

IN THE MATTER OF

OCCIDENTAL PETROLEUM CORPORATION, ET AL.

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

Docket 9205. Final Order, Dec. 22, 1992--Modified Final Order, Feb. 3, 1994*

This modified final order requires Occidental, a California-based corporation, to divest certain PVC assets to a Commission-approved acquirer within twelve months and to provide to the acquirer all PVC technology used or developed by the respondent for use in connection with the PVC assets to be divested. The modified order also prohibits Occidental, for 10 years, from acquiring all or any part of the stock or assets of, or any interest in, any producer of PVC located in the United States, without prior Commission approval.

Appearances

For the Commission: *Eric D. Rohlck* and *Daniel P. Ducore*.

For the respondents: *Michael Sohn, Arnold & Porter*, Washington, D.C. *Louis Nizer, Phillips, Nizer, Benjamin, Krim & Ballon*, New York, N.Y. and *Robert D. Luss*, in-house counsel for respondent Occidental Chemical Corporation, Dallas, TX.

MODIFIED FINAL ORDER

The Commission issued a final order in this proceeding on December 22, 1992, and the respondents, Occidental Petroleum Corporation and Occidental Chemical Corporation (collectively "Occidental"), subsequently filed a petition for review of that order in the United States Court of Appeals for the Second Circuit. On November 15, 1993, the Commission and Occidental filed a joint motion asking that court to modify the Commission's final order pursuant to a stipulation between the Commission and Occidental. Commissioner Yao issued the attached statement and Commissioner Owen issued the attached dissent to the Commission's entry into the stipulation. On January 12, 1994, the court of appeals granted the parties' joint motion and entered its order modifying the Commission's final order of December 22, 1992.

* Final Order, etc. previously published at 115 FTC 1010 (1992).

Now therefore, it is hereby ordered, That the aforesaid final order be, and it hereby is, modified in accordance with the order of the Court of Appeals to read as follows:

FINAL ORDER

I.

It is ordered, That the following definitions apply:

A. “*Occidental*” means collectively Occidental Petroleum Corporation, a corporation organized under the laws of Delaware with its principal place of business in Los Angeles, California, and Occidental Chemical Corporation, a corporation organized under the laws of New York with its principal place of business in Dallas, Texas, and their directors, officers, agents and employees and their subsidiaries, divisions, affiliates, successors and assigns;

B. “*Tenneco*” means Tenneco, Inc., and Tenneco Polymers, Inc., two corporations organized under the laws of Delaware with their principal places of business in Houston, Texas, and their directors, officers, agents and employees and their subsidiaries, divisions, affiliates, successors and assigns;

C. “*Acquired PVC assets*” means the suspension PVC homopolymer manufacturing facility located at Pasadena, Texas, the suspension PVC and dispersion PVC manufacturing facility located at Burlington, New Jersey, and all assets, titles, properties, interests, rights and privileges, tangible and intangible, related to the PVC business that were acquired by Occidental from Tenneco on or about April 30, 1986;

D. “*PVC divestiture assets*” means the PVC manufacturing facility owned by Occidental and located at Addis, Louisiana; the suspension PVC and dispersion PVC manufacturing facility located at Burlington, New Jersey; all assets, titles, properties, interests, rights, privileges, and goodwill, tangible and intangible, utilized in the production, distribution or sale of PVC from the Addis, Louisiana, and Burlington, New Jersey, facilities; and all assets, titles, properties, interests, rights, privileges, and goodwill, tangible and intangible, related to the suspension PVC copolymer and dispersion PVC business that were acquired by Occidental from Tenneco on or about April 30, 1986, together with all improvements

thereto. The PVC divestiture assets include, without limitation, the following:

1. All plant facilities, machinery, fixtures, equipment, vehicles, transportation and storage facilities, furniture, tools, supplies, stores, spare parts, and other tangible personal property;

