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.

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 ("VF_2") and polyvinylidene fluoride ("PVDF").

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

11. Production and distribution of both VF_2 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 VF_2 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. "*EAI*" 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. "VF_2" 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 VF_2 at such plant and all Pennwalt's commercial grades of PVDF whether or not produced at such plant.

1. "*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 VF_2 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 that "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.

The accompanying Memorandum in support of this Petition sets forth the basis for the requested relief.

Respectfully submitted,

Jack R. Bierig
Richard D. Raskin
Sidley & Austin

Of Counsel:

Glenn R. Haase
Paul R. Peterson
The Firestone Tire &
Rubber Company

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

Introduction

Pursuant to 15 U.S.C. 45(b) and Rule 2.51 of the Commission's Rules of Practice, the Firestone Tire and Rubber Company respectfully requests the Federal Trade Commission to reopen Docket No. 8818 and modify paragraphs 3, 4, and 5 of the final order dated September 22, 1972. *See* 37 Fed. Reg. 22,977 (October 27, 1972). Alternatively, Firestone requests an advisory opinion pursuant to Rule 2.41(d) interpreting these provisions as applied to generalized claims of tire safety.

The order is having unintended effects detrimental to consumers and competition. Entered nearly two decades ago, the order today is deterring Firestone from providing consumers with truthful, material product information. In particular, it is preventing Firestone from making the types of generalized safety **[2]** claims that its competitors are making.[1] As a result, consumers are receiving a false picture of the relative merits of competing tire brands.

In the interest of flexibility, Firestone has submitted a number of alternative proposals for relief. These proposals range from deleting particular order provisions to interpreting them through an advisory opinion. While differing in form, the proposals are directed towards common goals: they will enable Firestone to disseminate a greater amount and variety of product information; they will help level the

[1] Paragraphs I-B and III-A of our Petition contain illustrative examples of generalized safety claims.

field of competition in the tire industry; and they will make the market for tires more competitive, to the benefit of consumers.[2]

A. Paragraphs 3 and 4: *The Ban on Unconditional Safety Claims*

Paragraphs 3 and 4 of the order jointly prohibit claims of unconditional, or absolute, tire safety. Specifically, paragraph 3 forbids Firestone from using the words "the safe tire" or "otherwise representing directly or by implication, that [Firestone's] tires will be safe under all conditions of use." Paragraph 4 requires Firestone to disclose in close conjunction **[3]** with any safety representation that "the safety of any tire is affected by conditions of use, such as inflation pressure, vehicle weight, wear, and other operating conditions."

For at least three independent reasons, paragraphs 3 and 4 should be deleted, modified, or clarified through an advisory opinion. First, since 1979 federal law has required Firestone and all other tire manufacturers to make point-of-sale disclosures that exceed the requirements of the order. *See* pp. 22-29, *infra.* During the same period, state liability law has expanded, adding a further incentive for Firestone to continue providing consumers with this information. Indeed, Firestone now provides prospective tire purchasers at the point of sale with extensive safety information that goes well beyond the requirements of the order or other provisions of law. Firestone's point-of-sale disclosures provide information that is at once more detailed, more accurate, more understandable, and more useful to consumers than the burdensome advertising disclosures required by paragraph 4. In light of these point-of-sale disclosures, paragraph 4 no longer provides benefits that justify the substantial burdens it imposes.

Second, the basic factual premise of paragraphs 3 and 4—that, absent qualifying disclosures, reasonable consumers will interpret claims of general tire safety as promising absolute safety—is obsolete. *See* pp. 30-35, *infra.* Because **[4]** consumers today receive a breadth of explicit safety information at the point of sale, it would be unreasonable to presume that they lack knowledge of the fundamentals of proper tire care and use. Indeed, a recent consumer survey by Gallup & Robinson, Inc. confirms that in 1988 reasonable consumers understand that even a good quality tire is not safe under all

[2] The specific terms of Firestone's proposals are contained in the accompanying Petition. The current terms of the order are set forth in an attachment to the Petition.

conditions of use. Reasonable consumers therefore do not interpret truthful, unqualified claims of general safety as asserting absolute safety, nor do they make purchasing decisions based on any such misapprehension.

Third, paragraphs 3 and 4 injure consumers and competition by suppressing truthful, material information about Firestone tires. *See* pp. 35-40, *infra.* In recent years, Firestone's leading competitors have emphasized generalized safety themes in their passenger tire advertising. Firestone, by contrast, has been constrained from making comparable claims. As a result of this constraint, consumers today receive a lesser quantity of truthful product information than they otherwise would. In addition, consumers are led falsely to believe that competing brands of tires are safer than Firestone tires. These facts strongly suggest that, to restore the informational integrity of the tire market, Firestone should be placed on a more equal footing with its competitors. **[5]**

As set forth in specific terms in the accompanying Petition, Firestone proposes the following modifications to paragraphs 3 and 4:

1. Delete either or both provisions; or

2a. Modify paragraph 3 to provide that generalized safety claims will not be deemed to imply that Firestone's tires will be safe under all conditions of use; and/or

b. Modify paragraph 4 to provide that, in consumer advertising, it is sufficient for Firestone to disclose that a copy of Firestone's safety brochure is available at the point of sale, and/or to disclose that tire safety requires proper care and use.

Alternatively, Firestone requests an advisory opinion to the effect that (1) paragraph 3 does not apply to generalized safety claims, and that (2) paragraph 4 is satisfied by a disclosure referring consumers to their Firestone retailers for a copy of Firestone's safety brochure, and/or by a disclosure indicating that tire safety requires proper care and use.

B. Paragraph 5: *The Requirement of Full and Complete Scientific Substantiation*

Under paragraph 5, Firestone may not represent that its tires have any safety or performance characteristic unless each such characteristic is "fully and completely substantiated by competent scientific tests." This provision also is having unintended effects detrimental to

the public interest. These [6] adverse effects can be substantially lessened by clarifying the meaning of paragraph 5 in two respects.

First, the scope of paragraph 5 must be clarified. *See* pp. 40-44, *infra.* As currently phrased, paragraph 5 could be interpreted as requiring scientific substantiation for all safety and performance claims. However, three sources—the text of paragraph 5, its history, and subsequent Commission pronouncements on advertising substantiation—each point towards a different interpretation. These sources indicate that paragraph 5 applies only to claims regarding specific, objectively verifiable tire characteristics, not to generalized safety claims. Generalized safety claims are appropriately considered under the more flexible reasonable basis standard.

Second, the type and amount of substantiation required by paragraph 5 should be clarified. *See* pp. 45-47, *infra.* As the order is currently phrased, the terms "fully and completely" could be interpreted as requiring a level of substantiation that is, as a practical matter, impossible to obtain. By defining these terms in a manner that would appropriately limit their effect, the Commission would conform the order to orders recently entered in comparable cases involving scientific substantiation. In this regard, Firestone proposes that a definition of "scientific tests" derived from the *Firestone* opinion be added to the order. This definition would provide Firestone with additional [7] guidance and enable it to make a greater variety of truthful product claims.

Firestone therefore proposes the following modifications to paragraph 5:

1. Clarify that claims regarding specific, objectively verifiable tire characteristics are within the scope of paragraph 5's scientific substantiation requirement, but that generalized safety claims are subject to a "reasonable basis" standard; and

2. Clarify that the phrase "fully and completely substantiated by competent scientific tests" does not impose a requirement of absolute proof, but requires substantiation 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 generally accepted in the profession to attain valid and reliable results.

Alternatively, Firestone requests an advisory opinion addressing these two issues.

