventories of products, raw materials (to the extent requested by the Commission-approved acquirer), supplies and parts, including work-in-process and finished goods, relating to the research, design, manufacture, development, marketing, or sale of Polyfibron Liquid Photopolymer Products in North America, listed and described in Schedule D to the related Decision and Order;
5. all rights, title, and interest in and to agreements, express or implied, relating to the research, design, development, manufacture, distribution, marketing, or sale of Polyfibron Liquid Photopolymer Products in North America, regardless of whether such agreements relate exclusively to such purposes, including, but not limited to, warranties, guarantees, and contracts with joint venture partners, suppliers, including plate-making equipment suppliers, personal property lessors, personal property lessees, licensors, licensees, consignors, consignees, and customers; provided that Respondents may retain a non-exclusive right to such agreements as may be required to operate and for the purposes of operating the Polyfibron

Order to Maintain Assets

Sheet Photopolymer Business and the Polyfibron International Liquid Photopolymer Business;

6. all rights, title and interest in and to Permits and Approvals relating to the research, design, development, manufacture, distribution, marketing, or sale of Polyfibron Liquid Photopolymer Products in North America, regardless of whether such Permits and Approvals relate exclusively to such purposes, to the extent such Permits and Approvals are transferrable; and
7. all customer and vendor lists, catalogs, sales promotion literature and advertising materials relating to the research, design, development, manufacture, distribution, marketing, or sale of Polyfibron Liquid Photopolymer Products in North America.

provided, however, the Assets To Be Divested do not include those assets of Polyfibron that relate exclusively to the Polyfibron Sheet Photopolymer Business or the Polyfibron International Liquid Photopolymer Business.

- F. "Capability to Manufacture the Polyfibron Liquid Photopolymer Resins" means the ability of the Commission-approved acquirer to manufacture each of the Polyfibron Liquid Photopolymer Resins manufactured by Polyfibron since January 1, 1999 used to produce printing plates for the printing of packaging materials to specifications identical to the Polyfibron Liquid Photopolymer Resins produced by Polyfibron, which ability shall be determined using an infra red spectrometer and verified by both Polyfibron and the Commission-approved acquirer, and that the

Order to Maintain Assets

equipment, materials, tools, furniture and other tangible property listed in Schedule A to the related Decision and Order have been relocated to the facilities of the Commission-approved acquirer and are fully operational.

- G. “Chemence” means Chemence Incorporated, a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 185 Bluegrass Parkway, Alpharetta, Georgia 30005.
- H. “Liquid Photopolymers” means liquid photopolymer resins used to produce printing plates for any printing application.
- I. “Polyfibron International Liquid Photopolymer Business” means the business of Polyfibron of researching, designing, developing, manufacturing, distributing, marketing and selling: (1) liquid photopolymer printing plate products and equipment for customers outside North America; and (2) liquid photopolymer printing plate products and equipment for publishing, including newspapers, newspaper inserts, and books anywhere in the world.
- J. “Polyfibron Liquid Photopolymer Business” means the business of Polyfibron of researching, designing, developing, manufacturing, distributing, marketing and selling the Polyfibron Liquid Photopolymer Products.
- K. “Polyfibron Liquid Photopolymer Products” means:
 - 1. any liquid photopolymer resins used to produce printing plates,

Order to Maintain Assets

2. any plate-backing and cover films used in conjunction with liquid photopolymer resins in the production of photopolymer printing plates,
3. any chemicals and related products used in conjunction with liquid photopolymer resins in the production of photopolymer printing plates, and
4. any equipment, agreements relating to equipment, or rights in or to equipment, used to produce photopolymer printing plates from liquid photopolymer resins,

that have been manufactured, distributed, leased or sold by Polyfibron, or have been the subject of research or development by Polyfibron, in North America.

- L. "Polyfibron Liquid Photopolymer Resins" means all of the kinds and types of liquid photopolymer resins manufactured by Polyfibron used to produce photopolymer printing plates.
- M. "Polyfibron Sheet Photopolymer Business" means the business of Polyfibron of researching, designing, developing, manufacturing, distributing, marketing and selling solid sheet photopolymer printing plate products and equipment for any printing applications anywhere in the world.