2. All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, management information systems, rights to software, trademarks, patents, inventions, trade secrets, technology, know-how, specifications, designs, drawings, processes and quality control data; provided, however, that Occidental shall not be required to convey any property rights in, or any right to use, the "Occidental," "Oxy" or "OxyChem" trademarks or the Occidental logo;

3. Raw material and finished product inventories and goods in process;

4. All right, title and interest in and to real property, together with appurtenances, licenses and permits;

5. All right, title and interest in and to the contracts entered into in the ordinary course of business with customers (to the extent assignable) (together with associated bid and performance bonds), sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees; provided however, that

- (a) Any revenues earned or losses incurred by Occidental in connection with Occidental's operation; or

- (b) Any claim arising under a bid or performance bond as a result of the operation of the PVC divestiture assets prior to the date of divestiture shall be retained by Occidental.

6. All rights after the date of divestiture under warranties and guarantees, express or implied;

7. All separately maintained, as well as relevant portions of not separately maintained books, records and files; and

8. All items of prepaid expense.

The PVC divestiture assets do not include any assets, titles, properties, interests, rights, privileges, or goodwill, tangible or intangible, related exclusively to any PVC manufacturing facility

other than the facility located at Addis, Louisiana, or the suspension PVC and dispersion PVC facility located at Burlington, New Jersey.

E. “PVC” means any vinyl chloride homopolymer with the repeating unit $\text{CH}_2=\text{CHCl}$ and any copolymer of vinyl chloride with varying amounts of other chemicals, including vinyl acetate, ethylene, propylene, vinylidene chloride or acrylates;

F. “Mass PVC” means PVC produced from vinyl chloride by the mass (also referred to as “bulk”) process;

G. “Suspension PVC homopolymer” means PVC homopolymer produced from vinyl chloride by the suspension process;

H. “Suspension PVC copolymer” means any copolymer of vinyl chloride and vinyl acetate produced by the suspension process and containing more than 50 percent by weight of vinyl chloride;

I. “Dispersion PVC” means PVC produced by the emulsion or dispersion process.

II.

It is ordered, That within twelve (12) months from the date this order becomes final, Occidental shall divest, absolutely and in good faith, at no minimum price, the PVC divestiture assets. The purpose of the divestiture is to establish the PVC divestiture assets, either singly or separately, as a viable competitor in PVC, by ensuring the continuation of the assets as ongoing, viable enterprises in the PVC industry and to remedy the lessening of competition resulting from the acquisition of the acquired PVC assets by Occidental. The divestiture(s) shall be made only to an acquirer or acquirers and only in a manner that receives the prior approval of the Federal Trade Commission.

Pending divestiture, Occidental shall take all measures necessary to maintain the PVC divestiture assets in their present condition and to prevent any deterioration, except for normal wear and tear, of any part of the PVC divestiture assets, so as not to impair the present operating viability and market value of the PVC divestiture assets.

III.

It is further ordered, That at the time of the divestiture required by this order, Occidental shall provide to the acquirer or acquirers of the PVC divestiture assets, on a nonexclusive basis, all PVC

technology (including patent licenses and know-how) used by Occidental or developed by Occidental for use in connection with the PVC divestiture assets; and

For a period of one (1) year following the divestiture required by this order, Occidental shall provide the acquirer or acquirers of the PVC divestiture assets, if the acquirer(s) so requests, such additional know-how as may reasonably be required to enable the acquirer(s) to manufacture and sell PVC. Occidental shall charge the acquirer(s) no more than its own costs for providing such additional know-how.

IV.