Background

A. *Proceedings in Docket No. 8818*

1. Opinion and Order

The Complaint in Docket No. 8818 focused primarily on two advertising claims made by Firestone during the late 1960s. **[8]** *Firestone Tire & Rubber Co.*, 81 FTC 398 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973). The first claim was that Firestone manufactures a "safe tire." The Commission found that some consumers might understand the "safe tire" advertisement as implying that Firestone tires are safe under all conditions of use. 81 FTC at 458. Although the Commission did not dispute the fact that Firestone tires were generally safe, it determined that the implied absolute safety claim represented a technological impossibility and was, therefore, untrue. *Id.* at 452 & n.15.[3]

The Commission rejected, solely on methodological grounds, consumer survey data offered by Firestone on the question whether consumers viewed the ads as claiming absolute safety. *Id.* at 453. Instead, the Commission relied on evidence indicating that "many people do not follow safe practices in using their tires." *Id.* at 458. From this evidence of consumer practices, the Commission inferred that consumers lack knowledge about the fundamentals of proper tire care. *Id.* at 459 n.21. Emphasizing that the law protects not only the sophisticated consumer, but also " 'the ignorant, the unthinking and the credulous,' " the Commission held that the evidence established a **[9]** violation of the Act. *Id.* at 459 (quoting *Charles of the Ritz Distributors Corp.* v. *FTC*, 143 F.2d 676, 679 (2d Cir. 1944)). As relief, the Commission imposed paragraphs 3 and 4 of the order.[4]

The second claim, that Firestone Wide Oval tires "stop 25% quicker," was held to be inadequately substantiated. 81 FTC at 451. Firestone did not contest that the advertisement made an objective claim for which consumers would expect test support. *Id.* at 444, 450. The only question was whether Firestone had relied on adequate

[3] The Commission also concluded that the advertisement could be construed as implying that Firestone tires are "free of all defects." Firestone does not request modification of paragraphs 1 and 2 of the Order, which relate to the free of all defects claim. It therefore addresses this aspect of the proceedings only to the extent necessary to an understanding of the background of paragraphs 3, 4 and 5.

[4] Two Commissioners dissented from the majority's holding on the conditions of use claim and the relief ordered in paragraphs 3 and 4. Chairman Kirkpatrick found that the implication drawn by the majority was "remote when contrasted with common knowledge regarding minimal levels of tire care." 81 FTC at 439. Commissioner Dennison disagreed with the majority's conclusion that Firestone had represented that its tires "would be safe under all possible conditions of use." *Id.*

substantiating evidence for the claim. That evidence consisted of comparative data from testing of two Firestone tires in ten runs on the same day. The tires were tested on the same wet smooth concrete with the same tire pressure and load.

The Commission, finding that the advertisements implied that Wide Oval tires would stop 25% quicker under all road and weather conditions, held that the tests were too limited to support such claims. Further, the Commission held that whether the claims influenced consumers' purchasing decisions was "not relevant to this proceeding." *Id.* at 451. As relief, the **[10]** Commission imposed the scientific substantiation requirement of paragraph 5. *Id.* at 475.[5]

2. Subsequent Developments

a. *Synopsis of Opinion and Order.* In October 1975, pursuant to a program then in effect at the Commission, all tire manufacturers were mailed a synopsis of the *Firestone* decision. The purpose of the mailing was to put tire manufacturers on official notice of the practices found unlawful in *Firestone. See FTC* v. *Sears, Roebuck & Co.*, 1983-2 Trade Cases ¶ 65,677 at 69,459 (D. Colo. 1983); D. Bickart, "Civil Penalties Under Section 5(m) of the Federal Trade Commission Act," 44 U. Chi. L. Rev. 761, 767-68 (1977). The synopsis reiterated the order's ban on "defect free" and unconditional safety claims, and it set forth certain substantiation requirements. It did not, however, contain any disclosure requirement, and it did not require scientific substantiation. Rather, the synopsis stated that it is an unfair or deceptive practice to represent that a test exists to support a representation regarding a safety or performance characteristic of a tire "unless such is the case." **[11]**

b. *Consent Decree.* In February 1976, the United States brought an enforcement proceeding against Firestone for alleged violations of the order. Without admitting any of the complaint's allegations, Firestone agreed to the entry of a consent decree. *See United States* v. *Firestone Tire & Rubber Co.*, 1976-1 Trade Cases ¶ 60,729 at 68,134 (N.D. Ohio 1976). Under the decree, Firestone paid $50,000 in civil penalties and $750,000 to produce and run advertisements designed to inform the public about tire safety. The advertisements stated that tires are not safe under all conditions of use and that tire safety depends upon proper maintenance and proper vehicle operation.

[5] Two Commissioners also dissented from this portion of the decision. *See* 81 FTC at 439 (Commissioner Dennison, concurring in part and dissenting in part); *id.* at 441 (Commissioner MacIntyre, concurring in part as to the result).

Id. at 68,135. The consent decree further required Firestone to refer to its radial tires as steel-belted radials, rather than steel radials, to avoid the possibility of consumer misunderstanding.

Firestone ran the corrective ads during 1976-77. No subsequent proceedings have been initiated.

B. *The Tire Industry Today*

The tire industry has changed significantly since the date of the proceedings that gave rise to the order. In 1972, Firestone was the leading manufacturer in a U.S. market largely unpenetrated by foreign competition. Today, Firestone is battling for second place in replacement market tire sales with **[12]** Michelin—one of several foreign manufacturers that have entered the field since 1972. Appendix A, Affidavit of Stephen R. Cook, ¶ 6. In May 1988, Firestone was purchased by Bridgestone Corporation of Japan, which now owns 100% of Firestone stock. *Id.*, ¶ 9.

Tire marketing practices have changed as well. At one end of the spectrum, the emergence of the "performance tire" has led to a variety of very specific, factual advertisements directed at automotive enthusiasts. *Id.*, ¶ 10 (and exhibits cited therein). Typically, performance tire purchasers are highly informed consumers willing to pay more for tires that provide better handling and comfort on a high performance vehicle. *Id.*

At the other end of the spectrum—in the traditional passenger tire market—non-specific, family-oriented themes have prevailed. *Id.*, ¶ 11 (and exhibits cited therein). This latter trend is exemplified by the Michelin "baby" campaign—a series of television commercials depicting a baby, a set of Michelin tires, and the slogan, "Michelin: Because so much is riding on your tires." *Id.* Rather than conveying specific factual information, these advertisements provide prospective tire purchasers with general assurances that Michelin tires can be expected to perform safely and reliably. *Id.* Notably, they **[13]** do not contain any disclosures regarding the conditions of use that affect tire safety.

The baby ads have received widespread exposure since the campaign first appeared in 1985. *Id.*, ¶ 12. During the same period, Michelin's market share has increased appreciably. Several competing tire manufacturers have responded by making their own generalized safety claims. Goodyear, for example, has initiated marketing campaigns based on such themes as "Goodyear Take Me Home' and

"the Perfect Tire for You." *Id.*, ¶ 12 (and exhibits cited therein). General Tire Company has run a series of ads based on themes of concern for family welfare. *Id.* Sears has marketed its Roadhandler tires under the slogan, "Tough tires you can trust." *Id.* And B.F. Goodrich has marketed a tire called the "Lifesaver GT4 All Seasons Radial." *Id.* None of these advertisements contains a disclosure stating that tire safety is affected by conditions of use.

Firestone, by contrast, has been constrained by the order from making comparable claims. *Id.*, ¶¶ 13-18. To illustrate, when Firestone considers making a generalized safety claim, it must take into account the inevitable dampening effect of the disclosure mandated by paragraph 4. *Id.*, ¶ 14. It must also weigh the risk that, even with the disclosure, the claim will run afoul of paragraph 3. *Id.*, ¶ 15. Even if the claim is viewed as properly conditional under paragraphs 3 and 4, **[14]** Firestone still must consider whether paragraph 5 requires it to substantiate the claim through scientific testing. *Id.*, ¶ 16. If it does, then Firestone must weigh the costs of obtaining such substantiation against any remaining benefits of the claim—if indeed the claim can be scientifically substantiated at *any* cost. *Id.* In making each of these calculations, Firestone must take into account the substantial penalties, in terms of adverse publicity as well as $10,000 per day fines, that it would incur if the Commission were to find a violation of the order. *Id.*, ¶ 13.

