

MARC SIEGEL (CSBN 142071)
LISA V. TENORIO (CSBN 205955)
KESLIE STEWART (CSBN 184090)
DANA R. WAGNER (CSBN 209099)
DINA WONG (CSBN 202878)
Antitrust Division
U.S. Department of Justice
450 Golden Gate Avenue
Box 36046, Room 10-0101
San Francisco, CA 94102
Telephone: (415) 436-6660

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Attorneys for the United States

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA

v.

ELF ATOCHEM S.A.,

Defendant.

No. CR 02-0079 SI

PLEA AGREEMENT

The United States of America and ELF ATOCHEM S.A. ("ELF"), a corporation organized and existing under the laws of France, hereby enter into the following Plea Agreement under Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure ("Fed. R. Crim. P."):

RIGHTS OF DEFENDANT

1. ELF understands its rights:

- (a) To be represented by an attorney;
- (b) To be charged by Indictment;
- (c) To plead not guilty to any criminal charge brought against it;
- (d) To have a trial by jury, at which it would be presumed not guilty

1 of the charges and the United States would have to prove every essential
2 element of the charged offenses beyond a reasonable doubt in order for it to
3 be found guilty;

4 (e) To confront and cross-examine witnesses against it and to
5 subpoena witnesses in its defense at trial;

6 (f) To be charged in the State and District where the offense
7 occurred;

8 (g) As a corporation organized and existing under the laws of
9 France, to decline to accept service of the Summons in this case, and to
10 contest the jurisdiction of the United States to prosecute this case against it
11 in United States District Court;

12 (h) To appeal its conviction if it is found guilty at trial; and

13 (i) To appeal the imposition of sentence against it.

14 **WAIVER OF RIGHTS AND OFFENSES CHARGED**

15 2. ELF waives the rights set out in Paragraph 1(b)-(h). ELF also waives
16 the right to appeal the imposition of the sentences against it so long as the
17 sentences imposed are consistent with the recommendation in Paragraph 9. Under
18 Rule 7(b), Fed. R. Crim. P., ELF will waive indictment. It will plead guilty to a two-
19 count Information filed in the United States District Court for the Northern District
20 of California. Count I of the Information will charge ELF with participating in a
21 conspiracy to suppress and eliminate competition by fixing the prices and allocating
22 market shares of monochloroacetic acid and sodium monochloroacetate (collectively
23 referred to as "MCAA") to be sold in the United States and elsewhere, beginning in
24 or about September 1995 and continuing until in or about August 1999, in violation
25 of the Sherman Antitrust Act, 15 U.S.C. § 1. Count II of the Information will
26 charge ELF with participating in a conspiracy to suppress and eliminate
27 competition by fixing the prices of organic peroxides ("OP"), specifically t-butyl
28 perbenzoate and t-butyl peracetate dedicated to styrene polymerization (ELF

1 brands Luperox P and Luperox 7M50) (“the Specified OP Products”) to be sold in
2 the United States and elsewhere, beginning in or about August 1997 and continuing
3 until in or about, March 1998, in violation of the Sherman Antitrust Act, 15 U.S.C.
4 § 1.

5 3. Under the terms of this Plea Agreement, ELF will plead guilty to the
6 criminal charges described in Paragraph 2 and will make a factual admission of
7 guilt to the Court in accordance with Rule 11, Fed. R. Crim. P., as set forth in
8 Paragraphs 4 and 5.

9 **FACTUAL BASIS FOR OFFENSES CHARGED**

10 4. Had this case gone to trial, the United States would have presented
11 evidence to prove the following facts in support of Count I of the Information:

12 (a) For purposes of this Plea Agreement, the “Relevant Period” with
13 respect to Count I of the Information begins in or about September 1995 and
14 continues until in or about August 1999. During the Relevant Period, ELF
15 was a corporation organized and existing under the laws of France. ELF has
16 its principal place of business in Puteaux, France. On April 17, 2000, as a
17 result of the merger of TOTALFINA and Elf Aquitaine, ELF's corporate name
18 was changed to ATOFINA. ATOFINA is organized and exists under the laws
19 of France with its principal place of business in Puteaux, France. During the
20 Relevant Period, ELF was a producer of MCAA and exported MCAA into the
21 United States and elsewhere. MCAA is a reactive compound that is used to
22 form a number of intermediate chemicals. Markets for MCAA and
23 derivatives include plastic additives, herbicides, and cosmetics;