It is further ordered, That at the time of the divestiture required by this order, Occidental shall assign or otherwise transfer to the acquirer(s) of the PVC divestiture assets:

A. To the extent requested by the acquirer(s), any or all purchase, exchange, and other supply agreements for vinyl chloride monomer ("VCM") and other feedstocks for the manufacture of PVC relating to the PVC divestiture assets;

B. All PVC sales, toll or exchange agreements relating to PVC produced in (or supplied by Occidental at any time since May 1, 1986, from) the PVC divestiture assets;

C. All PVC customer records and files for each customer to whom Occidental has supplied suspension PVC homopolymer, suspension PVC copolymer, or dispersion PVC, respectively, since May 1, 1986, from the PVC divestiture assets exclusively, apart from any temporary supply from another production facility in connection with any supply disruption, temporary shutdown, capacity outage, or maintenance of the PVC divestiture assets; and

D. The name and address of, and the name and telephone number of the contact person(s) at, each customer to whom Occidental has supplied suspension PVC homopolymer, suspension PVC copolymer, or dispersion PVC, respectively, at any time since May 1, 1986, from the PVC divestiture assets and from another production facility; any portion of the customer records and files for each such customer that relates solely to sales to such customer from the PVC divestiture assets; and a copy of all other customer records and files for each

such customer excluding any portion of such records and files that relates solely to sales to such customer from a production facility other than the PVC divestiture assets. Provided, however, that Occidental may redact from any such copy any disclosure of pricing, volume or customer complaints with respect to a production facility other than the PVC divestiture assets.

V.

It is further ordered, That if Occidental has not divested the PVC divestiture assets within the twelve-month period provided in paragraph II of this order, the Federal Trade Commission may appoint a trustee to effect the divestiture. The trustee shall be a person with experience and expertise in acquisitions and divestitures. Neither the appointment of a trustee nor a Commission decision not to appoint a trustee under this paragraph V of the order shall preclude the Commission from seeking civil penalties and other relief available to it, including a court-appointed trustee, for any failure by Occidental to comply with this order.

Any trustee appointed by the Commission pursuant to this paragraph V shall have the following powers, authority, duties and responsibilities:

A. The trustee shall have the exclusive power and authority, subject to the prior approval of the Commission, to divest the PVC divestiture assets. The trustee shall have twelve (12) months from the date of appointment to accomplish the divestiture. If, however, at the end of the twelve month period, the trustee has submitted a plan of divestiture or believes that divestiture can be accomplished within a reasonable time, the divestiture period may be extended by the Commission.

B. The trustee shall have full and complete access to the personnel, books, records and facilities of the PVC divestiture assets, and Occidental shall develop such financial or other information relevant to the PVC divestiture assets as the trustee may reasonably request. Occidental shall cooperate with the trustee and shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Occidental shall

extend the time for divestiture under this paragraph V in an amount equal to the delay, as determined by the Commission.

C. The power and authority of the trustee to divest shall be at the most favorable price and terms available consistent with this order's absolute and unconditional obligation to divest at no minimum price and with the purposes of the divestiture as stated in paragraph II of this order, subject to the prior approval of the Commission.

D. The trustee shall serve without bond or other security and at the cost and expense of Occidental on such reasonable and customary terms and conditions as the Commission may set. The trustee shall have authority to retain, at the cost and expense of Occidental, such consultants, attorneys, investment bankers, business brokers, accountants, appraisers and other representatives and assistants as are reasonably necessary to assist in the divestiture. The trustee shall account for all monies derived from the divestiture and for all expenses incurred. After approval by the Commission of the account of the trustee, including fees for the trustee's services, all remaining monies shall be paid to Occidental, 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 divesting the PVC divestiture assets.

E. Occidental shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages or liabilities arising in any manner out of or in connection with the trustee's duties under this order, unless the Commission determines that such losses, claims, damages or liabilities arose out of the misfeasance, gross negligence or the willful or wanton acts or bad faith of the trustee.

F. Promptly upon appointment of the trustee and subject to the approval of the Commission, Occidental shall, subject to the Federal Trade Commission's prior approval and consistent with the provisions of this order, transfer to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

G. If the trustee ceases to act or fails to act diligently, the Commission may appoint a substitute trustee.

H. The Commission may on its own initiative or at the request of the trustee issue such additional orders or directions as may be

necessary or appropriate to accomplish the divestiture required by this order.

I. The trustee shall have no obligation or authority to operate or maintain the PVC divestiture assets.

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

VI.

