

Complaint

112 F.T.C.

IN THE MATTER OF
COCA-COLA BOTTLING COMPANY
OF THE SOUTHWEST, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket 9215. Complaint, July 29, 1988—Decision, Dec. 20, 1989

This consent order requires, among other things, that Dr Pepper take no action that interferes with the accomplishment of any relief that might be ordered by the Commission against the Coca-Cola Bottling Company of the Southwest.

Appearances

For the Commission: *James E. Elliott, Joan Greenbaum and Constance M. Salemi.*

For the respondents: *Andy Berg and Owen Johnson, Akin, Gump, Strauss, Hauer & Feld, Washington, D.C. Philip D. Bartz, Morrison & Forester, Washington, D.C. Nelson A. Bangs, Dr. Pepper Company, Dallas, Tx. and Gregory S.C. Huffman and Frank L. Hill, Thompson & Knight, Dallas, Tx.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that the respondent, Coca-Cola Company of the Southwest, a corporation, subject to the jurisdiction of the Commission, has acquired the Dr Pepper and the Canada Dry franchises and certain other assets from the San Antonio Dr Pepper Bottling Company, a wholly-owned subsidiary of the then Dr Pepper Company or DP Holdings, Inc., now respondent Dr Pepper/Seven-Up Company, a corporation, that may be in violation of the provisions of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45; and that said acquisition constitutes a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45; and it appearing to the Commission that a proceeding by it in

respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

I. DEFINITIONS

1. For the purposes of this complaint, the following definitions shall apply:

a. "*CCSW*" means Coca-Cola Company of the Southwest and its subsidiaries, divisions, and groups controlled by CCSW and their respective directors, officers, employees, agents and representatives, and their successors and assigns.

b. "*Dr Pepper*" means Dr Pepper/Seven-Up Company and its subsidiaries, divisions and groups controlled by Dr Pepper and their respective directors, officers, employees, agents and representatives, and their successors and assigns.

c. "*San Antonio DPB*" means the San Antonio Dr Pepper Bottling Company and its subsidiaries, divisions and groups controlled by San Antonio DPB and their respective directors, officers, employees, agents and representatives, and their successors and assigns.

d. "*Brand*" or "*brand name*" means the trademarked name of any type of soft drink product and includes warehouse, private label and house brands. For example, "Dr Pepper" and "Diet Dr Pepper" are each separate brands.

e. "*Bottler*" refers to a person that is engaged in bottling soft drinks or that has been granted an exclusive bottling appointment by any manufacturer of soft drink syrup or concentrate.

f. "*Bottles*", "*bottling*" or "*bottled*" means the process of putting syrup or concentrate and other ingredients together as a soft drink in a bottle or can, regardless of the sources of the syrup or concentrate.

g. "*Territory*" means an area for which a bottler has been granted an exclusive bottling appointment.

h. "*Soft drink*" means a carbonated soft drink, as classified under the four-digit Standard Industrial Classification industry code 2086.

II. THE PARTIES

2. CCSW is a privately-held corporation organized and existing under the laws of the State of Texas with its principal place of business located at No. 1 Coca-Cola Place, San Antonio, Texas.

3. In 1984, CCSW's net sales totaled approximately \$90 million.

4. Dr Pepper is a corporation organized and existing under the laws of the State of Texas, with its principal place of business located at 5523 East Mockingbird Lane, Dallas Texas.

5. In 1985, Dr Pepper's net sales totaled approximately \$173 million.

6. CCSW and Dr Pepper 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 Federal Trade Commission Act, as amended, 15 U.S.C. 44.

III. THE ACQUISITION

7. On or about September 1984, CCSW acquired from San Antonio DPB, a wholly-owned subsidiary of Dr Pepper, the Dr Pepper and the Canada Dry franchises and other assets which include, among other things, some of the San Antonio DPB delivery trucks, Dr Pepper-identified vending machines and a warehouse. CCSW paid approximately \$14.5 million for the franchises and other assets. At the time of the acquisition CCSW and San Antonio DPB bottled, distributed and sold soft drinks in the San Antonio area. After the acquisition the remaining portion of San Antonio DPB became the Big Red Bottling Company.

IV. TRADE AND COMMERCE

Relevant Line of Commerce

8. A relevant line of commerce in which to analyze CCSW's acquisition of the Dr Pepper and the Canada Dry franchises is no broader than all soft drinks.

Relevant Sections of the Country

9. Relevant sections of the country are approximately a ten-county area surrounding and including San Antonio, Texas. This area encompasses the territories of the Dr Pepper and the Canada Dry franchises acquired by CCSW. These counties may include, but are not limited to, Atascosa, Bandera, Bexar, Frio, Kendall, Medina, Wilson and parts of Blanco, Comal, and Karnes counties.

V. MARKET STRUCTURE

10. The production, distribution and sale of soft drinks is highly

concentrated, whether measured by the Herfindahl-Hirshmann indices or two-firm and four-firm concentration ratios.

VI. ENTRY CONDITIONS

11. Entry into the relevant markets is difficult or unlikely.

VII. COMPETITION

12. CCSW and San Antonio DPB were actual competitors in the production, distribution and sale of soft drinks in the ten-county area.

