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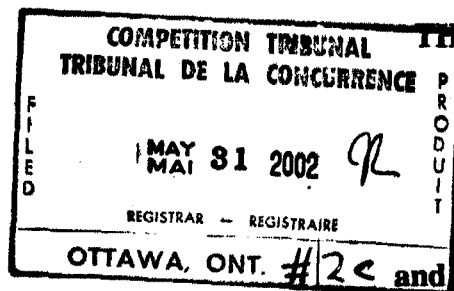
THE COMPETITION TRIBUNAL

IN THE MATTER OF an application by the Commissioner of Competition for an Order pursuant to sections 92 and 105 of the *Competition Act*, R.S.C. 1985, c.C-34, as amended;

AND IN THE MATTER OF an application by the Commissioner of Competition for an Order pursuant to section 104 of the *Competition Act*;

AND IN THE MATTER OF the acquisition by Bayer AG of all of the shares of Aventis CropScience Holding S.A., constituting the agrochemical business of Aventis S.A. and, in Canada, the indirect acquisition by Bayer AG of all of the shares of Aventis CropScience Canada Co.

BETWEEN:



THE COMMISSIONER OF COMPETITION

Applicant

- and -

BAYER AG

and AVENTIS CROPSCIENCE HOLDING S.A.

Respondents

**MEMORANDUM OF ARGUMENT
INTERIM RELIEF**

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Interim Relief

PART I - INTRODUCTION

1. This is an application by the Commissioner of Competition (the "Commissioner") on consent, for an interim order under section 104 of the *Competition Act* (the "Act") requiring the Hold Separate Businesses and the Hold Separate Business Assets, as defined in the Draft Consent Interim Order ("DCIO") to be held separate from the other

businesses of the Respondents, Bayer AG (“Bayer”) and Aventis CropScience Holding S.A. (“ACS”) pending determination of the Commissioner’s application for an Order pursuant to section 92 of the *Act*. The DCIO is required to preserve the ability of the Competition Tribunal (the “Tribunal”) to order divestitures of the specified businesses and business assets to remedy the substantial lessening or prevention of competition which the Commissioner alleges will likely occur if the Respondents are permitted to retain these businesses and assets. The Respondents, Bayer and ACS, have consented to the DCIO sought by the Commissioner.

PART II - FACTS

2. Pursuant to definitive stock purchase agreements, signed effective October 2, 2001, among Bayer, Aventis Agriculture and Schering Aktiengesellschaft ("Schering") and SCIC Holdings LLC ("SCIC"), Bayer intends to acquire all shares in ACS (the “Acquisition”).

Application Record, (VOL. I), Affidavit of Dean Shaikh sworn May 31st, 2002 (“Shaikh Affidavit”), Tab 3 at para. 5.

3. In Canada, as part of the Acquisition, Bayer would acquire Aventis CropScience Canada Co. (“ACS Canada”) and its direct and/or indirect subsidiaries. ACS Canada's business activities include the research, development, manufacture and supply of the following

pesticides: insecticides; seed treatments; herbicides; fungicides; and professional-use pesticides.

Application Record, (VOL. I), Shaikh Affidavit, Tab 3 at para. 6.

4. The Commissioner believes that the Acquisition will likely substantially lessen or prevent competition in the following markets: (a) insecticides for certain fruit and vegetable crops in Canada; (b) seed treatments for canola in Canada; (c) seed treatments for cereals in Canada; and, (d) grassy weed herbicides for spring wheat in Western Canada.

Application Record, (VOL. I), Shaikh Affidavit, Tab 3 at para. 12.

5. This conclusion is set out in the competitive analysis of the Acquisition outlined in the Statement of Grounds and Material Facts.

Application Record, (VOL. I), Shaikh Affidavit, Tab 3 at para. 13.

6. The Bureau has accepted proposed remedies consistent with those accepted by the Competition Directorate-General of the European Commission (the “European Commission”) and the Federal Trade Commission of the United States (the “FTC”). The proposed remedies for Canada relating to the Triticonazole Business and parts of the Iprodione Canola Seed Treatment Business in Canada (as these terms are defined in the

Draft Consent Order) are consistent with the remedies required by the European Commission as set out in paragraphs 129, 145 and 148 of the European Commitments. The proposed remedies for Canada relating to the Acetamiprid Business and the Flucarbazone Business (as these terms are defined in the Draft Consent Order (“DCO”)) are identical to the remedies required by the FTC as set out in Parts II, IV, XI and XII of the FTC’s Decision and Order. Common language is considered necessary to prevent conflict between the remedies proposed in each jurisdiction.

Application Record, (VOL. II), Draft Consent Order, Tab 7.

Application Record, (VOL. I), Shaikh Affidavit, Tab 3 at paras. 16-20.