Faced with these substantial barriers to the making of accurate, effective safety claims, Firestone has been inhibited from responding to its competitors' safety advertising. *Id.*, ¶ 17. After some early experiments during the 1970s with commercials that made the disclosure, Firestone in recent years has simply refrained from making safety claims. *Id.* Instead, it has relied primarily upon image or price advertising. *Id.*, ¶ 17, and exhibits cited therein. Yet, by any objective standard, Firestone's tires are as safe as any available in the market today. Appendix A, Affidavit of Bruce E. Lindenmuth, ¶¶ 4-10 (and exhibits cited therein). **[15]**

C. *The Gallup & Robinson Survey*

Recently, Firestone commissioned Gallup & Robinson, Inc. of Princeton, New Jersey to conduct an extensive survey of current consumer knowledge and perceptions of tire safety and tire advertising. The survey was performed in September, 1988 according to a two-part research protocol. In the first part, Gallup & Robinson's

telephone interviewers asked one thousand tire purchasers from throughout the United States to respond to a variety of statements and questions about tire safety. Cook Affidavit, ¶ 21; *see* App. B. In the second part, two hundred tire purchasers at malls in ten major cities were interviewed following exposure to each of two sample Michelin commercials. *Id.; see* App. C. In the planning and performance of both phases of the survey, Gallup & Robinson followed generally recognized research techniques to ensure a high level of scientific accuracy. *Id.*, ¶ 22.

The Gallup & Robinson survey provides a wealth of valuable information about the characteristics of today's tire buyers. Four findings in particular relate to issues addressed in this proceeding. These findings and their supporting data are discussed below. **[16]**

Finding #1: *Tire purchasers know that the safety of any tire is affected by conditions of use.*

An overwhelming majority of tire purchasers knows that tire safety is affected by a variety of maintenance and operating conditions. When asked whether they frequently think of or follow particular precautions to maintain tire safety, 97.8% of respondents mentioned checking tire pressure and 96.1% mentioned checking tire wear and damage. App. B, Table 22. An additional 88.7%, 86.7% and 85.4%, respectively, knew that wheel alignment, frequent fast starts and stops, and tire rotation also affected tire safety. *Id.* A mere 0.6% expressed the view that "nothing could be done" to help maintain tire safety. *Id.*

Even when presented with the abstract question whether "conditions of use" affect tire safety, a substantial majority of respondents gave the correct answer. For example, 83.8% rejected the statement that "a good quality tire will be safe under all conditions of use" in favor of the statement that "the safety of a good quality tire depends in part upon the operating conditions under which it is used, such as inflation pressure, vehicle weight, and/or wear." App. B, Table 12. Asked to rate on a scale of 0-10 their level of agreement with a variety of statements, respondents gave the highest mean rating (9.12) to the statement that "To be safe, tires need proper care and maintenance." *Id.*, Table 15. The lowest mean agreement rating **[17]** (2.75) was given to the statement that "Tires are safe under all conditions of use." *Id.*, Table 19.[6]

[6] *See also* App. B, Table 11 (87.7% of respondents view tire safety either as a shared responsibility of driver and manufacturer or as largely the driver's responsibility); *id.*, Table 16 (second lowest mean agreement

Finding #2: *Perceptions of safety influence the purchasing decision, including the decision to pay a higher price.*

Tire purchasers place a high premium on safety. The statement that "Tire safety is a highly important consideration in buying a tire for my car" received a mean agreement rating of 8.98—the second highest rating of all statements in the survey. App. B, Table 13. From a list of ten factors that may influence the purchasing decision, respondents rated "good traction and skid resistance in rain and snow" (9.16) and "above average in safety" (8.90) as the two most important. *Id.*, Tables 6-7. Moreover, 66.7% of respondents indicated a high level of agreement with the statement that "Increased tire safety is something I'd pay more for." *Id.*, Table 17. **[18]**

Finding #3: *Consumers perceive tires manufactured by Firestone's leading competitors as being safer than Firestone tires.*

A clear majority of survey respondents (81.9%) agreed with the view that "some tire brands are safer than others." *Id.*, Table 23.[7] Of this group, 29.1% mentioned Firestone as a "safer" tire, while 57.1% and 50.9% mentioned Goodyear and Michelin, respectively. *Id.*, Table 24. Asked whether one brand more than other brands "currently advertises itself or implies in its advertising that it is a "safe tire," " 8.6% named Firestone, 28.8% named Goodyear, and 42.3% named Michelin. *Id.*, Table 26.

Finding #4: *Tire purchasers view the Michelin baby ads as making a generalized safety claim.*

By overwhelming percentages, consumers perceive the Michelin baby ads as conveying a safety message. After viewing commercial A, 90.0% of respondents in the mall intercept survey agreed that the ad asserted that "Michelin is a safe tire." App. C, Commercial A, p. 5. For commercial B, the figures were even higher: 93.0% perceived a "safe tire" claim. *Id.*, Commercial B, p. 5. When asked to report the "main idea" of the ads, 84.5% and 66.0%, respectively—without any

rating (3.17) for statement that "Any tire produced by a major manufacturer today can be considered blow-out proof"); *id.*, Table 20 (third highest mean agreement rating (8.87) for statement that "An otherwise safe tire can become potentially dangerous if driven without proper regard for weather conditions, road surface conditions, or if the car itself is driven recklessly"); *id.*, Table 21 (86.7% of respondents mention "check proper tire pressure" in response to unaided question regarding actions which can be taken to help maintain tire safety).

[7] Similarly, the statement "Assuming the same price range, all major brands of tires are equally safe" received the third lowest mean agreement rating (4.35). App. B, Table 14.

prompting—**[19]**mentioned safety themes. *Id.*, Commercial A, p. 2; Commercial B, p. 2.

Moreover, the respondents' comments to a series of open-ended questions indicate that many drew a direct link between the safety claims and the idea that Michelin tires are "worth more."[8] Forty-two percent of respondents mentioned the cost/safety link in their open-ended responses to commercial B. App. C, Commercial B, p. 3. Even for commercial A, which makes no explicit textual reference to cost, 5.5% mentioned this theme. *Id.*, Commercial A, p. 3. The open-ended comments further demonstrate that most respondents came away from the baby ads with subjective feelings of safety and security, rather than specific factual knowledge about the characteristics of Michelin tires. *See, e.g., id.*, Commercial A, p. 25; *id.*, p. 31; *id.*, Commercial B, p. 40. **[20]**

Argument

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing [of] changed conditions of law or fact." A satisfactory showing is made when the request to reopen "identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of the order inequitable or harmful to competition." *Interco,* 53 Fed. Reg. 9108, 9109 (1988), *modifying* 43 Fed. Reg. 48991 (1978). The petitioner bears the burden of making a satisfactory showing that the requisite changed conditions exist. *Id.*; *Louisiana-Pacific Corp.*, Docket No. C-2956, letter to John C. Hart (June 5, 1986) at 4.

Section 5(b) also provides that the Commission may reopen and modify an order when, although changed circumstances do not require reopening, the Commission determines that the public interest so requires. To obtain review on this ground, the petitioner must demonstrate some affirmative need to modify the order. *Damon Corp.*, Docket No. C-2916, letter to Joel E. Hoffman, Esq. (March 24, 1984) at 2. Among the reasons supporting order modifications on this

[8] As one respondent stated:

> The main idea was, that for whatever reason, you should have Michelin tires because they are safer and more dependable and your family is worth the more money. . . . They got that across verbally—just a statement—and that is only their opinion. They didn't show any comparative tests or anything. . . . I was thinking that you should buy Michelin no matter what the cost.

App. C, Commercial B, p. 9.

basis are the need to increase the availability of truthful product information, *General Motors,* 104 FTC 511, 512 (1984), *modifying* 85 FTC 27 (1975); **[21]** competitive disadvantage to the respondent, *Damon Corp.,* 101 FTC 689, 690 (1983), *order to show cause in* Docket No C-2916 (1978); and obsolescence of the order's factual premises. *Reader's Digest,* 102 FTC 1268, 1269 (1983), *modifying* 79 FTC 696 (1971); *Sterling Drug,* 101 FTC 375 (1983), *modifying* 84 FTC 547 (1974). In determining whether the public interest warrants modification, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. *Interco, supra,* 53 Fed. Reg. at 9109.

Rule 2.41(d) of the Commission's Rules of Practice governs advisory opinion requests by respondents subject to Commission orders. Under the rule, a respondent may request advice as to whether a proposed course of action would comply with the order. "On the basis of the facts submitted, as well as other information available to the Commission, the Commission will inform the respondent whether or not the proposed course of action, if pursued, would constitute compliance with its order." *Id.* **[22]**

I. CHANGED CONDITIONS OF LAW AND FACT AND THE PUBLIC INTEREST WARRANT DELETION OR CLARIFICATION OF PARAGRAPHS 3 AND 4; ALTERNATIVELY, THE COMMISSION SHOULD ISSUE AN ADVISORY OPINION INTERPRETING THESE PROVISIONS AS APPLIED TO GENERALIZED SAFETY CLAIMS.