VIII. EFFECTS

13. The effect of the acquisition may be substantially to lessen competition in the relevant line of commerce and the relevant sections of the country in the following ways, among others:

- a. By significantly weakening the Big Red Bottling Company, raising its costs and reducing its output;
- b. By reducing competition between Coca-Cola and other soft drink brands and the Dr Pepper and the Canada Dry soft drink brands;
- c. By increasing the likelihood of, or facilitating, actual or tacit collusion; or
- d. By increasing the likelihood that CCSW will unilaterally exercise market power.

14. Any or all of the above increase the likelihood that firms will increase prices and restrict output both in the near future and in the long term.

15. The acquisition by CCSW of San Antonio DPB's Dr Pepper and Canada Dry franchises and other assets violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and Section 7 of the Clayton Act, 15 U.S.C. 18.

Commissioner Azcuenaga recused.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging respondents Coca-Cola Bottling Company of the Southwest and Dr Pepper/7-Up Companies, Inc. with violation 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 having been served with a copy of that complaint, together with a notice of contemplated relief; and

Respondent Dr Pepper/7-Up Companies, Inc., its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by Dr Pepper/7-Up Companies, Inc. of all jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication as to respondent Dr Pepper/7-Up Companies, Inc. in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now, in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Dr Pepper/7-Up Companies, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of Delaware with principal offices at 8144 Walnut Hill Lane, Dallas, Texas.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent Dr Pepper/7-Up Companies, Inc., and the proceeding is in the public interest.

ORDER

I.

DEFINITIONS

For purposes of this order the following definitions shall apply:

A. "*Dr Pepper*" means Dr Pepper/Seven-Up Companies, Inc., a corporation organized, existing and doing business under and by virtue of the laws of Delaware with its principal place of business at 8144 Walnut Hill Lane, Dallas, Texas, and its directors, officers, agents, and employees, and its subsidiaries, divisions, affiliates, successors, and assigns;

B. "*CCSW*" means Coca-Cola Bottling Company of the Southwest, a corporation organized, existing and doing business under and by

virtue of the laws of Delaware with its principal place of business at One Coca-Cola Plaza, San Antonio, Texas and its directors, officers, agents, and employees, and its subsidiaries, divisions, affiliates, successors, and assigns;

C. "*Asset Purchase Agreement*" means the Asset Purchase Agreement Between San Antonio Dr Pepper Bottling Company, Dr Pepper Company and Coca-Cola Bottling Company of the Southwest, dated as of August 28, 1984;

II.

It is ordered, That Dr Pepper shall take no action that interferes with the accomplishment of any relief that might be ordered by the Commission against CCSW in this proceeding to the extent that it prohibits CCSW from retaining any assets or business conveyed to CCSW under the Asset Purchase Agreement or to the extent that it orders CCSW to cease and desist from bottling or distributing any products pursuant to the Asset Purchase Agreement.

III.

It is further ordered, That for a period of ten years following the date of this order, for the purpose of determining compliance with this order, upon written request of the Federal Trade Commission, the Director or any Assistant Director of the Bureau of Competition or the Director of the Dallas Regional Office of the Federal Trade Commission made to Dr Pepper at its principal offices and subject to any legally recognized privilege, Dr Pepper shall permit duly authorized representatives of the Federal Trade Commission, of the Bureau of Competition or of the Dallas Regional Office:

A. Reasonable access during the office hours of Dr Pepper, which may have counsel present, to those books, ledgers, accounts, correspondence, memoranda, reports and other records and documents in Dr Pepper's possession or control that relate to any matter contained in this order; and

B. An opportunity, subject to the reasonable convenience of Dr Pepper, to interview officers or employees of Dr Pepper, who may have counsel present, regarding such matters.

IV.

It is further ordered, That Dr Pepper shall cooperate in this proceeding by producing, at its own expense, information and documents in its possession, custody or control and individuals to provide deposition or hearing testimony as may be requested by complaint counsel in connection with this proceeding.

V.

It is further ordered, That, while paragraph III of this order is effective, Dr Pepper shall notify the Commission at least thirty (30) days prior to any proposed corporate change such as dissolution, assignment of substantially all assets, sale, or acquisition resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries in the United States, or any other change in the corporation which may affect compliance with the obligations arising out of this order.

VI.

It is further ordered, That, within sixty (60) days after service upon Dr Pepper of the Commission's final order against CCSW in this proceeding and at such other times as the Commission or its staff may request, Dr Pepper shall file with the Commission a verified written report setting forth in detail the manner and form in which Dr Pepper has complied with this order.

Commissioner Azcuenaga recused.

Complaint

IN THE MATTER OF

SOCIETE NATIONALE ELF AQUITAINE, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket C-3270. Complaint, Dec. 28, 1989—Decision, Dec. 28, 1989

This consent order requires, among other things, the corporation, based in Paris, to divest a chemical plant in New Jersey, to a Commission-approved acquirer, and to "hold separate" the entire fluorocarbon division, to eliminate antitrust concerns created by its acquisition of Pennwalt Corporation.

Appearances

For the Commission: *Howard Morse* and *Edward F. Glynn*.