7. The proposed remedies involve the divestiture of significant intellectual property. Bayer is also required to provide the acetamiprid acquirer with a licence to Iprodione (an active ingredient in fungicide seed treatments for canola).

Application Record, (VOL. I), Shaikh Affidavit, Tab 3 at para. 21.

8. The Commissioner requests that an interim order be issued requiring that the Hold Separate Businesses (as defined in the DCIO) be held separate and apart from the Respondents’ other business operations pending the Tribunal’s final determination of the

Commissioner's application. The proposed order provides for the Hold Separate Businesses to be managed by independent managers, under the supervision of an independent monitor.

Application Record, (VOL. I), Shaikh Affidavit, Tab 3 at paras. 23-24.

9. The Respondents have consented to the proposed interim order. The proposed independent managers, Mr. Wolfgang Bieber, Mr. Vincent Turriès, Mr. Stan Prokopchuk, Mr. Garry Van Den Bussche, Mr. Leo Blydorp and Mr. Bryan Bowden and the independent monitor, Mr. Richard Gilmore have also consented to their appointments.

Application Record, (VOL. II), Consents of the Independent Managers and the Monitor, Tab 8.

Application Record, (VOL. I), Shaikh Affidavit, Tab 3 at paras. 24-26.

PART III - ISSUES AND LAW

(A) Statutory Provisions

10. Section 92 of the *Act* provides:

92(1) Where, on application by the Commissioner, the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially

(a) in a trade, industry or profession,

(b) among the sources from which a trade, industry or profession obtains a product,

(c) among the outlets through which a trade, industry or profession disposes of a product,

or

(d) otherwise than as described in paragraphs (a) to (c), the Tribunal may, subject to sections 94 to 96,

(e) in the case of a completed merger, order any party to the merger or any other person

(i) to dissolve the merger in such manner as the Tribunal directs,

(ii) to dispose of assets or shares designated by the Tribunal in such manner as the Tribunal directs, or

(iii) in addition to or in lieu of the action referred to in subparagraph (i) or (ii), with the consent of the person against whom the order is directed and the Commissioner, to take any other action, or

(f) in the case of a proposed merger, make an order directed against any party to the proposed merger or other person

(i) ordering the person against whom the order is directed not to proceed with the merger,

(ii) ordering the person against whom the order is directed not to proceed with a part of the merger, or

(iii) in addition to or in lieu of the order referred to in subparagraph (ii), either or both

(A) prohibiting the person against whom the order is directed, should the merger or part thereof be completed, from doing any act or thing the prohibition of which the Tribunal determines to be necessary to ensure that the merger or part thereof does not prevent or lessen competition substantially, or

(B) with the consent of the person against whom the order is directed and the Commissioner, ordering the person to take any other action.

- (2) For the purpose of this section, the Tribunal shall not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share.

11. Subsection 104(1) of the *Act* provides:

104(1) Where an application has been made for an order under this Part, other than an interim order under section 100, the Tribunal, on application by the Commissioner, may issue such interim order as it considers appropriate, having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief.

12. Section 105 of the *Act* provides:

105(1) Where an application is made to the Tribunal under this Part for an order and the Commissioner and the person in respect of whom the order is sought agree on the terms of the order, the Tribunal may make the order on those terms without hearing such evidence as would ordinarily be placed before the Tribunal had the application been contested or further contested.

(B) Interlocutory or Injunctive Relief (Three Part Test)

13. Section 104 of the *Act* empowers the Tribunal to issue an interim order pending the determination of an application under section 92. In exercising this power, the Tribunal must have regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief. The Tribunal must thus consider three issues: (i) whether there is a serious issue, (ii) whether irreparable harm would ensue if the interim relief is not granted, and (iii) where the balance of convenience lies.

Competition Act, R.S.C. 1985, c. C-34, section 104.

Canada (Director of Investigation and Research) v. Superior Propane Inc. Reasons for Order released December 6th, 1998 at para. 5 (“*Superior Propane*”).

RJR-MacDonald v. A.G. Canada, [1994] 1 S.C.R. 311 at 334 (“*RJR-MacDonald*”).

Manitoba (Attorney General) v. Metropolitan Stores Ltd., [1987] 1 S.C.R. 110.

American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396.

(i) Serious issue

14. The serious issue threshold is a low one. The Supreme Court of Canada has held that it is only necessary to determine that “the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried”. The Tribunal has applied this statement of the law to section 104 of the *Act*.

RJR-MacDonald, *supra*, at 335.

Superior Propane, *supra*, at para. 7.

Canada (Director of Investigation and Research) v. Southam Inc. (1991), 36 C.P.R. (3d) 22 (C.T.) at 25 (“*Southam*”).