A. *Firestone's Current Point-of-Sale Disclosures, Many of Which Are Required or Encouraged by Intervening Changes of Law, Obviate Any Necessity for Lengthy Advertising Disclosures.*

In light of changed legal and factual circumstances, paragraph 4's lengthy disclosures are no longer necessary. Federal law now requires Firestone and all other tire manufacturers to provide prospective tire purchasers with detailed tire safety information at the point of sale. Further, state liability laws provide a powerful incentive for tire manufacturers to disseminate additional safety information, beyond the requirements of federal law. In any event, quite apart from the requirements of the law, Firestone today provides prospective tire purchasers with a comprehensive tire safety manual, written in plain English. Because Firestone's point-of-sale disclosures are far more extensive, useful, and readily accessible to the consumer than the

advertising disclosures mandated by paragraph 4, that provision no longer confers benefits sufficient to outweigh its substantial costs.

1. Changes in Federal Law. Since 1979, regulations of the National Highway Traffic Safety Administration ("NHTSA") have required Firestone and all other tire manufacturers to make **[23]** informational handouts available at the point of sale to prospective tire purchasers. *See* 49 C.F.R. § 575.104(d)(A)(2)(ii).[9] The handouts must state verbatim that "[t]he relative performance of tires *depends upon the actual conditions of their use* . . . and may depart significantly from the norm due to variations in driving habits, service practices and differences in road characteristics and climate." 49 C.F.R. § 575.104, Fig. 2 (emphasis supplied). They must additionally state verbatim that "[e]xcessive speed, underinflation, or excessive loading, either separately or in combination, can cause heat build-up and possible tire failure." *Id.* Identical disclosures must be made on a label affixed to the tread surface of the tire. 49 C.F.R. § 575.104(d)(B).

The significance of the NHTSA regulations is two-fold. First, the point-of-sale disclosures that they require encompass the substance of paragraph 4's mandatory advertising disclosure—*i.e.*, that tire safety is affected by conditions of use. The regulations thus ensure that Firestone and all other tire manufacturers will continue to inform consumers of the conditional limitations on tire safety. Indeed, the regulations may have **[24]** played a role in bringing about the high level of consumer awareness reflected in the Gallup & Robinson survey. *See* pp. 15-16, *supra.*

Second, NHTSA is "the federal agency with specific statutory authority to regulate traffic safety." *American Motors Corp., supra,* 105 FTC at 195. NHTSA's formative statute specifically empowers the agency to promulgate consumer information regulations. *See* 15 U.S.C. § 1401(d); 49 C.F.R. pt. 575. The NHTSA regulations quoted above thus reflect a judgment by the agency with primary responsibility for regulating tire safety as to the type of information consumers need. Notably, the regulations do not include any requirement of disclosures in print, radio, or television advertising.

2. Changes in State Law. Quite apart from the changes in the federal requirements, state liability law has expanded dramatically

[9] The information must be provided "without charge and in sufficient quantity to be available for retention by prospective purchasers or sent by mail to a prospective purchaser upon his request." 49 C.F.R. § 575.6(c). It should be emphasized that this information is made available to *prospective* purchasers *prior* to sale, as well as to actual purchasers after sale. *See* n.10, *infra; cf. Firestone,* 81 FTC at 459 & n.20.

since 1972, adding a further incentive for Firestone to make extensive safety disclosures. Under the law of virtually every state, a failure to warn consumers about the potential dangers associated with the use of a product may expose a manufacturer to tort liability. *See* Restatement (Second) of Torts, § 388. Damages can run as high as the millions of dollars to a single plaintiff. Firestone is committed, on principle, to protecting consumers from harm in every way possible. Even apart from its sense of corporate responsibility, however, the **[25]** expansion of state liability laws ensures that Firestone's economic self-interest will remain closely aligned with the interests of consumers.

3. Changes in Firestone's Consumer Information Practices. The consumer safety information that Firestone today provides at the point of sale far exceeds the requirements of either the order, the NHTSA regulations, or state law. Exhibit 24 to the Affidavit of Stephen R. Cook includes a copy of Firestone's current "Tire Maintenance Warranty and Safety Manual."[10] The seven-page section of the Manual devoted to safety begins with a plain English version of paragraph 4's mandatory disclosure: "Any tire, no matter how well constructed, may fail in use as a result of punctures, impact damage, improper inflation, overloading, or other conditions resulting from use or misuse." Cook Affidavit, Exh. 24, at 4. The section proceeds with a series of detailed safety disclosures, for example: **[26]**

> Driving on tires with too little air pressure is dangerous. Your tires will get overheated. This can cause a sudden tire failure that could lead to serious personal injury.
>
> * * *
>
> Driving on tires with too much air can be dangerous. The tires are more likely to be cut, punctured, or broken by sudden impact. Serious personal injury could result.
>
> * * *
>
> Driving your vehicle in an overloaded condition is dangerous. Overloading causes excessive heat to build up in your tires. This can lead to sudden tire failure and serious personal injury while the tire is overloaded or at some later date.
>
> * * *
>
> Driving on damaged tires is dangerous. A damaged tire can suddenly fail causing serious personal injury.

[10] Firestone provides copies of this Manual to all purchasers of replacement market Firestone tires and to all purchasers of vehicles that include Firestone tires as original equipment. Cook Affidavit, ¶ 20. It also makes the Manual available free-of-charge to all prospective purchasers of replacement tires at the point of sale. *Id.*; *cf. Firestone*, 81 FTC at 459 & n.20. The Manual is provided separately and in addition to the informational handouts and tire labels required by the NHTSA regulations. *Id.*

* * *

Driving your vehicle with an improper mix of tires is dangerous. Your car's handling characteristics can be seriously affected. You could have an accident resulting in serious injury.

Id., Exh. 24, at 4-8.

These disclosures provide ample protection against any remote risk that actual or potential Firestone buyers could be misled by truthful, unqualified safety claims. Not only are they more specific than the paragraph 4 disclosure, they are considerably more clear and understandable. Moreover, they are provided in a format that can be easily transported and examined at the consumer's convenience. **[27]**

Taken together, these changes of law and fact make clear that any informational benefits the order may have provided in 1972 are now available through alternative, less costly sources. This case is thus closely comparable to the Commission's 1985 proceedings revising its Guides Against Deceptive Advertising of Guarantees. *See* Analysis of Revisions to Guides Against Deceptive Advertising of Guarantees, 50 Fed. Reg. 18462 (May 1, 1985) [hereinafter "Analysis of Revisions"]. Prior to the enactment of the Magnuson-Moss Warranty Act, the Guides had required that advertisements containing warranty claims disclose "lengthy and relatively complicated information" regarding the warranty's conditions and limitations. 50 Fed. Reg. at 18469. The Commission found that the Magnuson-Moss Act ensured that consumers would have access to this detailed information at the point of sale, obviating the necessity for lengthy advertising disclosures. *Id.*

As an additional reason for modifying the Guides, the Commission found that lengthy advertising disclosures were not an effective means of providing consumers with useful warranty information. The record showed that consumers did not benefit from such detailed disclosures in the context of a print, radio, or television advertisement. The Commission concluded that "examination of the warranty document prior to purchase, when there is an opportunity for detailed study and comparison is a **[28]** far more effective approach for obtaining information." *Id.* at 18470.[11]

[11] *See also* Analysis of Revisions, *supra*, 50 Fed. Reg. at 18464, *quoting* American Association of Advertising Agencies' Remarks in Response to FTC Request for Comments on Revising Guarantee Advertising Guides ("When time is precious, seconds spent providing excessively technical data about warranty provisions that are readily available at the point of sale often add relatively little to the advertisement's principal purpose."); *Beneficial Corp.*, 108 FTC 168 (1986), *modifying* 94 FTC 425 (1979) (deleting requirement that respondents disclose all guarantee terms in advertising and replacing it with less burdensome requirement).

