PUBLIC VERSION

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of **Bayer AG,** a corporation, and **Aventis S.A.,** a corporation.	)	Docket No. C-4049

PETITION OF BAYER AG FOR APPROVAL OF PROPOSED DIVESTITURE

Pursuant to Section 2.41(f) of the Federal Trade Commission ("Commission") Rules of Practice and Procedure, 16 C.F.R. § 2.41(f) (2002), and paragraph III.A of the Decision and Order in the above-captioned matter (the "Decision and Order"), Bayer AG ("Bayer") hereby petitions the Commission to approve the divestiture of Bayer's Fipronil Assets (as such term is defined in the Decision and Order) to BASF AG ("BASF").

I. Consent Agreement and Complaint

On May 30, 2002, Bayer, Aventis SA ("Aventis") and the Commission entered into an Agreement Containing Consent Orders, which included the Decision and Order and an Order to Hold Separate and Maintain Assets (collectively, the "Consent Agreement"). The Consent

Agreement, together with the Commission's Complaint, was placed in the public record on June 1, 2002, and was finally approved by the Commission on August 2, 2002. On June 4, 2002, Bayer completed its acquisition of Aventis CropScience, a subsidiary of Aventis. Currently, Bayer's wholly-owned subsidiary, Bayer CropScience AG, owns the Fipronil Assets and operates them in accordance with the Order to Hold Separate and Maintain Assets.

Counts II and III of the Commission's Complaint allege that the acquisition by Bayer of Aventis CropScience will substantially lessen competition in the markets for New Generation Chemical Insecticide Active Ingredients and Products. Accordingly, paragraph III.A of the Decision and Order requires Bayer to divest the Fipronil Assets no later than 180 days from the date the Commission accepted the Consent Agreement for public comment.

This application describes the principal terms of the Sale and Purchase Agreement ("Sale and Purchase Agreement") by which Bayer proposes to divest the Fipronil Assets and explains why the divestiture of the Fipronil Assets to BASF satisfies the purposes of the Decision and Order.

II. <u>The Transaction Documents</u>

On October 28, 2002, Bayer CropScience AG, a wholly owned subsidiary of Bayer, and BASF entered into the Sale and Purchase Agreement for the sale and purchase of the Fipronil Assets. A copy of the Sale and Purchase Agreement and all the attachments, exhibits, and schedules attached thereto (collectively, the "Transaction Documents") is attached to this Application as Confidential Appendix A.

Bayer requests that the Transaction Documents and other information provided in Confidential Appendix A be treated by the Commission as strictly confidential and not be made available to the public. Confidential Appendix A contains commercially and competitively sensitive information relating to the divestiture of the Fipronil Assets. Disclosure of the information contained in the Confidential Appendix to the public will prejudice Bayer and BASF and negatively affect Bayer's ability to comply with the Consent Agreement. Bayer requests that the Commission inform it immediately if the Commission will not treat the confidential version of this application and the accompanying documents and information of Bayer and BASF as confidential so that Bayer may seek appropriate relief.[1]

As explained below, the terms of the Transaction Documents comply with and satisfy the purposes of the Decision and Order.

A. <u>Sale and Purchase Agreement</u>

Under the Sale and Purchase Agreement, Bayer has agreed to sell (and to cause its affiliates to sell) and BASF has agreed to purchase the following assets and rights associated with Fipronil (as those assets and rights are defined in the Sale and Purchase Agreement): (i) the Active Substance Fipronil, its Existing Formulations, all its Existing Mixture Products, and its Pipeline Products; (ii) the Inventories of the items listed under (i); (iii) the Registration Rights, Registration Data Packages, Intellectual Property Rights, Customer Lists, Know How, and all documentation relating to research and development that primarily relate to the Divested Business Fipronil; (iv) the Elbeuf Assets; and (v) other tangible and intangible assets predominately related to the items listed under (i) and the Fipronil Contracts.

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[1] For the convenience of maintaining the public record, Bayer is submitting this application in two versions, one that includes confidential and proprietary information (the "Confidential Information") and another that is the same as the Confidential Version, but with Confidential Appendix A redacted (the "Public Version").

Taking into consideration certain licenses to Bayer, BASF has agreed to pay 1.185 billion for a package of the Fipronil Assets and certain other assets. This price may be adjusted depending on the value of Inventories at the time of closing.

BASF will retain exclusive rights to develop, patent, make, have made, use, sell, offer for sale, and import Fipronil based products for agricultural applications worldwide; Non-agricultural Uses, as that term is defined in the Sale and Purchase Agreement, in Canada, Europe, Africa, Brazil, Mexico, and Australia and New Zealand; and termite applications in the United States. BASF will grant Bayer exlusive rights to (a) Non-agricultural Uses in Asia and Latin America (except Brazil and Mexico); and (b) Non-agricultural Uses in the United States, except for termite applications and liquid formulations (other than glue). Bayer will also retain a license for Fipronil based products to be used in the ICON rice seed treatment business.