Order to Maintain Assets

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

- A. The purpose of this order is: (i) to preserve the Polyfibron Liquid Photopolymer Business as a viable, competitive, and ongoing business until the divestiture, as described in Paragraphs II and III of the related Decision and Order, is achieved; (ii) to assure that no material confidential information is exchanged between the respective liquid photopolymer businesses of MacDermid and Polyfibron; and (iii) to prevent interim harm to competition pending divestiture and other relief.
- B. Respondents shall take such actions as are necessary to maintain the viability, competitiveness, and marketability of the Polyfibron Liquid Photopolymer Business and the Assets To Be Divested; shall not sell, transfer, or encumber the Assets To Be Divested or other assets related to the Polyfibron Liquid Photopolymer Business other than to the Commission-approved acquirer in accordance with Paragraph II.A. of the related Decision and Order and the sale of parts and finished goods inventory in the ordinary course of business; and shall not cause or permit the destruction, removal, wasting, or deterioration, or otherwise impair the viability, competitiveness, or marketability of the Assets To Be Divested or other assets related to the Polyfibron Liquid Photopolymer Business, except for ordinary wear and tear.
- C. Respondents shall conduct or cause to be conducted the Polyfibron Liquid Photopolymer Business in the regular and ordinary course and in accordance with past practice (including regular repair and maintenance efforts) and shall use their best efforts to preserve existing relationships with suppliers, customers, employees, and others having business relations with the Polyfibron Liquid Photopolymer Business.

Order to Maintain Assets

- D. Prior to the physical transfer of the Assets To Be Divested used in the manufacture of Polyfibron Liquid Photopolymer Products, Respondents shall ensure that a sufficient inventory of Polyfibron Liquid Photopolymer Products is maintained and built up, consistent with past and/or projected demand, so as to assure that no shortages of such products occur at any time, including the period in which the manufacturing assets are shut down for removal, physically transferred to the Commission-approved acquirer, and reassembled and capable of producing Polyfibron Liquid Photopolymer Products in sufficient quantity and quality to satisfy demand for such products.
- E. Respondents shall maintain a work force of equivalent size, training, and expertise associated with the Polyfibron Liquid Photopolymer Business. Respondents shall, directly or through agreement with Chemence or any other proposed acquirer, provide the individuals identified in Schedule F of the related Decision and Order with financial incentives to continue in their employment positions during the period covered by this Order to Maintain Assets. Such incentives shall consist of:
1. continuation of all employee benefits offered by Polyfibron until the divestiture is completed; and
 2. a bonus equal to ten (10) percent of the employee's annual salary (including any other bonuses) as of the date this Order to Maintain Assets is issued by the Commission to those Polyfibron employees that continue their employment with Polyfibron until the divestiture described in the related Decision and Order is completed. Employees identified in Schedule E of the related Decision and Order, or Schedule F if the Commission-approved acquirer is Chemence, that

Order to Maintain Assets

accept employment with the Commission-approved acquirer are entitled to an additional twenty (20) percent bonus under the terms specified in the Decision and Order.

- F. Respondents shall not make offers to remain in Respondents' employment after the divestiture to the individuals listed in Schedule E or Schedule F of the related Decision and Order,.
- G. Respondents shall not interfere with the employment by the Commission-approved acquirer of Polyfibron employees listed in Schedule E of the related Decision and Order, or Schedule F of the related Decision and Order if the Commission-approved acquirer is Chemence; shall not offer any incentive to such employees to decline employment with the Commission-approved acquirer or to accept other employment with the Respondents; and shall remove any impediments that may deter such employees from accepting employment with the Commission-approved acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with the Respondents that would affect the ability of those individuals to be employed by the Commission-approved acquirer; provided that Respondents may continue to enforce such provisions with respect to the Polyfibron International Liquid Photopolymer Business and the Polyfibron Sheet Photopolymer Business.
- H. At the time of execution of a purchase agreement with a Commission-approved acquirer, Respondents shall provide the Commission-approved acquirer with a complete list of all non-clerical employees who have been engaged in the research, design, development, manufacture, distribution, marketing and sale of the Polyfibron Liquid Photopolymer Products at any time during the period from January 1, 1999, until the date of

Order to Maintain Assets

such purchase agreement (Schedule E of the related Decision and Order). Such list shall state each such individual's name and position.