Similarly, in this case, Firestone's point-of-sale disclosures do a far better job of protecting consumers from unsafe practices and unwise purchasing decisions than any advertising disclosure could possibly do. Rather than merely reciting a list of some of the conditions that may affect tire safety—as paragraph 4 requires—Firestone's point-of-sale handouts affirmatively advise consumers of precautions they can take to reduce the hazards associated with these conditions. Moreover, they provide this information in a format that consumers can study at their leisure—unlike a fleeting reference in an advertisement. Firestone's point-of-sale handouts are at once more complete, more informative, and more readily understood by consumers than the lengthy and ambiguously-worded disclosure of paragraph 4. **[29]**

Simply put, Firestone's point-of-sale disclosures provide consumers with a higher quantity and quality of safety information at a lesser cost than the mandatory advertising disclosures of paragraph 4. Furthermore, given the changes in federal and state law that have taken place since the order was entered, it is inconceivable that Firestone would cease providing consumers with this sort of safety information. In light of the superior information consumers receive today through alternative channels, paragraph 4 no longer provides benefits that can justify the substantial burdens it imposes.[12] **[30]**

B. *Reasonable Consumers Today Are Not Misled by Truthful, Unqualified Claims Regarding a Tire's General Safety.*

Paragraphs 3 and 4 presume, in effect, that reasonable consumers do not know that tire safety depends upon proper maintenance and use. As explained in the preceding section, however, consumers today receive at the point of sale a significant quantity of readily understandable tire safety information. *See* pp. 22-29, *supra.* This

[12] Firestone believes that this consideration warrants deletion of paragraph 4. As alternatives, however, it has proposed that paragraph 4 be clarified—either through modification or an advisory opinion—to permit Firestone simply to disclose that safety information is available at the point of sale, or to permit a more simply stated disclosure. *See* Petition, at ¶¶ II-B, II-C. In this regard, we note that paragraph 4 does not explicitly require a verbatim disclosure of all of the illustrative conditions of use listed in that provision. Moreover, having reviewed the record of the FTC proceedings and the proceedings in connection with the 1976 consent decree, we know of nothing to indicate that the Commission intended that such a verbatim disclosure be made.

On the contrary, the Commission in its opinion explained that the purpose of paragraph 4 was simply to ensure that safety representations "be properly qualified to indicate that safety of any tire is affected by conditions of use." 81 FTC at 464. And the 1976 consent decree required corrective advertising that would "effectively communicate to viewers" that "proper tire safety depends upon the consumer taking specific steps for the proper maintenance of his tires and upon the manner in which he operates his vehicle." 1976-1 Trade Cases ¶60,729 at 68,135. In short, the purpose of paragraph 4 was to ensure that the concept of conditional safety be conveyed to consumers, not to compel Firestone to use the particular twenty-two words contained in the disclosure clause of that paragraph.

information includes specific caveats concerning the conditions of use that affect tire safety, as well as advice concerning proper care and use. *See* p. 28, *supra.* In this environment, it would be inappropriate to presume that consumers lack knowledge of something so fundamental as the necessity for proper tire care and use.

Indeed, the Gallup & Robinson survey supports the conclusion that an overwhelming majority of tire purchasers knows that tire safety is affected by a variety of maintenance and operating conditions. For particular conditions of use, such as tire pressure and tire wear, the percentage of informed consumers ranks in the high nineties. *See* pp. 15-16, *supra.* Less than 1% believe that they can do "nothing" to affect tire safety. *See* p. 16, *supra.*

These figures strongly suggest that if Firestone, like its competitors, were permitted to advertise the general safety **[31]** of its tires, consumers would not misperceive the ads as claiming absolute safety. Even if they did, they would be unlikely to believe the absolute safety claim, and even more unlikely to base a purchasing decision upon it. Under the Commission's deception standards, therefore, permitting Firestone to make such claims would raise no appreciable risk of consumer harm—certainly no risk sufficient to warrant the continued imposition of paragraphs 3 and 4. *See Cliffdale Associates,* 103 FTC 110, 164-66 (1984).

To be sure, one can presume—and the survey indicates—that a very small percentage of consumers lacks an appreciation of the fundamentally conditional nature of tire safety. But the law of deception does not, and cannot, protect every consumer from every conceivable misapprehension, no matter how outlandish or unreasonable. *See, e.g., Thompson Medical Co.,* 104 FTC 658 (1984), *aff'd,* 791 F.2d 189 (D.C. Cir. 1986), *cert. denied,* 107 S. Ct. 1289 (1987); *Heinz W. Kirchner,* 63 FTC 1282, 1290 (1963), *aff'd,* 337 F.2d 751 (9th Cir. 1964). As the Commission's recent case law and policy emphasize, the appropriate inquiry is whether the particular representation or omission is likely to materially mislead a reasonable consumer. *Cliffdale Associates, supra,* 103 FTC at 165; Policy Statement on Deception (October 14, 1983), *reprinted in* 5 Trade Reg. Rep. (CCH) ¶ 50,455, at 56,071 (Oct. 31, 1983). Any lesser standard would inhibit "the flow of useful, accurate information to **[32]** consumers" without providing any corresponding benefits in

consumer protection. *Thompson Medical Co., supra,* 104 FTC at 788.[13]

The Commission's decision in *Reader's Digest Association,* 102 FTC 1268 (1983), illustrates the application of these principles in the context of an order modification proceeding. A 1971 cease and desist order prohibited Reader's Digest from using fake currency or other "simulated items of value" in connection with its sweepstakes promotions. *Id.* at 1269. In petitioning for reopening and modification in 1983, Reader's Digest submitted surveys showing that consumers were not in fact misled by such items, along with evidence that its competitors often used them in their own promotions. *Id.* The Commission, finding that simulated items of value were "unlikely **[33]** to mislead consumers," deleted the prohibition from the order. *Id.*

Similarly, in this case, Firestone's survey evidence and current consumer information practices suggest that—whatever the case in 1972—reasonable consumers today are not misled by truthful, unqualified claims of general tire safety.[14] The fact that the instant order involves safety, as well as economic, considerations should not alter this conclusion. The safety threat targeted by paragraphs 3 and 4 is premised on the notion that an appreciable percentage of consumers lacks knowledge about the fundamental characteristics of tires. Once the presumption of consumer ignorance is removed, the threat to safety falls with it. *Cf. Sterling Drug, supra,* 101 FTC at 377 (modifying order due to change in scientific opinion regarding potential health benefits of respondent's product). **[34]**

Deleting paragraphs 3 and 4 would not, it should be emphasized, enable Firestone to make express claims of absolute safety (for

[13] The Commission need not decide whether the law of deception has changed since the order was entered in 1972. It should be noted, however, that—as to all three elements of deception—the *Firestone* opinion relied on differently worded formulations than the Commission now uses. First, the Commission required "a capacity and tendency" to mislead, 81 FTC at 398, rather than a "likelihood" that the representation would be misleading. *Cliffdale Associates, supra,* 103 FTC at 165. Second, it viewed the representations from the perspective of "the vast multitude of consumers," including " 'the ignorant, the unthinking and the credulous,' " 81 FTC at 459 (quoting *Charles of the Ritz Distributors Corp.* v. *FTC,* 143 F.2d 676, 670 (2d Cir. 1944)), rather than from the perspective of a consumer acting reasonably in the circumstances. *Cliffdale Associates, supra,* 103 FTC at 165. Finally, the Commission rejected any necessity of showing "materiality," 81 FTC at 451, as required under recent decisions. *See Cliffdale Associates, supra,* 103 FTC at 165-66.

[14] Interestingly, a majority of respondents in the mall intercept phase of the survey did view the sample Michelin commercials as claiming safety under all conditions of use. These respondents, however, had been carefully instructed to report only what they thought the commercial said or implied. They were not asked to report upon the perceived truth of the claim. Given the survey's further conclusion that consumers are well aware of the inherent limitations upon tire safety, it is unlikely that even those consumers who viewed the Michelin ads as claiming absolute safety would believe, much less act upon, such a claim. In any event, as explained below, Firestone's inability under the order to air a comparable claim results in a clear competitive disadvantage. *See* pp. 35-40, *infra.*

example, "skidproof" or "indestructible"). Such claims would be as untrue today as in 1972—and express false claims are deemed deceptive under Section 5 regardless of whether reasonable consumers would believe them. *Thompson Medical Co., supra,* 104 FTC at 788 n.6.[15] Deleting these provisions would merely eliminate the obsolete presumption that consumers view generalized safety claims as asserting absolute safety. It would thereby enable Firestone to compete on a more equal footing with its competitors.