For the respondents: *Wayne D. Collins, Shearman & Sterling*, New York City and *Stephen A. Stack, Jr., Dechert, Price & Rhoads*, Philadelphia, Pa.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondents, Societe Nationale Elf Aquitaine, a corporation; Atochem S.A., a corporation; Elf Aquitaine, Inc., a corporation; Atochem North America, Inc., a corporation; Atochem, Inc., a corporation (collectively "Elf"), all subject to the jurisdiction of the Federal Trade Commission, propose to acquire substantially all of the common stock of respondent, Pennwalt Corporation ("Pennwalt"), a corporation, also subject to the jurisdiction of the Federal Trade 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"), 15 U.S.C. 45; and 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 Societe Nationale Elf Aquitaine ("SNEA") is a French corporation with its office and principal place of business at Tour Elf, 92078 Paris La Defense, France.

2. Respondent Atochem S.A. is a French corporation with its office and principal place of business at 4-8 Cours Michelet, 92091 Paris La Defense, France.

3. Respondent Elf Aquitaine, Inc. is a corporation organized under the laws of the State of Delaware with its office and principal place of business at High Ridge Park, P.O. Box 10037, Stamford, Connecticut.

4. Respondent Atochem North America, Inc. is a corporation organized under the laws of the State of Delaware with its office and principal place of business at High Ridge Park, P.O. Box 10037, Stamford, Connecticut.

5. Respondent Atochem Inc. is a corporation organized under the laws of the State of Delaware with its office and principal place of business at 266 Harristown Road, Glen Rock, New Jersey.

6. Respondent Pennwalt is a corporation organized under the laws of the Commonwealth of Pennsylvania with its office and principal place of business at Three Parkway, Philadelphia, Pennsylvania.

7. Respondents at all times herein have been and now are 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 business or practices are in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

II. THE ACQUISITION

8. On or about March 20, 1989, Pennwalt entered into an Agreement and Plan of Merger with Elf, in which Elf agreed to purchase substantially all of Pennwalt's common stock. Purchase of substantially all of Pennwalt's common stock would give Elf control of Pennwalt. The total value of the proposed acquisition is approximately \$1.06 billion.

III. THE RELEVANT MARKETS

9. For purposes of this complaint, the relevant lines of commerce in which to analyze the proposed acquisition of Pennwalt are the production and distribution of vinylidene fluoride ("VF₂") and polyvinylidene fluoride ("PVDF").

10. For purposes of this complaint, the relevant geographic markets are worldwide.

11. Production and distribution of both VF₂ and PVDF are highly concentrated, whether measured by Herfindahl-Hirschmann indices or two-firm and four-firm concentration ratios in each relevant market.

12. Entry into the relevant markets set out in paragraphs 9 and 10 herein, is very difficult and time consuming.

13. Elf and Pennwalt are actual competitors in the production and distribution of both VF₂ and PVDF.

IV. EFFECTS

14. The effect of the acquisition may be substantially to lessen competition in the relevant markets described above in paragraphs 9 and 10 in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the FTC Act, 15 U.S.C. 45, by, among other things:

a. Eliminating substantial actual competition between Elf and Pennwalt;

b. Eliminating Elf as a perceived and potentially more significant competitive force than it is at present, especially in the sale of PVDF used in architectural coatings;

c. Significantly enhancing the likelihood of collusion or interdependent coordination between or among the firms that produce or sell the relevant products; and

d. Tending to create a dominant firm in the relevant markets.

V. VIOLATION CHARGED

13. The acquisition as set forth in paragraph 8 herein violates 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.

Chairman Steiger and Commissioner Owen not participating.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of section 7 of the Clayton Act and section 5 of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of

said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, 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 Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Societe Nationale Elf Aquitaine ("SNEA") is a French corporation with its office and principal place of business at Tour Elf, 92078 Paris La Defense, France.

2. Respondent Atochem S.A. is a French corporation with its office and principal place of business at 4-8 Cours Michelet, 92091 Paris La Defense, France.

3. Respondent Elf Aquitaine, Inc. 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 at High Ridge Park, P.O. Box 10037, Stamford, Connecticut.

4. Respondent Atochem North America, Inc. 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 at High Ridge Park, P.O. Box 10037, Stamford, Connecticut.

5. Respondent Atochem Inc. 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 at 266 Harristown Road, Glen Rock, New Jersey.

6. Respondent Pennwalt is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania with its office and principal place of business at Three Parkway, Philadelphia, Pennsylvania.

7. 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.

As used in this order, the following definitions shall apply:

a. "*Acquisition*" means SNEA's acquisition of any or all voting securities of Pennwalt.

b. "*SNEA*" means Societe Nationale Elf Aquitaine, a French corporation, its predecessors, any other corporations, partnerships, joint ventures, companies, subsidiaries, divisions, groups and affiliates that Societe Nationale Elf Aquitaine controls, directly or indirectly, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

c. "*Pennwalt*" means Pennwalt Corporation, a Pennsylvania corporation, as it was constituted prior to the acquisition, its predecessors, any other corporations, partnerships, joint ventures, companies, subsidiaries, divisions, groups and affiliates Pennwalt controls, directly or indirectly, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

d. "*Atochem*" means Atochem S.A., a French corporation, a directly wholly-owned subsidiary of SNEA, its predecessors, any other corporations, partnerships, joint ventures, companies, subsidiaries, divisions, groups and affiliates Atochem S.A. controls, directly or indirectly, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

e. "*EAP*" means Elf Aquitaine, Inc., a Delaware corporation and a directly wholly-owned subsidiary of SNEA, its predecessors, any other corporations, partnerships, joint ventures, companies, subsidiaries, divisions, groups and affiliates Elf Aquitaine, Inc. controls, directly or indirectly, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

