

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

COMMISSIONERS: **Robert Pitofsky, Chairman**
 Sheila F. Anthony
 Mozelle W. Thompson
 Orson Swindle
 Thomas B. Leary

In the Matter of

MACDERMID, INCORPORATED,
a corporation,

and

POLYFIBRON TECHNOLOGIES, INC.,
a corporation.

Docket No. C-

DECISION AND ORDER

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 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 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.
- 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:

1. 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;
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 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;
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 this 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 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.

- 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, 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

1. any liquid photopolymer resins used to produce printing plates,
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.

- U. “Polyfibron Liquid Photopolymer Resins” means all of the kinds and types of liquid photopolymer resins manufactured by Polyfibron used to produce photopolymer printing plates.
- V. “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.

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 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, 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

the period covered by the Order to Maintain Assets in this matter and to accept employment with the Commission-approved acquirer at the time of the divestiture. Such incentives shall consist of:

1. vesting of all pension benefits under the Polyfibron pension plan and Polyfibron's 401(k) Employees Savings and Investment Plan;
 2. continuation of all employee benefits offered by Polyfibron until the divestiture is completed;
 3. 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
 4. 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.
- 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 any customer or client of the Commission-approved acquirer, including Liquid Photopolymer customers or clients of Polyfibron and 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.
- 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 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 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.
- 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 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 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 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:
 1. 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.
 2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Assets To Be Divested.
 3. 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.
 4. 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 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.

5. 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.
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 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 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.
7. 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.

8. 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 misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.
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 Paragraph III.A. of this Decision and Order.
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 necessary or appropriate to accomplish the divestiture required by this Decision and Order.
11. 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.
12. The trustee shall have no obligation or authority to operate or maintain the Assets To Be Divested.
13. 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.

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.

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 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 twenty (20) years after the date on which this Decision and Order is issued by the Commission.

By the Commission.

Donald S. Clark
Secretary

SEAL

ISSUED:

[Schedules A-F Not Included With Electronic Copies of the Decision & Order]