Short of deleting paragraphs 3 and 4, the Commission should clarify these provisions either through modification or an advisory opinion. The Commission should make clear, first, that generalized safety claims do not imply absolute safety and are therefore not prohibited by paragraph 3. *See* Petition at ¶¶ I-B, I-C. In addition, the Commission should advise Firestone that **[35]** verbatim recitation of the conditions of use listed in paragraph 4 is not necessary. *See* Petition at ¶¶ II-B, II-C. These clarifications—whether issued in the form of an order modification or an advisory opinion—would limit the deterrent effects of paragraphs 3 and 4 and enable Firestone to disseminate a greater amount of safety information to consumers.

C. *Paragraphs 3 and 4 Injure Consumers and Competition by Suppressing Truthful, Material Information about Firestone Tires.*

Paragraphs 3 and 4 are more than merely unnecessary. As reasonably interpreted by Firestone, these provisions result in positive harm to consumers and competition. Specifically, paragraphs 3 and 4 deprive consumers of accurate, important information about Firestone tires. In addition, they cause Firestone to suffer a severe competitive disadvantage.

Paragraphs 3 and 4 effectively prohibit Firestone from making generalized safety claims comparable to those of its competitors. For example, if Firestone wanted to broadcast the Michelin baby commercials, it would be required as a prominent part of the advertisement to disclose that "the safety of any tire is affected by conditions of use,

[15] *See also* Tire Advertising and Labeling Guides, 16 C.F.R. pt. 228, Guide 17 ("Absolute terms such as 'skidproof,' 'blowout proof,' 'blow proof,' and 'puncture proof' should not be unqualifiedly used unless the product so described affords complete and absolute protection from skidding, blowouts, or punctures, as the case may be, under any and all driving conditions."). Moreover, even without paragraphs 3 and 4, general principles of deception law would prohibit Firestone from making *implied* claims of unconditional safety. *Thompson Medical Co., supra,* 104 FTC at 789. Given the Gallup & Robinson findings, however, it is highly unlikely that a claim would arise which a reasonable consumer would interpret as implying unconditional safetv.

such as inflation pressure, vehicle weight, wear, and other operating conditions.[16] **[36]** Firestone's marketing personnel believe that the making of this disclosure would simply cause confusion in the minds of consumers. Cook Affidavit, ¶ 14. Rather than conveying assurances of general reliability and safety, the revised commercial would have a tendency to pique consumer anxiety. *Id.; compare* Analysis of Revisions, *supra*, 50 Fed. Reg. at 18470 (excessive advertising disclosure requirements may have paradoxical effect of depriving consumers of genuinely useful information).

Moreover, even if Firestone made the disclosure required by paragraph 4, it would be far from clear whether the commercial would pass muster under paragraph 3. On the one hand, the inclusion of a paragraph 4 disclosure in an ad making a generalized safety claim could be viewed as making the claim "conditional" and therefore permissible under paragraph 3. But this interpretation, while logically appealing, would render paragraph 3 mere surplusage. **[37]**

Alternatively, the Commission could take the position that, even with the disclosure, the ad makes an absolute safety claim and is therefore forbidden. This interpretation would infuse paragraph 3 with some independent force, but would be logically self-contradictory: it would presume that an advertisement that explicitly mentions conditions of use could be viewed as making an unconditional claim. Furthermore, this interpretation would be wholly inconsistent with one of the key findings of the Gallup & Robinson survey—that consumers know that the safety of any tire is affected by conditions of use. *See* p. 16, *supra.* Regardless of which interpretation is correct, the critical point is that Firestone is reasonably apprehensive of making safety representations—with or without paragraph 4 disclosures—for fear of violating paragraph 3.

Thus, paragraphs 3 and 4, taken together with the potentially devastating penalties for violating a Commission order, have a profound deterrent effect. As a practical matter, they prevent Firestone from telling consumers a basic fact: that Firestone tires, no

[16] Given the overwhelming percentages of respondents in the Gallup & Robinson survey who viewed the sample Michelin commercials as making a safety representation, there can be no question that the baby commercials would be subject to the disclosure requirements of paragraph 4. *See* p. 18, *supra.* Less clear is whether Firestone must, in making any safety claim, run a disclosure that uses the precise language of paragraph 4. *See* n.12, *supra.* Rather than risk noncompliance and its attendant penalties, Firestone has assumed that the disclosure must contain substantially all the terms of paragraph 4. It recognizes, however, that it may be interpreting paragraph 4 too stringently. Firestone has therefore requested, as an alternative to deleting paragraph 4, that the Commission clarify whether a more limited disclosure would suffice. *See* Petition, at ¶¶ II-B, II-C.

less than other lead brands, can be expected to perform safely and reliably and to provide a reasonable measure of protection for oneself and one's family.[17] **[38]**

Firestone's inability to make this point impairs the informational integrity of the tire market in two ways. First, it decreases the total amount of truthful product information available to consumers. This fact alone warrants modification of the order. *Chesebrough-Pond's*, 106 FTC 567, 570 (1985), *modifying* 63 FTC 927 (1963) ("When an order no longer serves any useful purpose and impedes truthful advertising, it is clear under the statute and the rules that it should be set aside"). Moreover, the adverse impact of this informational loss is heightened by the singular importance of safety considerations in shaping the purchasing decision. *See General Motors, supra,* 104 FTC at 512 (1984) (modifying order to correct unintended restriction on dissemination of material information to consumers).

Second, the order has the effect of distorting the messages that do reach consumers. The Gallup & Robinson survey **[39]** shows that consumers today believe that Michelin and Goodyear tires are actually safer than Firestone's. *See* pp. 17-18, *supra.* By any objective standard, however, this is not true. *See* p. 14, *supra.* The result of this consumer misperception, from Firestone's perspective, is a frustrating competitive disadvantage. The ultimate harm, however, is to the consumer, who must make purchasing decisions based on a false picture of the relative merits of the competing products. *See Damon Corp., supra,* 101 FTC at 692; *Interco, supra,* 53 Fed. Reg. at 9109.

The harm inflicted upon consumers is not a mere abstraction. Truthful advertising plays an "indispensable role in the allocation of resources in a free enterprise system." *Bates* v. *State Board of Arizona,* 433 U.S. 350, 364 (1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 765 (1976). Restraints on truthful advertising are thus "inherently likely to produce anticompetitive effects." *Massachusetts Board*

[17] The risks under paragraph 3 are theoretically somewhat smaller with respect to specific safety claims. Such claims, by their very nature, are limited to particular tire characteristics and are therefore less likely to be viewed as claiming unconditional safety. However, specific claims are still subject to the disclosure requirements of paragraph 4 and the substantiation requirement of paragraph 5.

Moreover, the benefits of making specific safety claims may be smaller as well, particularly in the marketing of passenger tires. As the marketing practices of Firestone's competitors attest, the average purchaser of passenger tires is simply not interested in receiving highly technical tire information. Cook Affidavit, ¶ 14; *see also* Millman, "Product Claims Not Believable," Advertising Age, March 5, 1984, at 1 (reporting research data indicating that consumers view specific product claims as "somewhat unbelievable" overall). In terms of materiality to the purchasing decision, therefore, general assurances of safety can be uniquely informative and effective.

of Registration in Optometry, 5 Trade Reg. Rep. (CCH) ¶ 22,555 at 22,244 (June 21, 1988). Economic theory would predict that the order, by interfering with the flow of accurate product information and imposing an artificial competitive disadvantage, may result in higher prices or less choice for consumers.[18] **[40]**

In short, in the current tire marketing environment, paragraphs 3 and 4 are having the opposite of their intended effects. Rather than preventing deception, they are contributing to a distorted picture of the relative safety of competing tire brands. Rather than preventing unfair competition, they are causing Firestone to suffer a severe competitive disadvantage. And rather than protecting consumers, they may be causing consumers to receive less for their purchasing dollar, with no corresponding benefits in increased safety.