f. "*Atochem Inc.*" means Atochem Inc., a Delaware corporation and an indirectly wholly-owned subsidiary of SNEA, its predecessors, and other corporations, partnerships, joint ventures, companies, subsidiaries, divisions, groups and affiliates Atochem Inc. controls, directly or indirectly, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

g. "*ANA*" means Atochem North America, Inc., a Delaware corporation and an indirectly wholly-owned subsidiary of SNEA, its

predecessors, any other corporations, partnerships, joint ventures, companies, subsidiaries, divisions, groups and affiliates Atochem North America, Inc. controls, directly or indirectly, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

h. "*Respondents*" means SNEA, Atochem S.A., Elf Aquitaine, Inc., Atochem Inc., Atochem North America, Inc. and Pennwalt.

i. "*PVDF*" means polyvinylidene fluoride homopolymers and copolymers.

j. "*VF₂*" means vinylidene fluoride monomer.

k. "*Thorofare Plant*" means the manufacturing facility currently owned and operated by Pennwalt located at Thorofare, New Jersey, and all of its assets, title, properties, interests, rights and privileges, of whatever nature, tangible and intangible, including without limitation all buildings, machinery, equipment, customer lists, and other property of whatever description, and including the right to use in the United States on a nonexclusive basis (under a license, lease, contract or similar arrangement) Pennwalt's current technology and know-how employed to produce HCFC-142b and VF₂ at such plant and all Pennwalt's commercial grades of PVDF whether or not produced at such plant.

l. "*Acquirer*" shall have the meaning given to the term in Section II.

m. "*Commission*" means the Federal Trade Commission.

II.

It is ordered, That respondents shall divest, absolutely and in good faith, to an acquirer that receives the prior approval of the Commission (the "acquirer"), within twelve (12) months after the date this order becomes final, the Thorofare Plant.

III.

It is further ordered, That:

A. If respondents have not divested the Thorofare Plant as contemplated by Section II within the twelve-month period provided for in Section II, respondents shall consent to the appointment of a trustee empowered to divest the Thorofare Plant. In the event that the Commission 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. The appointment of a trustee shall not preclude the Commission from seeking civil penalties or any other relief available to it for any failure by respondents to comply with this order.

B. The trustee shall also be empowered to include in the assets to be divested a commitment from respondents to provide the acquirer for a period of at least one (1) year from the date of divestiture with technical assistance required by said acquirer to operate the Thorofare Plant using the proprietary technology and know-how licensed as part of the divestiture of the Thorofare Plant. If the commitment to provide technical assistance to the acquirer is included in the assets that the trustee is empowered to divest and if the Commission determines that respondents have not complied with its commitment, the Commission may extend the period of the commitment in addition to any other remedies available to the Commission.

C. 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 at no minimum price. The trustee shall make the divestitures contemplated by this Section III only to an acquirer that receives the prior approval of the Commission, and only in manner that receives the prior approval of the Commission.

D. If a trustee (the "trustee") is appointed by the Commission or a court in order to discharge respondents' obligations under Section III of this order, the following terms and conditions shall apply to the trustee's duties 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.

(2) The trustee shall have the power and authority to accomplish the divestiture contemplated by Section III of this order. The trustee shall have twelve (12) months from the date of appointment to accomplish the divestiture, which shall be subject to the prior approval of the Commission and, if the trustee is appointed by a court, subject also to the prior approval of the court. If, however, at the end of such twelve-month period the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or by the court

for a court-appointed trustee; *provided, however*, that the Commission or court may only extend the divestiture period two (2) times.

(3) Respondents shall make available in the United States to the trustee and the trustee shall have full and complete access to the personnel, books, records and facilities of any businesses that the trustee has the duty to divest. Respondents shall develop such financial or other information as the trustee may reasonably request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture.

(4) 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 at no minimum price.

(5) The trustee shall serve 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 authority to employ such consultants, accountants, attorneys or other persons reasonably necessary to carry out the trustee's duties and responsibilities and respondents shall bear the expense for such services. The trustee shall account for all monies derived from the sale 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 accomplishing the divestiture of the Thorofare Plant.

(6) Within sixty (60) days after appointment of the trustee, and subject to the prior approval of the Commission, and, in the case of a court-appointed trustee, of the court, the respondents shall execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture for which the trustee is responsible.

(7) If the trustee ceases to act or fails to act diligently, one or more substitute trustees shall be appointed in the same manner as provided in this Section III of the order.

(8) The trustee shall report in writing to respondents and the Commission every sixty (60) days concerning each trustee's efforts to accomplish the divestiture.

IV.

It is further ordered, That:

A. The Agreement to Hold Separate, attached hereto and made a part hereof as Appendix I, shall continue in effect until respondents' divestiture obligations under Sections II and III of the order are satisfied, or until such other time as the Agreement to Hold Separate provides, and the respondents shall comply with all terms of said Agreement.

B. The divestiture required by the order shall be made only to an acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture required by this order is to ensure the continuation of an ongoing viable enterprise and to remedy the lessening of competition charged in the Commission's complaint.

C. Respondents shall take such action as is necessary to maintain the viability and marketability of the Thorofare Plant, and to prevent the destruction, removal or impairment of any assets subject to possible divestiture pursuant to this order except in the ordinary course of business and except for ordinary wear and tear.