- I. Respondents shall provide the Commission-approved acquirer the opportunity to enter into employment contracts with the individuals listed in Schedule E of the related Decision and Order, or Schedule F of the related Decision and Order if the Commission-approved acquirer is Chemence.
- J. Except as required by law; except to the extent necessary information is exchanged in the course of evaluating the Acquisition, defending investigations or litigation, obtaining legal advice, negotiating agreements to divest assets, or complying with the related Decision and Order or this Order to Maintain Assets; or except as necessary to operate the Polyfibron International Liquid Photopolymer Business and the Polyfibron Sheet Photopolymer Business, MacDermid shall not receive or have access to any competitively sensitive or proprietary information, including, but not limited to, customer lists, price lists, marketing methods, patents, technologies, processes or other trade secrets, not independently known to MacDermid from sources other than Polyfibron and that relate to the Assets To Be Divested.
- K. For a period of ninety (90) days from the date of the divestiture required by the related Decision and Order, or until the Commission-approved acquirer has achieved the Capability to Manufacture the Polyfibron Liquid Photopolymer Resins, whichever is earlier, Respondents shall not solicit, induce or attempt to solicit or induce the Liquid Photopolymer business of any customer or client of the Commission-approved acquirer, including Liquid Photopolymer customers or clients of Polyfibron and

Order to Maintain Assets

customers or clients of distributors that have purchased Polyfibron Liquid Photopolymer Products, provided, however, that nothing in this paragraph shall be interpreted as restricting Respondents from (a) providing any product or service to any customer of the Commission-approved acquirer that solicits such purchases from Respondents; (b) engaging in general price reductions, increasing their general level of rebates, or improving generally the level of quality or service with respect to any products; (c) general advertising or engaging in general promotion of any product consistent with their prior business practice; or (d) continuing to solicit customers of the Polyfibron International Liquid Photopolymer Business or the Polyfibron Sheet Photopolymer Business.

III.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in Respondents, 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 this Order to Maintain Assets.

IV.

IT IS FURTHER ORDERED that for the purposes of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents made to their principal United States offices, Respondents shall permit any duly authorized representatives of the Commission:

- A. Access, during office hours of Respondents 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

Analysis to Aid Public Comment

possession or under the control of the Respondents relating to compliance with this Order to Maintain Assets; and

- B. Upon five (5) days' notice to Respondents and without restraint or interference from Respondents, to interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

V.

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. The day after the divestiture, as described in and required by the related Decision and Order, is completed.

By the Commission.

**ANALYSIS OF PROPOSED CONSENT ORDER TO AID
PUBLIC COMMENT**

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Agreement") from MacDermid, Inc. ("MacDermid") and Polyfibron Technologies, Inc. ("Polyfibron") to resolve competitive concerns arising out of MacDermid's proposed acquisition of Polyfibron. The Agreement includes a proposed

Analysis to Aid Public Comment

Decision and Order (the “proposed Order”) which would require MacDermid and Polyfibron (“respondents”) to divest the Polyfibron business of producing and selling liquid photopolymers; to terminate their respective agreements to distribute sheet photopolymers in North America (MacDermid's 1998 distribution agreement with Asahi Chemical Industry Co., Ltd. (“Asahi”), and Polyfibron's 1995 distribution agreement with BASF Lacke + Farben AG (“BASF”)); and to cease and desist from inviting, entering into or participating in any agreements with other photopolymer manufacturers that have as their effect any allocation, division or illegal restriction of competition. The Agreement also includes an Order to Maintain Assets which requires respondents to preserve the Polyfibron business of producing and selling liquid photopolymers as a viable, competitive, and ongoing business until the divestiture is achieved.

The proposed Order has been placed on the public record for thirty (30) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will review the Agreement and comments received and decide whether to withdraw its acceptance of the Agreement or make final the Agreement's proposed Order.

The proposed complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, as amended, and Section 5 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 45, as amended, in the following markets: (1) the research, development, manufacture, and sale of liquid photopolymers for use in the manufacture of flexographic printing plates for printing on packaging materials, such as corrugated containers and multi-wall bags (“Liquid Photopolymers”); and (2) the research, development and sale of solid sheet photopolymers for use in the manufacture of flexographic printing plates for printing on packaging materials such as plastic bags and other flexible packaging, as well as

Analysis to Aid Public Comment

corrugated containers and multi-wall bags (“Sheet Photopolymers”).

The proposed complaint alleges that the Liquid Photopolymer market in North America is highly concentrated, and that the proposed acquisition of Polyfibron by MacDermid represents a virtual merger to monopoly in that market.