II. CHANGED CONDITIONS OF LAW AND FACT AND THE PUBLIC INTEREST REQUIRE CLARIFICATION OF PARAGRAPH 5; ALTERNATIVELY, THE COMMISSION SHOULD ISSUE AN ADVISORY OPINION INTERPRETING PARAGRAPH 5.

Paragraph 5 of the order is ambiguous in two respects. First, paragraph 5 is unclear as to whether generalized claims fall within its scope. Second, paragraph 5 is unclear as to the type and amount of substantiation it requires. Each of these ambiguities adds to the deterrent effects of the order, causing further harm to consumers and competition. Appropriate clarifications of these ambiguities—either through addition of **[41]** clarifying language or through an advisory opinion—would substantially reduce their unintended anticompetitive effects.

A. *Paragraph 5 Was Intended to Apply to Claims Regarding Specific, Objectively Verifiable Tire Characteristics, Not to Generalized Safety Claims.*

Paragraph 5 requires Firestone to have scientific substantiation for any representation, direct or implied, that its tires "have any safety or performance characteristic." Firestone believes that the intent of this provision was to require scientific support for all claims regarding specific safety or performance characteristics—such as stopping

[18] *See* Report of the American Bar Association Section of Antitrust Law, Special Committee to Study the Role of the Federal Trade Commission 17-18 (1989):

> "[I]t is generally desirable to treat similarly-situated firms alike. This is more than a matter of simple fairness. When only one competitor is handicapped, competition is distorted. Unless the market is perfectly competitive, such distortion also will injure consumers, who will face less choice, higher prices, or lower quality than they would otherwise."

distance and puncture protection—but not to require such support for generalized safety claims. To the extent generalized safety claims impliedly assert that test support exists, they should be subject to the more flexible reasonable basis standard. *See Pfizer, Inc.*, 81 FTC 23 (1972); Policy Statement Regarding Advertising Substantiation, *reprinted in* 104 FTC 839 (1984) [hereinafter "Advertising Substantiation Statement"].

Firestone's interpretation of paragraph 5 is supported by each of three sources. First the text of paragraph 5 explicitly limits its scope to safety or performance "characteristics." Generalized safety claims—for example, the claims made by the Michelin baby commercials—relate to no particular **[42]** tire "characteristic." They would therefore appear to fall outside the scope of paragraph 5.

Second, the history of the proceedings in this matter supports Firestone's interpretation. In the original proceeding, the Commission never contended—even as an alternative theory of relief in its complaint—that Firestone's "safe tire" or "Safety Champion" ads lacked appropriate substantiation. *See* 81 FTC 398-403. These ads were apparently not viewed as conveying the sorts of claims for which consumers would expect test support. The Commission raised the substantiation issue only in connection with the "stops 25% quicker" claim. This claim, the Commission found, was the type of "specific advertising claim" for which consumers would expect "substantial scientific data" in support. *Id.* at 451 (emphasis supplied).

Third, Firestone's interpretation is consistent with the Commission's subsequent pronouncements on advertising substantiation. Under current standards, substantiation is required for "objective" product claims—that is, claims that "represent explicitly or by implication that the advertiser has a reasonable basis supporting these claims." Advertising Substantiation Statement, *supra*, 104 FTC 839; *see also Thompson Medical Co., supra*, 104 FTC 813 n.37. As a threshold matter, it might be questioned whether generalized safety claims make any objective assertion for which consumers expect test support. **[43]** Although the Gallup & Robinson survey did not specifically explore this question, the open-ended responses of respondents viewing the sample baby commercials notably do not reflect any expectation of test support—scientific or otherwise—for Michelin's generalized safety claims. *See* App. D, Commercials A and B, Verbatim Testimony.

Even assuming that some test support is called for, however, the

appropriate level is a reasonable basis rather than "full and complete substantiation by competent scientific tests." The Commission has stated that "[a]bsent an express or implied reference to a certain level of support, and absent other evidence indicating what consumer expectations would be, the Commission assumes that consumers would expect a 'reasonable basis' for claims." Advertising Substantiation Statement, *supra*, 104 FTC 839-40. Firestone does not contest that consumers generally expect scientific support for specific safety or performance claims. Generalized claims, however, are inherently more subjective in nature, more difficult (and expensive) to verify, and less likely to be viewed by consumers as implying test support. As such, they are appropriately made subject to a more flexible standard.[19] **[44]**

In short, Firestone's proposed clarification—whether implemented through order modification or an advisory opinion—would comport with the text and history of paragraph 5 as well as the Commission's subsequent case law and policy. In conjunction with Firestone's proposals for paragraphs 3 and 4, the clarification would enable Firestone to convey a greater quantity and quality of safety information to consumers. By contrast, requiring scientific substantiation for non-specific safety claims would subject Firestone to a higher standard than its competitors and impose prohibitive costs.

B. *Paragraph 5 Was Intended to Require Scientific Substantiation, Not Absolute Proof, for Claims within Its Scope.*

Firestone is also uncertain as to the type and amount of scientific testing required under paragraph 5. This uncertainty acts as a further deterrent to the making of truthful safety and performance claims. In this regard, Firestone requests additional clarification to paragraph 5. **[45]**

First, Firestone requests clarification that the terms "fully and completely" are not to be interpreted literally. Strictly construed, these terms would require a level of substantiation that is impractica-

[19] An alternative interpretation of paragraph 5 is that it is a "fencing-in" provision purposely designed to subject Firestone to a more restrictive standard than its competitors. *See FTC* v. *National Lead Co.*, 352 U.S. 419 (1957). But today—nearly seventeen years after the order's entry and thirteen years after the consent decree—there is no reason to impose unique burdens upon Firestone. As in *Interco, supra*, fencing in is "no longer necessary either to dissipate the effects of respondent['s] past conduct or to prevent its recurrence." 53 Fed. Reg. at 9109; *see also Magnavox Co.*, 102 FTC 807 (1983), *modifying* 78 FTC 1183 (1971) (terminating fencing-in provisions after twelve years); *Occidental Petroleum Corp.*, 101 FTC 373 (1983), *modifying* 83 FTC 1374 (1974) (terminating fencing-in provisions after nine years).

ble, if not impossible, to obtain. As explained in the Affidavit of Bruce E. Lindenmuth, tire safety and performance is affected by innumerable variables that cannot be "fully and completely" accounted for by any known test or set of tests. *Id.*, ¶ 11. Among other factors, tire safety and performance depends upon road conditions, driver maintenance and skill, vehicle type and features, and tire variability. *Id.* As a practical matter, it is impossible to run tests that control for all of these factors. *Id.*

Moreover, even if Firestone could obtain absolute proof for a particular, highly qualified claim, the costs of procuring such proof would outweigh the value of the claim. *See id.*, ¶ 14. Firestone would have to test numerous tires, run them for many thousands of miles, and repeat the tests numerous times. It would not be able to obtain complete results until the tested tires had been used for a substantial period of time. By then, Firestone's opportunity to benefit from the claim might have passed.

The Commission has often emphasized that the required level of substantiation must not be set so high as to "prevent consumers from being told potentially valuable information about **[46]** product characteristics." *Thompson Medical Co., supra,* 104 FTC 823; *see also General Motors,* 104 FTC 512. Firestone therefore believes that the terms "fully and completely" were not intended to be interpreted literally. Rather, Firestone believes that these terms are properly viewed as merely reinforcing paragraph 5's basic requirement of scientific substantiation. But unless and until the Commission clarifies these terms, Firestone must take seriously the risk that anything less than absolute proof may be viewed as insufficient.

In numerous recent cases, the Commission has imposed orders requiring substantiation by "competent scientific tests," but not including any additional requirement of "full and complete" substantiation. *See, e.g., General Motors, supra,* 104 FTC 512; *Sterling Drug, supra,* 101 FTC 379; *RR International,* 94 FTC 1312, 1334 (1979). A scientific testing requirement provides a high level of consumer protection without the unintended *in terrorem* effects caused by the order in its current form. The proposed clarification, which incorporates the phrase "fully and completely" into the general definition of "scientific tests," would therefore serve the public interest.

Finally, Firestone requests that a definition of "scientific tests" be added to the order. The proposed definition derives directly from the *Firestone* opinion. *See* 81 FTC 463. In addition, it contains several

refinements reflected [47] in the consent order in *RR International, supra*, 94 FTC 1334. *See also Associated Mills, Inc.*, 54 Fed. Reg. 1946, 1947 (January 18, 1989) (proposed consent order).

