

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

COMMISSIONERS: **Timothy J. Muris, Chairman**
 Sheila F. Anthony
 Mozelle W. Thompson
 Orson Swindle
 Thomas B. Leary

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| In the Matter of |) | |
| |) | |
| SOLVAY S.A. , |) | |
| a foreign corporation. |) | |
| |) | Docket No. C- 4046 |
| |) | |
| |) | |

**ORDER REOPENING AND MODIFYING
ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS**

On March 6, 2003, Solvay S.A. (“Solvay”) filed with the Commission the Petition of Solvay S.A. to Reopen and Modify Hold Separate Order (“Petition”). In the Petition, Solvay asks that the Commission reopen and modify the Order To Hold Separate And Maintain Assets issued by the Commission on April 29, 2002, (“Hold Separate Order”) to remove language that prohibits Solvay from hiring a former employee of the divested business that the acquirer has decided not to hire. For the reasons stated below, the Commission has determined to grant the Petition.

I. The Orders

The Hold Separate Order in this matter was issued by consent at the end of an investigation of Solvay’s proposed acquisition of Ausimont. The Complaint alleges product markets that include polyvinylidene fluoride (“PVDF”) used for coating building exteriors, coating wires and cables, manufacturing specialized pipes and tubing, and other applications. The Decision and Order (accepted for public comment on April 29, 2002, and issued on June 21, 2002) (“Decision and Order”) requires Solvay to divest the Solvay Fluoropolymers Business, which includes two plants and related assets in Decatur, Alabama, used to manufacture PVDF. See Decision and Order ¶¶ I.EE. and II.A. The Decision and Order further requires Solvay to divest its interest in a joint venture that manufactures vinylidene fluoride monomer (“VF₂”), a key raw material used to manufacture PVDF. See Decision and Order ¶¶ I.JJ. and II.A. The Hold Separate Order obligated Solvay to hold the Solvay

Fluoropolymers Business and Solvay's interest in the VF₂ manufacturing joint venture separate until divested. See Hold Separate Order ¶ II.A.

The Hold Separate Order required Solvay to operate the businesses held separate under the direction of a trustee ("Hold Separate Trustee") appointed by the Commission. See Hold Separate Order ¶¶ II. and III.B.3. The order also required Solvay to contract with a Hold Separate Manager to manage the day-to-day operations of the business under the Hold Separate Trustee's direction. See Hold Separate Order ¶ III.C.1.

The Decision and Order encourages the employees of the divested PVDF business to continue employment with an acquirer. For example, the Order grants any acquirer the right to review a list of employees of the divested business, to review their personnel files, to interview them, and to offer employment to them. See Decision and Order ¶ II.D.6. The Decision and Order prohibits Solvay from interfering with an acquirer's attempts to hire these employees, and requires Solvay to pay a bonus to employees who accept an offer of employment from an acquirer. Id.

The Decision and Order and Hold Separate Order include special provisions to preserve the availability of the Hold Separate Manager for employment by an acquirer. Hold Separate Order ¶ III.C.5. provides:

For a period of two (2) years beginning after the termination of this Hold Separate, Respondent shall not retain the services of the Solvay Fluoropolymers Manager.¹

The Commission appointed Rajiv Gupta as the Hold Separate Trustee on April 29, 2002, when the Commission approved the consent agreement and the proposed decision and order for public comment. As required by paragraph III.C. of the Hold Separate, Solvay obtained Mr. Gupta's approval to retain Gary Mularski as the Solvay Fluoropolymers Manager to operate the Solvay Fluoropolymers Business pending divestiture.

¹ The Hold Separate Order terminates automatically on the divestiture of the Solvay Fluoropolymers Business. See Hold Separate Order ¶ VII.B. Solvay divested the Solvay Fluoropolymers Business and its interest in the VF₂ joint venture on January 21, 2003. However, the Decision and Order effectively incorporates this provision of the Hold Separate Order into the Decision and Order by requiring Solvay to "comply fully with all terms and provisions of the Hold Separate, including, but not limited to, provisions restricting [Solvay's] employment of Persons participating in the management of assets held separate." Decision and Order ¶ II.H.

II. The Petition

Solvay has petitioned the Commission to reopen and modify the Hold Separate Order to remove the employment ban from Hold Separate Order ¶ III.C.5., so as to permit Solvay to re-hire Gary Mularski, the Solvay Fluoropolymers Manager. Solvay proposes to employ Mr. Mularski as the Southern Key Accounts Manager for Solvay Minerals, Inc., a subsidiary that manufactures and sells soda ash.² Petition at 2-3. Mr. Mularski's position "will not relate, directly or indirectly, to the research, development, manufacture, marketing, sale, or distribution of PVDF," *id.* at 3, and he will remain bound by provisions of the Decision and Order and Hold Separate Order prohibiting him from disclosing confidential information about the PVDF business to anyone at Solvay. *See* Order ¶ II.H. and Hold Separate Order ¶¶ III.C.2. and I.V.C. The Petition asserts that, based on these representations in the Petition, Dyneon does not object to the Petition. *See* Letter from James E. Gregory, President, Dyneon LLC, to Donald S. Clark, Esq., Secretary, Federal Trade Commission (March 3, 2003), attached as Exhibit A to the Petition.