The proposed complaint also alleges that the Sheet Photopolymer market in North America is highly concentrated, with the pre-merger market being dominated by two firms, E.I. du Pont de Nemours & Co., Inc. (“DuPont”) and Polyfibron (selling its own-manufactured Sheet Photopolymer products, and those of BASF under the 1995 distribution agreement). Other firms that participate in the North American Sheet Photopolymer market are niche players with minor market shares. While MacDermid does not produce Sheet Photopolymers, it entered into a distribution agreement with Asahi in 1998 that gives it the right—which it has not yet exercised—to distribute and sell Asahi’s Sheet Photopolymer products in North America. The proposed complaint alleges that the existence of the respective distribution agreements means that the present duopoly in the sale of Sheet Photopolymers in North America would be further entrenched, because the only two likely entrants, BASF and Asahi, are bound by the distribution agreements to sell only through Polyfibron and MacDermid, respectively.

The proposed complaint further alleges that the effect of the acquisition may be to substantially lessen competition and to tend to create a monopoly by, among other things, eliminating direct competition between MacDermid and Polyfibron in the manufacture, distribution and sale of Liquid Photopolymers, entrenching the existing duopoly in North America in the sale of Sheet Photopolymers, increasing the likelihood that purchasers of Liquid Photopolymers and Sheet Photopolymers will be forced to pay higher prices, increasing the likelihood that technical and

Analysis to Aid Public Comment

sales services provided to customers will be reduced, and increasing the likelihood that innovation will be reduced. Customers have complained that the effect of the transaction would be increased prices for Liquid Photopolymers and Sheet Photopolymers and reduced technical service, support, and innovation.

The proposed complaint further alleges that entry into the relevant markets would not be timely, likely, or sufficient to deter or offset the adverse effects of the acquisition on competition. Entry is difficult in this market because of the length of time it would take and the expense that would be incurred in building appropriate chemical production facilities; the difficulty of perfecting the underlying polymer chemistry without violating existing patents; the need to offer to customers plate-making equipment on a consignment or lease basis and the concurrent difficulty and cost of obtaining a source of supply for plate-making equipment; and the difficulty of gaining recognition in a marketplace in which customers are reluctant to change from proven suppliers. In addition, the proposed complaint alleges that most customers in the relevant market for Liquid Photopolymers are engaged in long-term equipment and material supply contracts with either MacDermid or Polyfibron, further reducing the number of customers available to a new entrant at any given time.

Finally, the proposed complaint alleges that the respondents have allocated markets for the sale of photopolymers with competitors, or invited competitors to allocate markets for the sale of photopolymers. Specifically, the complaint alleges that beginning in 1995, when MacDermid first entered the market for the production and sale of Liquid Photopolymers (by virtue of its acquisition of Hercules, Inc.'s photopolymer business), MacDermid and Asahi agreed to allocate markets such that MacDermid would not compete in the sale of Liquid Photopolymers in Japan and in other areas of the world in which Asahi sold Liquid Photopolymers while Asahi would not compete in the sale of Liquid Photopolymers in North America. In the case of Polyfibron, the proposed complaint alleges that during the

Analysis to Aid Public Comment

same period of 1995 through 1998, Polyfibron engaged in discussions with Asahi that had as their purpose the division of markets between the two companies. The proposed complaint alleges that on several occasions during this time period, Polyfibron invited Asahi to agree not to compete in the sale of Sheet Photopolymers and Liquid Photopolymers in North America in return for Polyfibron's agreement not to compete in the sale of Sheet Photopolymers and Liquid Photopolymers in Japan.

The proposed Order is designed to remedy the anticompetitive effects of the acquisition in the North American markets for Liquid Photopolymers and Sheet Photopolymers, as alleged in the complaint, by requiring the divestiture of Polyfibron's Liquid Photopolymer business, by requiring the respondents to terminate their respective distribution agreements with Asahi and BASF, and by requiring the respondents to cease and desist from entering into, inviting or participating in any agreements to allocate, divide or illegally restrict competition in the relevant markets.

Under the terms of the proposed Order, respondents are required to divest Polyfibron's North American Liquid Photopolymer business to Chemence, Inc. ("Chemence"), no later than twenty (20) days after the date the Order becomes final. Chemence currently produces adhesives, sealants and photopolymers for making printing stamps, using technology similar to that involved in Liquid Photopolymers. Chemence also produces a small amount of Liquid Photopolymers in its facilities in Alpharetta, Georgia, as well as in the United Kingdom.