V.

It is further ordered, That within sixty (60) days after the date of this order becomes final and every sixty (60) days thereafter until respondents have fully satisfied the divestiture obligation of this 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 or have complied with the order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of all contacts or negotiations with prospective acquirers for the divestiture required by this order, including the identity of all parties contacted. Respondents also shall include in their compliance reports copies of all written communications to and from such parties, and all internal memoranda, reports, and recommendations concerning the required divestiture.

VI.

It is further ordered, That for the purposes of determining or

securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to respondents made to their principal offices, respondents shall make available to any duly authorized representatives of the Commission:

A. 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 order, for inspection and copying in the United States during office hours and in the presence of counsel; and

B. Upon five (5) days' notice to respondents, and without restraint or interference from respondents, for interview in the United States, officers or employees of respondents, who may have counsel present, regarding such matters.

VII.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in any respondent, such as dissolution, assignment or sale resulting in the emergence of a successor, or the creation or dissolution of subsidiaries or any other change that may affect compliance with this order.

VIII.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, each respondent shall cease and desist from acquiring, without the prior approval of the Commission, directly or indirectly, through subsidiaries or otherwise, assets used or previously used in (and still suitable for use in), or the whole or any part of the stock or share capital of, or interest in, any company engaged in, the manufacture or sale of PVDF or VF₂ in the United States. One year from the date this order becomes final and annually thereafter for nine (9) more years, respondents shall file with the Commission a verified written report of their compliance with this paragraph.

Chairman Steiger and Commissioner Owen not participating.

APPENDIX I.

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate (the "Agreement") is by and between Société Nationale Elf Aquitaine, a French limited company ("SNEA"), Atochem S.A., a French limited company, Atochem North America, Inc., a Delaware corporation, Elf Aquitaine, Inc., a Delaware corporation, Atochem Inc., a Delaware corporation, Pennwalt Corporation, a Pennsylvania corporation (collectively the "Respondents"), and the Federal Trade Commission (the "Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41 *et seq.* (Respondents and the Commission collectively, the "Parties").

PREMISES

Whereas, Elf Aquitaine, Inc. ("EAI"), a direct wholly-owned subsidiary of SNEA, and AC Development, Inc. ("AC"), an indirect wholly-owned subsidiary of SNEA, commenced a tender offer on March 23, 1989, as amended, for all outstanding shares of Pennwalt Corporation ("Pennwalt"), with the intent of effecting a merger of AC into Pennwalt, pursuant to which Pennwalt would become a wholly-owned subsidiary of SNEA (the "Acquisition"), all as contemplated by and provided for in that certain Agreement and Plan of Merger dated as of March 20, 1989, among SNEA, EAI, AC and Pennwalt; and

Whereas, the Commission has reason to believe that the Acquisition would violate the statutes enforced by the Commission; and

Whereas, if the Commission accepts the attached Agreement Containing Consent Order (the "Consent Order"), the Commission must place it on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission is concerned that if an understanding is not reached to preserve the status quo ante and to hold separate the assets and businesses of the Fluorochemicals Division of Pennwalt (the "Division") until the divestiture contemplated by the Consent Order has been made, divestiture resulting from any proceeding challenging the legality of the acquisition might not be possible or might be less than an effective remedy; and

Whereas, the purpose of this Agreement and the Consent Order is to preserve the assets to be divested as a viable business pending

divestiture, and to preserve the Commission's ability to require the divestiture of properties described in the Consent Order and to remedy any anticompetitive aspects of the Acquisition; and

Whereas, Respondents' entering into this Agreement shall in no way be construed as an admission by Respondents that the Acquisition is unlawful; and

Whereas, Respondents understand that no act or transaction contemplated by this Agreement shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Agreement.

Now, therefore, the Parties agree, upon the understanding that the Commission has determined that the Acquisition would be challenged, and in consideration of the Commission's agreement that, unless the Commission determines to reject the Consent Order, it will not seek further relief from Respondents with respect to the Acquisition, except that the Commission may exercise any and all rights to enforce this Agreement and the Consent Order to which it is annexed and made a part thereof, as follows:

1. Respondents agree to execute and be bound by the attached Consent Order.

2. Respondents agree that, until the first to occur of (i) three business days after the Commission withdraws its acceptance of the Consent Order pursuant to the provisions of Section 2.34 of the Commission's Rules; or (ii) if the Commission issues the Consent Order finally, until the date the divestiture required by the Consent Order is accomplished, Respondents shall hold the Division separate and apart on the following terms and conditions:

a. All of the Division's assets and businesses shall be operated independently of Respondents.

b. Except as is necessary to assure compliance with this Agreement and the Consent Order, Respondents shall not exercise direction or control over, or influence directly or indirectly, the Division.

c. Respondents shall not change the composition of the management of the Division, except that they may replace the head of the Division for cause.

d. Respondents shall not cause or permit the wasting or deterioration of the Division assets in any manner that impairs the marketability of such assets and operations or that impairs in any manner the viability of the assets and operations as a going concern until such

time as the divestiture to a Commission-approved acquirer, as required by the Consent Order, has been accomplished.

e. Respondents shall maintain separate financial and operating books and records, shall prepare separate financial statements for the Division assets and shall, within ten (10) days after they become available, provide the Commission's Bureau of Competition with quarterly and annual financial statements for the Division assets, which annual financial statements shall be audited and certified by independent certified public accountants.