III. Standard for Reopening and Modifying Final Orders

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 Commission determines that the public interest so requires.³ Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification.⁴ In the case of "public interest" requests, FTC Rule of Practice 2.51(b) requires an initial "satisfactory showing" of how modification would serve the public interest before the Commission determines whether to reopen an Order and consider all of the reasons for and against its modification.

A "satisfactory showing" requires, with respect to public interest requests, that the requester make a *prima facie* showing of a legitimate public interest reason or reasons justifying relief. A request to reopen and modify will not contain a "satisfactory showing" if it is merely conclusory or otherwise fails to set forth by affidavit(s) specific facts demonstrating in detail the reasons why the public interest would be served by the modification.⁵ This showing requires the requester to demonstrate, for

² There is no commercial relationship between soda ash and PVDF.

³ Section 5 of the FTC Act also provides that the Commission shall reopen an Order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require. The Petition does not allege any changed conditions of law or fact.

⁴ Letter to John Hart (June 5, 1986) at 5; 16 C.F.R. § 2.51.

⁵ 16 C.F.R. § 2.51.

example, that there is a more effective or efficient way of achieving the purposes of the Order, that the Order in whole or part is no longer needed, or that there is some other clear public interest that would be served if the Commission were to grant the requested relief.⁶ In addition, this showing must be supported by evidence that is credible and reliable.⁷

If, after determining that the requester has made the required showing, the Commission decides to reopen the Order, the Commission will then consider and balance all of the reasons for and against modification. In no instance does a decision to reopen an Order oblige the Commission to modify it,⁸ and the burden remains on the requester in all cases to demonstrate why the Order should be reopened and modified. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission Orders.⁹ All information and material that the requester wishes the Commission to consider shall be contained in the request at the time of filing.¹⁰

⁶ Thus, a requester's mere assertion of competitive injury or disadvantage will ordinarily not constitute a "satisfactory showing" where the requester is unable to demonstrate how the proposed modification would promote effective competition or otherwise serve the broader public interest. *See, e.g., California & Hawaiian Sugar*, 119 F.T.C. at 44-45 (1995) (a requester cannot avoid order obligations just because its competitors are not so restricted; order was reopened and modified, however, to allow limited comparative claims that encouraged competition by enabling consumers to distinguish and choose among otherwise fungible products).

⁷ The Statement of Basis and Purpose to Rule 2.51 states that, "[r]equests to reopen orders must not only allege facts that, if true, would constitute the necessary showing, but must also credibly demonstrate that the factual assertions are reliable. [The Rule] therefore specifically requires that requesters provide one or more affidavits to support facts alleged in requests to reopen and modify orders. This [requirement] will not only help the Commission in its decision making process but, by clarifying the applicable standard, aid requesters in presenting meritorious cases . . . This [requirement] specifies the procedural method for substantiating factual assertions." 53 FR 40867 (Oct. 19, 1988).

⁸ *See United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) (reopening and modification are independent determinations).

⁹ *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

¹⁰ 16 C.F.R. § 2.51(b).

IV. It Is In The Public Interest To Grant The Petition

Solvay's Petition asks the Commission to reopen and modify the Hold Separate Order to eliminate the provision that prohibits Solvay from employing the Solvay Fluoropolymers Manager for two years after the divestiture. The Petition makes the requisite "public interest" showing to support reopening the Hold Separate Order by establishing that the 2-year employment ban found in the final sentence of Hold Separate Order ¶ III.C.5. is no longer needed. Moreover, the Petition establishes that a modification of the Hold Separate Order is warranted because Solvay has shown that the employment ban harms the personal interests of the former Solvay Fluoropolymers Manager without contributing to achieving the purposes of the Order.

Solvay's Petition includes a satisfactory showing of a legitimate public interest reason to reopen the Hold Separate Order. The Hold Separate Order's 2-year employment ban was one of several provisions in the Hold Separate Order and the Decision and Order designed to encourage the employees of the Solvay Fluoropolymers Business to remain with the business during the hold separate period and to accept employment with the acquirer of that business. The Hold Separate Order and Decision and Order defined a term, "Solvay Fluoropolymers Employees," to include all persons employed directly, full-time or part-time, by the divested business within one year of the divestiture, as well as all other Solvay employees anywhere in the world (including R&D and marketing staff) whose services were billed or paid, in whole or in part, by or to the divested business within one year of divestiture. See Decision and Order ¶ I.FF. and Hold Separate Order ¶ I.HH. Both orders also defined the term, "Solvay Fluoropolymers Key Employees," to mean the managers of the divested business when Solvay closed the Ausimont acquisition, together with additional employees designated by Solvay and an acquirer. See Decision and Order ¶ I.GG. and Hold Separate Order ¶ I.JJ.

The Hold Separate Order prohibited Solvay from employing or offering employment to any Solvay Fluoropolymer Employee and Solvay Fluoropolymers Key Employee during the hold separate period. See Hold Separate Order ¶ III.H.3. In addition, the Commission required Solvay to offer employees a bonus equal to 5% of their annual salaries to remain with the divested business during the hold separate period. Id. at ¶ III.H.5. These provisions preserved the work force of the Solvay Fluoropolymers Business so that Dyneon could select and hire any employees of the acquired business that Dyneon desired to employ.