Divestiture of Polyfibron's Liquid Photopolymer business to Chemence is designed to promote the viability and competitiveness of the divested business by placing the business in the hands of a company with extensive expertise in photopolymer technology, expertise in related chemistries, and economies of scale resulting from shared research and

Analysis to Aid Public Comment

development, overhead and production. The divestiture package, in turn, will permit Chemence to penetrate the North American market. It provides Chemence with a photopolymer technology that is well-known, well-respected and proven in the marketplace, access to plate-making equipment that it may offer to its resin customers, a sales and technical support force that is well-known in the industry, customer lists, and long-term equipment/resin supply contracts with those customers.

The proposed Order requires that respondents divest all trade secrets, know-how, trade marks and trade names, intellectual property, intangible assets, tangible assets including equipment, and supply contracts and business information (including purchasing, sales, marketing, licensing, and similar information) relating to Polyfibron's Liquid Photopolymer business. The proposed Order also requires that respondents provide incentives to certain employees identified by the acquirer as important to the continued competitiveness and viability of the Liquid Photopolymers business, to facilitate their transfer and the transfer of know-how to the acquirer.

The proposed Order to Maintain Assets requires that respondents preserve the Polyfibron Liquid Photopolymer business as a viable and competitive business until it is transferred to the Commission-approved acquirer. It includes an obligation on respondents to build and maintain a sufficient inventory of Liquid Photopolymers to ensure there is no shortage of supply during the period that the business is being transitioned to the Commission-approved acquirer, and obligations to maintain an adequate workforce.

Both the proposed Order and the Order to Maintain Assets include provisions designed to protect the Commission-approved acquirer during the transition period from the possibility that respondents might target customers on the customer lists being transferred to the Commission-approved acquirer. The provisions prohibit respondents from soliciting Liquid Photopolymer customers of Polyfibron for the transition period, which in any

Analysis to Aid Public Comment

event is not to exceed ninety (90) days from the date the assets to be divested are transferred to the Commission-approved acquirer.

If, following receipt and review of public comments regarding the proposed Order, the Commission determines to disapprove the divestiture to Chemence, respondents are required to rescind the transaction with Chemence and divest Polyfibron's Liquid Photopolymers business, within three (3) months, to an acquirer that receives the prior approval of the Commission. The proposed Order also provides that if respondents fail to divest the Liquid Photopolymers business as required by the proposed Order, the Commission may appoint a Divestiture Trustee to divest the business along with any assets related to the business that are necessary to effect the purposes of the proposed Order.

Under the terms of the proposed Order, respondents are required to terminate their distribution agreements with BASF and Asahi. These provisions of the proposed Order are designed to remedy the foreseeable anticompetitive effects of maintaining the existing duopoly in the sale of Sheet Photopolymers in North America. Presently, DuPont and Polyfibron represent over ninety (90) percent of the sales of Sheet Photopolymers in North America. The investigation revealed that prices for Sheet Photopolymers in North America are considerably higher than prices for Sheet Photopolymers in other areas of the world where all of the major world players--DuPont, Polyfibron, BASF and Asahi--compete for business. Furthermore, the investigation revealed evidence of coordinated price activity in the sale of Sheet Photopolymers in North America among the two major firms. By requiring the respondents to terminate the distribution agreements with BASF and Asahi, the order frees BASF and Asahi to enter the North American market independently, and thereby to act as a competitive counterweight to DuPont and respondents.

Analysis to Aid Public Comment

Finally, the proposed Order requires that respondents cease and desist from inviting, creating, maintaining, adhering to, participating in, or enforcing any agreement with any producer of photopolymer products to allocate, divide or illegally restrict competition in the relevant markets. This provision of the proposed Order is designed to further enhance competition in the North American markets for Liquid Photopolymers and Sheet Photopolymers by ensuring that no potential entrant into these markets refrains from entering because of any illegal invitations from or arrangements with the respondents.

The proposed Order requires respondents to provide the Commission, within thirty (30) days of the date the Agreement is signed, with an initial report setting forth in detail the manner in which respondents will comply with the provisions relating to the divestiture of assets. The proposed Order further requires respondents to provide the Commission with a report of compliance with the Order within thirty (30) days following the date the Order becomes final and every thirty (30) days thereafter until they have complied with the divestiture provisions of the Order. Furthermore, the Order requires respondents to report annually to the Commission, for ten (10) years, regarding their compliance with the provisions of the Order relating to the Sheet Photopolymer distribution agreements and market allocation agreements.

The purpose of this analysis is to facilitate public comment on the proposed Order. This analysis is not intended to constitute an official interpretation of the Agreement or the proposed Order or in any way to modify the terms of the Agreement or the proposed Order.