It is further ordered, That for a period of ten (10) years from the date this order becomes final, Occidental, without the prior approval of the Federal Trade Commission, shall not directly or indirectly acquire -- other than the acquisition of manufactured product in the ordinary course of business -- all or any part of the stock of, or any interest in, any producer of PVC located in the United States; or all or any part of the assets of any producer of PVC located in the United States used, or previously used, either in connection with the production or sale of PVC or in connection with the development of PVC product.

VII.

It is further ordered, That Occidental shall, within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until it has fully complied with paragraph II of this order, submit in writing to the Commission a report setting forth in detail the manner and form in which it intends to comply, is complying or has complied with that paragraph. Such compliance reports shall include, among other things that may be required from time to time, a full description of all contacts and negotiations relating to the divestiture of the PVC divestiture assets, including the name and address of all persons contacted, copies of all written communications to and from such persons and all nonprivileged internal memoranda, reports and recommendations concerning divestiture; and

Occidental shall submit such further written reports of its compliance as the staff of the Commission may from time to time request in writing.

VIII.

It is further ordered, That Occidental, upon written request and on reasonable notice, for the purpose of securing compliance with this order, and subject to any legally recognized privilege, shall permit duly authorized representatives of the Commission.

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

B. Subject to the reasonable convenience of Occidental, an opportunity to interview officers or employees of Occidental, who may have counsel present, regarding such matters.

IX.

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

Commissioner Owen dissenting in part.¹

¹ Commissioner Owen concurs with the result reached in the Opinion of the Commission with respect to the markets for suspension PVC copolymer and dispersion PVC and with the relief ordered with respect to those two markets, including the divestiture of the Burlington, New Jersey, plant. Commissioner Owen dissents with respect to the provisions in the Modified Final Order that require divestiture of the Addis plant.

STATEMENT OF COMMISSIONER DEBORAH K. OWEN
CONCURRING IN PART AND DISSENTING IN PART

While the proposed settlement seems preferable to the Commission's final order in this matter in certain respects, I continue to believe that the Occidental/Tenneco combination did not violate Section 5 of the Federal Trade Commission Act in the mass and suspension PVC homopolymer market, for reasons stated in my separate opinion. Accordingly, I do not believe that any divestiture should be required beyond that which is necessary to cure the anticompetitive problems in the suspension PVC copolymer and dispersion PVC markets, and I must respectfully dissent with respect to the provisions in the Modified Final Order that require divestiture of the Addis plant.

CONCURRING STATEMENT OF COMMISSIONER DENNIS A. YAO

The Commission has accepted a settlement that modifies the Commission's order that was issued with its decision in this matter on December 22, 1992. I did not participate in the Commission's decision in this matter. Given that decision, however, I believe that the Modified Final Order accomplishes the aims of the Commission's order and, therefore, have voted in favor of accepting this settlement.

IN THE MATTER OF

ABBOTT LABORATORIES

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

Docket 9253. Complaint, June 10, 1992--Decision, Feb. 4, 1994

This consent order prohibits, among other things, an Illinois-based manufacturer of infant formula from soliciting its competitors to adopt or adhere to any provision restricting consumer mass media advertising, including provisions in the Infant Formula Council or other organizational codes or statements, except to the extent that they prohibit false or deceptive advertising.

Appearances

For the Commission: *Richard B. Dagen* and *Michael E. Antalics*.

For the respondent: *Thomas A. Gottschalk, Kirkland & Ellis*,
Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Abbott Laboratories ("Abbott" and sometimes referred to as "respondent") has violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

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

(a) "*Infant formula*" means a food as described at 21 U.S.C. 321(aa), which purports to be or is represented for special dietary use solely as a food for infants by reason of its simulation of human milk or its suitability as a complete or partial substitute for human milk.

(b) "*WIC*" means the Special Supplemental Food Program for Women, Infants and Children as described in 42 U.S.C. 1786 *et seq.*