f. Except as required by law, and except to the extent that necessary information is exchanged in the course of defending investigations or litigation, or to comply with any of Respondent's obligations under this Agreement or the Consent Order, Respondents shall not receive or have access to, or the use of, any "material confidential information" relating to the Division not in the public domain, except as such information would be available in the normal course of business if the Acquisition had not taken place. Any such information that is obtained pursuant to this subparagraph shall only be used for the purposes set out in this subparagraph. "Material confidential information", as used herein, means competitively sensitive or proprietary information, including but not limited to customer lists, price information, marketing methods, patents, technologies, processes, and sales of individual products and product lines, but shall not include information in the public domain, information which would be available to Respondents in the normal course of business if the Acquisition had not taken place, information independently known to Respondents from sources other than Pennwalt, and information on Division-wide sales and profits. Respondents shall not disclose to any third person or use to obtain any advantage for itself any material confidential information which it may be permitted to receive under this Agreement.

g. Nothing herein shall prevent Respondents requiring their prior approval of the following actions concerning the Division: (i) capital expenditures in excess of \$1,500,000; (ii) sale of any capital assets for more than \$1,500,000; and (iii) actions reasonably necessary to assure that the Parties comply with their obligations under the Consent Order.

h. Notwithstanding paragraphs a through g above Respondents may engage in joint research and development activities with the Division with respect to chlorofluorocarbons ("CFCs") substitutes.

3. Should the Commission seek in any proceeding to compel Respondents to divest itself of the shares of Pennwalt stock that SNEA may acquire, or to compel respondents to divest any assets or businesses respondents may hold, or to seek any other injunctive or equitable relief, respondents shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted Pennwalt stock to be acquired. Respondents also waive all rights to contest the validity of this Agreement.

4. In the event the Commission has not finally approved and issued the Consent Order within one hundred twenty (120) days of its publication in the Federal Register, respondents may, at their option, terminate this Agreement to Hold Separate by delivering written notice of termination to the Commission, which termination shall be effective ten (10) days after the Commission's receipt of such notice, and this Agreement shall thereafter be of no further force and effect. If this Agreement is so terminated, the Commission may take such action as it deems appropriate, including but not limited to an action pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b). Termination of this Agreement to Hold Separate shall in no way operate to terminate the Agreement Containing Consent Order that respondents have entered into in this matter.

5. For the purpose of determining or securing compliance with this Agreement, subject to any legally recognized privilege, and upon written request and on reasonable notice to respondents made to their principal offices, respondents shall make available to any duly authorized representatives of the Commission:

a. 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 Agreement, for inspection and copying in the United States during office hours and in the presence of counsel; and

b. Upon five (5) days' notice to respondents and without restraint or interference from respondents for interview in the United States, officers or employees of respondents, who may have counsel present, regarding such matters.

Any information or documents obtained by the Commission from Respondents shall be accorded such confidential treatment as is available under Sections 6(f) and 21 of the Federal Trade Commission Act, 15 U.S.C. 46(f) and 57b-2.

6. This Agreement shall not be binding until approved by the Commission.

Clarification of three provisions of a 1972 order concerning safety claims for its tires. [*Firestone Tire and Rubber Company, D-8818*]

November 30, 1989

Dear Mr. Haase:

On July 7, 1989, respondent in the above-referenced matter filed with the Commission a request pursuant to Rule 2.51 of the Commission's Rules of Practice for a reopening of the proceeding and a modification of the order entered therein. In the alternative, respondent requested an Advisory Opinion from the Commission, pursuant to Rule 2.41, interpreting several provisions of the order in a manner that would obviate the need for the proposed modifications. The Commission has determined to issue the requested Advisory Opinion and, therefore, has not considered whether the proceeding should be reopened and the order modified.

Firestone is concerned with the interpretation of three aspects of the order. First, respondent points to the provision in paragraph 3 prohibiting any representation "that respondent's tires will be safe under all conditions of use," and to paragraph 5, which requires substantiation for representations "that any of respondent's automobile tires have any safety or performance characteristic."

Respondent contends that neither one of the quoted expressions covers, or should cover, such generalized claims as "Quality you can trust," "Because so much is riding on your tires," or "Performance, safety, and price all rolled into one." Firestone argues that such generalized safety claims do not amount to representations that a tire is "safe under all conditions of use" or that a tire has a "safety characteristic."

The Commission agrees that paragraph 3 of the order was not intended to apply to all representations regarding tire safety. In particular, the Commission believes that this provision of the order does not apply to generalized safety claims, such as those noted above. In reaching this conclusion, the Commission notes that in its administrative complaint against Firestone it cited six Firestone advertisements as violating the FTC Act and that four of them explicitly referred to tire safety. Yet in that complaint the Commission only charged one of those advertisements (the "Safe Tire" advertisement) with being a representation that Firestone tires were safe under

all conditions of use. The Commission did not allege that the other advertisements that explicitly made safety claims (the "Safety Champion" advertisements) also made that representation.

Therefore, it is the Commission's opinion that a generalized safety claim such as "Quality you can trust," "Because so much is riding on your tires," or "Performance, safety, and price all rolled into one" would not constitute a representation, direct or implied, that Firestone tires will be "safe under all conditions of use" and, consequently, would not be prohibited under paragraph 3. Of course, any generalized safety claim that is unfair or deceptive would still be prohibited by Section 5(a) of the FTC Act.