15. The application raises a serious issue. As set out in paragraph 4 above, the Commissioner alleges that the Acquisition will likely result in a substantial lessening or prevention of competition in the provision of certain pesticides throughout Canada.

(ii) Irreparable harm

16. “Irreparable harm” refers to the nature of the harm rather than its magnitude. Harm is irreparable if it cannot be compensated for by money or be cured.

RJR-MacDonald, supra, at 340.

17. Irreparable harm to competition will likely ensue in the absence of the DCIO. The likely harm to competition includes the following:

- (a) The Respondent, Bayer, would be free to integrate the Hold Separate Businesses with its other operations and would be able to exercise the market power the Commissioner alleges will arise if the Respondent, Bayer, acquires certain assets within the Hold Separate Businesses; and
- (b) The Respondent, Bayer, would have access to pricing, customers lists and other confidential information pertaining to those assets within the Hold Separate Businesses.

Application Record, (VOL. I), Shaikh Affidavit, Tab 3 at para. 27.

18. It is submitted that the interim order is necessary to preserve the divestiture of certain assets that are part of the Hold Separate Businesses as an effective remedy in this case.

Application Record, (VOL. I), Shaikh Affidavit, Tab 3 at para. 28.

19. It is respectfully submitted that the form of interim order proposed by the Commissioner will achieve that purpose.

20. The Commissioner submits that the DCIO is necessary to protect divestiture as a valid remedial option until the full implementation of the DCO. As Teitlebaum J. stated in *Southam*:

“Protecting divestiture as a valid remedial option will always be a strong impetus for interim relief in merger cases. The futility of attempting to “unscramble the eggs” upon a later finding that the merger will indeed likely lessen competition substantially is apparent. The legislative scheme attempts to guard against this eventuality by, for example, instituting a regime for pre-notification of some mergers and allowing the Director to apply for interim relief under ss.100 and 104.”

Southam, supra, at 26.

(iii) Balance of convenience

21. In determining where the balance of convenience lies, the Tribunal must “balance the equities between the parties” with a view to ensuring that the interim order is “adequate to its purpose but not any more intrusive or restrictive than is absolutely necessary”.

Southam, supra, at 26.

22. The purpose of the interim order is to preserve the Tribunal's ability to remedy the substantial lessening or prevention of competition that the Commissioner believes is likely to result from the merger. This is in the public interest. Courts and the Tribunal have recognized the importance of the public interest in competition when assessing the balance of convenience.

RJR-MacDonald, supra, at 343-347.

D & B Companies of Canada Ltd. v. Director of Investigation and Research (1994), 58 C.P.R. (3d) 342 (F.C.A.) Aff'g C.T. decision, appended, at 352.

23. Where, as here, the Respondents have consented to the order requested, that should determine the balance of convenience in favour of granting the order.

(C) Conclusion

24. The Commissioner submits that the terms of the DCIO are adequate to preserve divestitures as a valid remedy. They do so by requiring that the Hold Separate Businesses and Hold Separate Business Assets, as defined in the DCIO be held separately from the Respondents' other businesses, managed by independent hold separate managers, and supervised by an independent monitor who will be responsible for monitoring the Respondents' compliance with the proposed order.

Application Record, (VOL. II), Draft Consent Interim Order, Tab 9.

25. The Commissioner submits that the terms of the proposed interim order are not any more intrusive or restrictive than is necessary to preserve divestiture as an adequate remedy. Further, as noted above, the Respondents have consented to the DCIO.

Application Record, (VOL. II), Consent of the Parties, Tab 6.

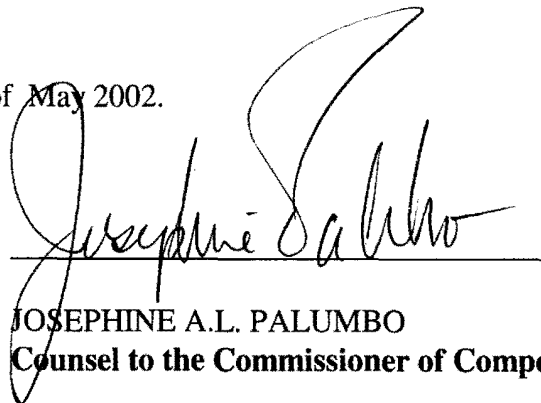
PART IV - ORDER REQUESTED

26. The Commissioner respectfully requests, with the consent of the Respondents, that the Tribunal issue a Consent Interim Order in accordance with the DCIO.

Application Record, (VOL. II), Draft Consent Interim Order, Tab 9.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Gatineau, Québec this 31st day of May 2002.



JOSEPHINE A.L. PALUMBO
Counsel to the Commissioner of Competition