Both the Decision and Order and the Hold Separate Order contain other provisions to help Dyneon retain the employees of the Solvay Fluoropolymers Business. Paragraph II.D.6. of the Decision and Order requires Solvay to provide a list of employees of the business, and an opportunity to review their personnel files, at least forty-five (45) days before the divestiture. The Decision and Order further requires Solvay to make those employees available to meet privately with Dyneon at least thirty (30) days prior to divestiture to offer employment to them, and prohibits Solvay from interfering with Dyneon's attempts to hire these employees. Id. Solvay also must pay a 10% bonus to any of the Solvay Fluoropolymers Key Employees who accept employment with Dyneon. Id. The orders

prohibit Solvay from hiring any of these employees within one (1) year after the divestiture closes, unless Dyneon has terminated the person's employment. See Decision and Order ¶ II.F. and Hold Separate Order III.H.4.

As highlighted by Solvay's Petition, the Hold Separate Order singles out the Solvay Fluoropolymers Manager for special treatment. It was assumed that any acquirer likely would hire the manager to help run the divested business because he would be the day-to-day manager of the business, and perhaps the most knowledgeable person about the business, when the divestiture closed. Therefore, the Hold Separate Order explicitly prohibited Solvay from hiring the manager for two (2) years after the divestiture. See Hold Separate Order ¶ III.C.5. In marked contrast to all of the other restrictions limiting Solvay's rights to hire its former employees, this provision does not allow Solvay to re-hire the Solvay Fluoropolymers Manager *even if Dyneon terminated him*.

In fact, Dyneon has decided not to offer employment to Mr. Mularski. Although Dyneon has decided not to retain him, Dyneon has kept 35 out of 37 people employed by the business when it was divested. Dyneon's success at retaining the work force suggests that the provisions of the Decision and Order and Hold Separate Order designed to facilitate the transfer of employees from the respondent to the acquirer have been successful. The order provisions have worked well, and Dyneon has retained all of the employees that, in Dyneon's judgment, are necessary to operate the divested business successfully. These circumstances demonstrate that the two-year ban on Solvay hiring the Solvay Fluoropolymers Manager is no longer necessary, which satisfies the requirement for establishing a sufficient public interest to support reopening the Hold Separate Order.

However, Dyneon's decision leaves Mr. Mularski in a disadvantageous position to seek new employment. The orders prevent Solvay, the company most familiar with Mr. Mularski's work skills, from hiring him. From Mr. Mularski's standpoint, continued employment by Solvay is far more attractive than any other option, but the orders prevent that.

In determining whether to modify the Hold Separate Order, the Commission must consider and balance all the reasons for and against the modification. Although the Hold Separate Order's two year ban on Solvay employing the Solvay Fluoropolymers Business promoted the important goal of encouraging the employees of the divested business to accept employment with Dyneon, its decision not to hire Mr. Mularski renders the employment ban obsolete and unnecessary. The employment ban now imposes an unintended harm to Mr. Mularski's personal financial and employment interests because the employment ban prevents Solvay from hiring Mr. Mularski. In balancing and weighing the reasons for and against modifying the Hold Separate Order, it appears that Mr. Mularski will suffer personal harm if the Hold Separate Order is not modified, but that declining to modify the Hold Separate Order will not promote any competitive or public purpose.

Accordingly, the Petition satisfies the standard for reopening and modifying the Hold Separate Order under the “public interest” provision of Rule 2.51(b) of the FTC Rules of Practice and Section 5 of the FTC Act. Solvay has established that reopening the Hold Separate Order is in the public interest and warranted because Hold Separate Order ¶ III.C.5. is no longer needed. Solvay has shown that the Hold Separate Order should be modified by demonstrating that Paragraph III.C.5. harms Mr. Mularski’s personal interests without promoting any public or competitive interest at all.

Accordingly, **IT IS ORDERED** that the Hold Separate Order in this matter be, and it hereby is, reopened; and,

IT IS FURTHER ORDERED that the Hold Separate Order be, and it hereby is, modified to delete Hold Separate Order ¶ III.C.5. as found in the Hold Separate Order issued on April 29, 2002, and to substitute the following language:

The Solvay Fluoropolymers Manager shall have no financial interests affected by Respondent’s revenues, profits or profit margins, except that the Solvay Fluoropolymers Manager’s compensation for managing the Solvay Fluoropolymers Business and the Solvay VF₂ Joint Venture Business may include economic incentives dependent on the financial performance of the Solvay Fluoropolymers Business and the Solvay VF₂ Joint Venture Business if there are also sufficient incentives for the Solvay Fluoropolymers Manager to operate the Solvay Fluoropolymers Business and the Solvay VF₂ Joint Venture Business at no less than current rates of operations (including, but not limited to, current rates of production and sales) and to achieve the objectives of this Hold Separate.

By the Commission.

Donald S. Clark
Secretary

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ISSUED: April 22, 2003