The Commission also agrees with Firestone that the substantiation requirement contained in paragraph 5 of the order was not intended to apply to generalized safety claims. Such claims do not refer to any particular safety or performance characteristic and the Commission has never interpreted the order to require scientific testing for such claims.

Therefore, it is the Commission's opinion that a generalized safety claim would not be subject to paragraph 5's requirement of scientific testing for any representation, direct or implied, of a safety characteristic. For example, such claims as "Quality you can trust," "Because so much is riding on your tires," and "Performance, safety, and price all rolled into one" are generalized safety claims for which paragraph 5 of the order does not require scientific testing. By contrast, claims that relate to a specific, objectively verifiable tire characteristic such as "Tests show our tires are 30% less likely to blow out on the highway," "The indestructible tire," or "Five times stronger than steel of the same weight" would require scientific testing.

The second aspect of the order about which Firestone is concerned also involves the substantiation requirement in paragraph 5. This provision prohibits representations

that any of respondent's automobile tires have any safety or performance characteristic or are superior in quality or performance to other products unless each such characteristic was fully and completely substantiated by competent scientific tests, with the results of the test, the original test data collected in the course of the test, and a detailed description of how the test was performed available in written form for inspection for at least three years following the final use of the representation.

Firestone states that it is unsure what is meant by the expression

“fully and completely substantiated by competent scientific tests” in paragraph 5. According to respondent, this phrase might require “absolute proof” for claims about safety or performance characteristics, rather than the level of substantiation that is typically required in Commission orders requiring scientific substantiation.

Paragraph 5 should be interpreted in a manner consistent with the Commission’s Opinion in *Firestone* (81 FTC 463 (1972)), and with the Commission’s other orders that contain requirements of scientific testing. See, e.g., *Jerome Milton, Inc.*, 110 FTC 104 (1988). Moreover, in the *Firestone* Opinion the Commission stated that:

In our view a scientific test is one in which persons with skill and expertise in the field conduct the test and evaluate its results in a disinterested manner using testing procedures generally accepted in the profession which best insure accurate results. This is not to say that respondent always must conduct laboratory tests. The appropriate test depends on the nature of the claim made. Thus a road or user test may be an adequate scientific test to substantiate one performance claim, whereas a laboratory test may be the proper test to substantiate another claim. Respondent’s obligation is to assure that any claim it makes is adequately substantiated by the results of whatever constitutes a scientific test in those circumstances.

Therefore, it is the Commission’s opinion that the expression “fully and completely substantiated by competent scientific tests” found in paragraph 5 means substantiated by tests in which persons qualified by professional training, education and experience formulate and conduct the tests and evaluate their results using testing procedures which are generally accepted in the profession to attain valid and reliable results.

Finally, Firestone seeks clarification of the Commission’s interpretation of paragraph 4 of the order. This provision prohibits respondent from

making any representation, directly or by implication, regarding the safety of respondent’s tires without disclosing clearly and conspicuously and in close conjunction with such representation that the safety of any tire is affected by conditions of use, such as inflation pressure, vehicle weight, wear, and other operating conditions (emphasis added).

Firestone concedes that this paragraph covers all safety claims, whether general or specific, but argues that the required disclosure need not contain the precise words underlined above. The Commission agrees. The absence of quotation marks surrounding the above

passage in the order and the discussion of this provision in the *Firestone* Opinion, 81 FTC at 463-64, indicate that the Commission intended to leave the exact wording of the disclosure up to Firestone, as long as any disclosure used adequately conveys the desired message.

Therefore, it is the Commission's opinion that paragraph 4 would be satisfied by a disclosure that states that "tire safety requires proper care and use," along with a statement directing consumers to their Firestone retailers for a copy of Firestone's safety brochure.

By direction of the Commission, Commissioner Strenio dissenting.

DISSENTING STATEMENT OF COMMISSIONER ANDREW J. STRENIO, JR.

The Commission majority has issued an advisory letter that, among other things, informs Firestone Tire & Rubber Co. that generalized safety claims are not covered by paragraph 5 of the 1972 order and that such claims do not require scientific substantiation. This aspect of the advisory letter is inconsistent with the existing Commission order and contrary to the public interest. Accordingly, I respectfully dissent.

First, I think that in issuing the order in 1972 the Commission intended to require substantiation not only for claims about specific safety attributes, such as "Firestone tires are puncture-resistant," but also for overall claims such as "Firestone tires are safe." Indeed, the concurrent Commission opinion took an inclusive approach. The ALJ's substantiation provision used the expansive phrase, "have any safety or performance characteristics." The Commission proceeded to interpret the ALJ's provision as covering, "any representations as to ... quality, safety or performance." Although the Commission changed other parts of the ALJ's substantiation requirement, it retained the "any safety or performance characteristics" language. Thus, it appears that the substantiation provision covers all safety claims, regardless of whether those claims are specific or generalized.

Second the rationale for treating "generalized safety claims" more leniently than "specific safety claims" is strained at best. It seems illogical to allow a possibly lower level of substantiation for the broad claim of overall safety than for narrower claims of quality regarding a subset of safety attributes, such as puncture resistance.