B. <u>Employees</u>

Bayer is providing BASF a list of Key Employees working for the divested business outside Elbeuf, France (where the Fipronil production facilities are located). Before closing, BASF may require Bayer to add to the list up to 25 additional employees whose work relates predominately to the divested business. BASF will be provided an opportunity to interview the listed employees, review their employment files, and receive information about them. Bayer and its affiliates must remove any contractual impediments that might deter Key Employees from accepting employment with BASF, may not interfere with their employment by BASF, and may not offer the Key Employees any incentives to decline employment with BASF.

Under the Elbeuf Separation Term Sheet, operations at the Elbeuf Site will be split. Accordingly, certain employees must be transferred to BASF under statutory provisions ("Elbeuf Statutorily Transferred Employees"). An additional 120 employees will also be transferred under the Elbeuf Separation Term Sheet. Under the Sale and Purchase Agreement, Bayer must make reasonable best efforts to cause Rhone-Poulenc Biochimie S.A. -- the current employer of the Elbeuf Statutorily Transferred Employees and the additional 120 employees -- to provide BASF with a list of those employees and their employment files. Bayer may not offer incentives to any of the Elbeuf Statutorily Transferred Employees or the additional 120 employees to decline employment with BASF.

III. The Proposed Acquirer

A. Background

BASF AG of Ludwigshafen, Germany, is one of the world's leading chemical companies. Its Agricultural Products Division is one of the leading provides of crop solutions in the U.S. and worldwide. BASF Corporation is BASF's U.S. affiliate. Both BASF Corporation and the global headquarters of BASF's Agricultural Products Division are based in Mount Olive, New Jersey, at the following address:

BASF Corporation
Agricultural Products
Global Headquarters
3000 Continental Drive-North
Mount Olive, NJ 07828-1234

BASF's stock is publicly traded on the New York Stock Exchange under the ticker symbol BF.

B. Financial Capability

BASF has the financial stability and resources to ensure the continued success of the Fipronil Business as a viable, on-going business. BASF's worldwide sales last year were approximately 32.5 billion Euros.

C. Operation Experience

BASF has the operations and marketing expertise necessary to manage the Fipronil Business successfully. BASF's Agricultural Products Division is a leading supplier and marketer of herbicides, fungicides, and, to a lesser extent, insecticides. Its sales to third parties totaled 3.478 billion Euros in 2001. The Agricultural Products division operates in 170 countries and has research and development centers located in Europe (Limburgerhof, Germany) and in the United States (RTP, North Carolina). BASF Agricultural Products supplies a wide variety of agricultural herbicides, fungicides, plant regulators, and insecticides – which are used in the production of nearly every crop grown in the United States. BASF has previously demonstrated its ability to integrate a large crop protection business when it acquired and successfully integrated American Cyanamid into its Agricultural Products Division in 2000. In 2001, partly as a result of that acquisition, BASF's agricultural sales rose by 1.05 billion Euros.

V. BASF Absence of Market Presence

In its Complaint, the Commission stated concerns that the acquisition by Bayer of Aventis CropScience would substantially lessen competition in alleged markets for New Generation Chemical Insecticide Active Ingredients and Products by leaving Bayer with three of the four allegedly most important New Generation Chemical Active Ingredients (Aventis's

Fipronil and Acetamiprid and Bayer's Imidacloprid). BASF currently has no significant New Generation Chemical Insecticide Active Ingredients or Products. Therefore, the divestiture of Fipronil to BASF does not pose any competitive concerns in these alleged markets.

In non-agricultural products, BASF has only a minor presence in termiticides in the United States, and is forecasted to remain only a minor player. Thus, BASF's acquisition of Fipronil for termiticides will not lessen competition for termiticides.

As explained above, BASF will license to Bayer the rights to fipronil for certain other applications. Bayer offers no products that are significant competitors to fipronil for any of those applications. Accordingly, although the licenses vary in minor respects from those contemplated in the Consent Agreement, they will not lessen competition.

VII. Conclusion

The proposed divestiture of the Fipronil Business to BASF will accomplish the purposes of the Consent Agreement and remedy any alleged lessening of competition in the markets for New Generation Chemical Insecticide Active Ingredients and Products. BASF has the financial capability to ensure the continued operation of the Fipronil Business as a viable business. Furthermore, BASF has the experience and resources necessary to operate the Fipronil Business successfully. BASF has no significant presence in the alleged markets for New Generation Chemical Insecticide Active Ingredients and Products, and the proposed divestiture will create no competitive concerns. Accordingly, Bayer requests that the Commission approve the proposed divestiture and acquirer.

Respectfully submitted,

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