Specifically, the proposed clarification, like the order in *RR International*, states that Firestone must use testing procedures that are generally accepted in the profession to attain "valid and reliable results." The *Firestone* opinion refers to testing procedures which "best insure" accurate results, 81 FTC at 463, a formulation which is at best vague and at worst unduly stringent. As revised, the order would provide Firestone with additional guidance and substantially reduce the costs and risks of making truthful product claims. [48]

Conclusion

For the reasons stated above, Firestone respectfully requests that the Commission reopen this proceeding and modify the final order or, in the alternative, that the Commission provide Firestone with an advisory opinion.

Respectfully submitted,

Jack R. Bierig
Richard D. Raskin
Sidley & Austin

Of Counsel:

Glenn R. Haase
Paul R. Peterson
The Firestone Tire &
Rubber Company

Re: The Kroger Company
Docket No. 9040

August 18, 1989

Dear Mr. Diamond:

This is in response to the petition that you filed on July 1, 1988, on behalf of your client, The Kroger Company, requesting the Commission to reopen and vacate the consent order in Docket No. 9040.

Under Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), the Commission must reopen an order to consider whether it should be altered, modified or set aside if a respondent files a request that makes a satisfactory showing that changed conditions of law or fact require the order to be altered, modified or set aside in whole or in part. This provision also permits the Commission to reopen an order for the purpose of altering, modifying or setting aside some or all of its terms whenever it believes that such an action would be required in the public interest. Rule 2.51(b) of the Commission's Rules of Practice implements this provision of law and states that to be satisfactory, a request may not be "merely conclusory" but must "set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modifications."

The Commission has determined that petitioner's request that the order be reopened and vacated fails to meet the statutory standard. Therefore, petitioner's request is denied.

Petitioner's Request

Petitioner requests that the Commission reopen and vacate the order as of the effective date of the amended Retail Food Store Advertising and Marketing Practices Trade Regulation Rule, 16 CFR 424 (the "Rule"). Petitioner states that changes in law, fact and the public interest warrant the requested relief.

Petitioner states that the Commission's action in approving amendments to the Rule constitutes a change of law requiring that the order be reopened and vacated. Both the order and the original Rule require the petitioner to have advertised items readily available, at or below the advertised prices, and both permit similar defenses. When the

amendments to the Rule approved by the Commission become effective, the pricing prohibition will be stricken, and new defenses to unavailability not permitted under the original Rule or the order will be allowed.

If the order remains in effect after the Rule is amended, petitioner argues, it will be at a competitive disadvantage because most of its competitors will be relieved of significant costs and will be able to lower their prices to the extent of such savings, while it will continue to be exposed to heavy penalties and costs. Under the amendments to the Rule approved by the Commission, petitioner says, rainchecks, items of comparable value, other compensation of equivalent value and general disclaimers in advertising will provide an "absolute defense" to its competitors while petitioner will be exposed to higher costs. Such consequences could not have been foreseen, petitioner continues, when it consented to the issuance of the order.

Arguing that it is in the public interest to reopen and vacate the order, petitioner refers to the Commission's April 21, 1988, press release announcing that it had approved the amendments to the Rule. Petitioner states that the press release referred to Commission staff's conclusions "that the current rule imposes an estimated $132 to $370 million in costs on retail food stores—and ultimately on consumers—each year." Petitioner estimates that compliance with the original Rule and the order costs it approximately $7 million per year and that, if it were required to comply only with the amended Rule, these costs would be reduced by $3 to $4 million.

The Commission's Decision

The Commission is not persuaded by petitioner's argument that the amendments to the Retail Food Store Advertising and Marketing Practices Rule constitute a changed condition of law and fact, and that these changes require that the order be reopened and vacated. When the order was issued, the Rule was in effect. Since that time, petitioner has been regulated by both the order and the Rule. Absent changes of law or fact not shown in the petition, the amendments to the Rule do not require that the order be vacated. These changes, however, may require that the order be modified so that it is not inconsistent with the amended Rule. *See, e.g., H&R Block, Inc.*, 100 FTC 523 (1982).

The Commission is also not persuaded by petitioner's argument that the public interest would be served by reopening and vacating the

order. The Commission has determined that it is in the public interest to amend, not repeal, the Rule. The evidence upon which that decision was based does not demonstrate that vacating the order would benefit the public. It may be in the public interest, however, to reopen and modify the order to enable petitioner, and ultimately the consumer, to benefit from the Rule's amendments, but petitioner has not requested such relief.

Moreover, the order contains provisions specifically designed to apply to petitioner, while the Rule's provisions were designed to apply generally to the retail food store industry. Petitioner has failed to demonstrate that it is in the public interest to vacate these order provisions, which were never in the Rule and were not considered when the Rule was amended.

Conclusion

Petitioner has failed to establish that changed conditions of law or fact or public interest considerations warrant reopening and vacating the order in Docket No. 9040. Therefore, petitioner's request to reopen and vacate the order is denied.

By direction of the Commission, Chairman Oliver dissenting.[1]

Dissenting Statement of Chairman Daniel Oliver

On July 1, 1988, The Kroger Company filed a petition requesting that the Commission reopen and vacate a consent order issued by the Commission in November 1977. The consent order was largely based on the original requirements of the Retail Food Store Advertising and Marketing Practices Trade Regulation Rule (the "Unavailability Rule"). Last year, the Commission approved a number of amendments to the rule. Although I concurred in those amendments, I would have preferred to repeal the rule in its entirety. When the amendments become effective, after the issuance of a Statement of Basis and Purpose, a number of new defenses to unavailability not permitted under the order will be allowed under the rule. The Commission has nevertheless determined to deny the Kroger petition. I dissent.

In its original incarnation, the Unavailability Rule imposed substantial costs on the retail food industry and consumers without any discernible compensating benefits. To prevent inadvertent rule violations occasioned by running out of advertised items, most retail grocers had to maintain larger inventories than competitive conditions

[1] Prior to leaving the Commission, former Chairman Oliver registered his vote in the negative in this matter.

or consumer expectations warranted. Paradoxically, the original rule denied grocers the defense of offering rainchecks as a way of compensating consumers for unavailability. Moreover, the original rule forced retail grocers to devote additional resources to monitoring price and inventory levels, and to creating and retaining additional records. As a result, the original version of the rule imposed an estimated $132 to $370 million in costs on retail food stores—and ultimately on consumers—each year.

The order against Kroger is a burdensome and unnecessary adjunct to a burdensome and unnecessary rule. Kroger argues that it must spend $7 million each year to comply with the requirements of the original rule, and that that figure would fall by $3 to $4 million if it were required to comply only with the amended rule. Thus, continued compliance with the order can be expected to cost Kroger an additional $3 to $4 million each year. As a result, if the order against Kroger remains in effect after the rule amendments become effective—and Kroger's competitors are freed from the original rule's most costly requirements—Kroger will be at a substantial competitive disadvantage.

In my view, there is no legitimate reason to perpetuate any of the requirements of the Kroger order any longer. At the very least, however, the Commission should modify the Kroger order to bring it into conformity with the amended rule. Indeed, in its letter response denying the Kroger petition, the Commission majority states that the amendments to the Rule "may require that the [Kroger] order be modified so that it is not inconsistent with the amended Rule." *Letter to Norman Diamond* at 2 (citation omitted). The majority also recognizes that it "may be in the public interest . . . to reopen and modify the order to enable Petitioner, and ultimately the consumer, to benefit from the Rule's amendments . . ." *Id.* at 3. Nevertheless, the Commission has determined to deny the Kroger petition, without making any modifications in the order, apparently because "Petitioner has not requested such relief." *Id.*

I hope that Kroger—and other similarly situated respondents—will rely on the statements in the letter to Kroger as a basis for quickly filing petitions to modify the Kroger order—and all similar orders—to conform to the amended version of the Unavailability Rule. I strongly believe that all such petitions should be granted. The Commission, however, could have inferred—from Kroger's request to vacate all of the requirements of its order—that it wants as many of those

requirements as possible deleted as soon as possible. I therefore dissent from the Commission decision neither to vacate nor to modify the Kroger order now.

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