Finally, I am troubled by the majority's implicit suggestion that for advertising not covered by this order the Commission might require a lesser standard of substantiation for generalized safety claims. In my

view, generalized safety claims such as "Our tires are safe" are objective and verifiable claims covered by the Commission's ad substantiation doctrine.

Applying that standard, all safety claims should be substantiated by scientific evidence as defined by the Commission in the *Firestone* opinion. Specifically, a scientific test must be conducted by persons with skill and expertise in the field who evaluate the results in a disinterested manner and use testing procedures generally accepted in the profession as ensuring accuracy. This is a reasonable and flexible standard that protects the public without being unduly burdensome to Firestone—or to any other manufacturer choosing to make safety claims. In short, this is a standard for safety advertising that the public deserves and expects. The Commission should insist upon this standard of safety advertising substantiation rather than endangering it.

Letter of Request

July 7, 1989

PETITION TO REOPEN PROCEEDING AND MODIFY ORDER
OR, IN THE ALTERNATIVE, FOR AN ADVISORY OPINION

Pursuant to 15 U.S.C. 45(b) and Rule 2.51 of the Commission's Rules of Practice, respondent Firestone Tire and Rubber Company, Inc. ("Firestone") requests that this proceeding be reopened and that paragraphs 3, 4, and 5 of the final order herein be modified. In the alternative, Firestone requests advice pursuant to Rule 2.41(d) of the Commission's Rules of Practice regarding the meaning of these paragraphs. Firestone's specific requests are as follows:

I. Paragraph 3

[Current language orders Firestone to cease and desist from "Using the words, 'the safe tire,' or any other word or phrase of similar import or meaning to describe or designate respondent's tires or otherwise representing directly or by implication, that respondent's tires will be safe under all conditions of use."].

A. Delete; or

B. Modify by substituting the following language:

"Using the words, 'the safe tire' or otherwise representing, directly

or by implication, that respondent's tires will be safe under all conditions of use; *provided*, that a generalized safety claim will not be deemed to imply that respondent's tires will be safe under all conditions of use. For example, claims such as 'Quality you can trust,' 'Because so much is riding on your tires,' and 'Performance, safety, and price all rolled into one' are generalized safety claims that are not prohibited under this section. By contrast, absolute claims such as 'skidproof,' 'blowout proof,' 'indestructible,' or 'fail-safe' are prohibited."'; or

C. Advise Firestone that generalized safety claims such as "Quality you can trust," "Because so much is riding on your tires," and "Performance, safety, and price all rolled into one" do not represent directly or by implication that Firestone tires will be safe under all conditions of use and therefore are not prohibited under paragraph 3.

II. Paragraph 4

[Current language orders Firestone to cease and desist from "Making any representation, directly or by implication, regarding the safety of respondent's tires without disclosing clearly and conspicuously and in close conjunction with such representation that the safety of any tire is affected by conditions of use, such as inflation pressure, vehicle weight, wear, and other operating conditions."].

A. Delete; or

B. Modify by substituting the following language or substantially similar language acceptable to Firestone:

1. "Making any representation, directly or by implication, regarding the safety of respondent's tires without disclosing clearly and conspicuously and in close conjunction with such representation that consumers should see their Firestone retailers for a copy of Firestone's safety brochure"; or

2. "Making any representation, directly or by implication, regarding the safety of respondent's tires without disclosing clearly and conspicuously and in close conjunction with such representation that tire safety requires proper care and use"; or

C. Advise Firestone that paragraph 4 is satisfied by a disclosure that refers consumers to their Firestone retailers for a copy of Firestone's safety brochure, and/or advise Firestone that paragraph 4 is satisfied by a disclosure indicating that tire safety requires proper care and use.

III. Paragraph 5

[Current language orders Firestone to cease and desist from “Representing, directly or by implication, that any of respondent’s automobile tires have any safety or performance characteristic or are superior in quality or performance to other products unless each such characteristic was fully and completely substantiated by competent scientific tests, with the results of the test, the original test data collected in the course of the test, and a detailed description of how the test was performed available in written form for inspection for at least three years following the final use of the representation”].

A. Modify by adding the following language at the end of paragraph 5:

1. “*Provided*, that a generalized safety claim will not be deemed subject to the foregoing requirement of scientific substantiation. For example, such claims as ‘Quality you can trust,’ ‘Because so much is riding on your tires,’ and ‘Performance, safety, and price all rolled into one’ are generalized safety claims that do not require scientific substantiation. By contrast, claims that relate to specific, objectively verifiable tire characteristics such as ‘Tests show our tires are 30% less likely to blow out on the highway,’ ‘The indestructible tire,’ or ‘Five times stronger than steel of the same weight’ do require scientific substantiation.”

And, immediately following the above language:

2. “*And provided further*, that ‘fully and completely substantiated by competent scientific tests’ shall mean substantiated by tests in which one or more persons qualified by professional training, education and experience formulate and conduct the tests and evaluate their results using testing procedures which are generally accepted in the profession to attain valid and reliable results.”; or

B. Advise Firestone that generalized safety claims such as “Quality you can trust,” “Because so much is riding on your tires,” and “Performance, safety, and price all rolled into one” are not subject to paragraph 5, and that “fully and completely substantiated by competent scientific tests” means substantiated by tests in which one or more persons qualified by professional training, education and experience formulate and conduct the tests and evaluate their results using testing procedures which are generally accepted in the profession to attain valid and reliable results.