24 (b) During the Relevant Period, ELF, through several of its officers
25 or employees, participated in a conspiracy among major MCAA producers,
26 the primary terms of which were to fix the prices and allocate the market
27 shares of MCAA to be sold in the United States and elsewhere. In
28 furtherance of the conspiracy, ELF, through several of its officers or

1 employees, engaged in discussions and attended meetings with
2 representatives of other major MCAA producers. During these discussions
3 and meetings, agreements were reached to fix the prices and allocate the
4 market shares for MCAA to be sold in the United States and elsewhere; and

5 (c) During the Relevant Period, MCAA sold by one or more of the
6 conspirator firms, and equipment and supplies necessary to the production
7 and distribution of MCAA, as well as payments for MCAA, traveled in
8 interstate and foreign commerce. The business activities of ELF and its
9 coconspirators in connection with the production and sale of MCAA affected
10 by this conspiracy substantially affected interstate and foreign trade and
11 commerce, and the MCAA affected by this conspiracy was within the flow of
12 interstate and foreign trade and commerce.

13 5. Had this case gone to trial, the United States would have presented
14 evidence to prove the following facts in support of Count II of the Information:

15 (a) For purposes of this Plea Agreement, the "Relevant Period" with
16 respect to Count II of the Information begins in or about August 1997 and
17 continues until in or about, March 1998. During the Relevant Period, ELF
18 was a corporation organized and existing under the laws of France. ELF has
19 its principal place of business in Puteaux, France. On April 17, 2000, as a
20 result of the merger of TOTALFINA and Elf Aquitaine, ELF's corporate name
21 was changed to ATOFINA. ATOFINA is organized and exists under the laws
22 of France with its principal place of business in Puteaux, France. During the
23 Relevant Period, ELF, through its affiliates, manufactured and sold the
24 Specified OP Products in the United States. The Specified OP Products are
25 essential chemical inputs used in the manufacture of certain polystyrene
26 products, including containers and packaging materials;

27 (b) During the Relevant Period, ELF, through several of its officers
28 or employees, participated in a conspiracy between ELF and major OP

1 producers, the primary terms of which were to fix the prices of the Specified
2 OP Products to be sold in the United States and elsewhere. In furtherance of
3 the conspiracy, ELF, through several of its officers or employees, engaged in
4 discussions and attended meetings with representatives of major OP
5 producers. During these discussions and meetings, agreements were reached
6 to fix the prices of the Specified OP Products to be sold in the United States
7 and elsewhere; and

8 (c) During the Relevant Period, the Specified OP Products sold by
9 one or more of the conspirator firms, and equipment and supplies necessary
10 to the production and distribution of the Specified OP Products, as well as
11 payments for the Specified OP Products, traveled in interstate and foreign
12 commerce. The business activities of ELF and its coconspirators in
13 connection with the production and sale of the Specified OP Products affected
14 by this conspiracy substantially affected interstate and foreign trade and
15 commerce, and the Specified OP Products affected by this conspiracy were
16 within the flow of interstate and foreign trade and commerce.

17 POSSIBLE MAXIMUM SENTENCES

18 6. ELF understands that the maximum penalty that may be imposed
19 against it upon conviction for each violation of the Sherman Antitrust Act is a fine
20 equal to the largest of:

- 21 (a) \$10 million (15 U.S.C. § 1);
22 (b) Twice the gross pecuniary gain the conspirators derived from
23 the crime; or
24 (c) Twice the gross pecuniary loss caused to the victims of the crime
25 (18 U.S.C. § 3571(d)).

26 7. In addition, ELF understands that for each violation:

- 27 (a) Under § 8B1.1(a)(2) of the United States Sentencing
28 Commission Guidelines ("U.S.S.G."), the Court may order it to pay restitution

1 to the victims of the offense;

2 (b) Under 18 U.S.C. § 3013(a)(2)(B) and U.S.S.G. § 8E1.1, the
3 Court is required to order ELF to pay a \$400 special assessment upon
4 conviction for the charged crime; and

5 (c) Under 18 U.S.C. § 3561(c)(1), the Court may impose a term of
6 probation of at least one year, but not more than five years.

7 **SENTENCING GUIDELINES**

8 8. Sentencing for the offenses to be charged will be conducted based on
9 the U.S.S.G. Manual in effect on the day of sentencing. Under U.S.S.G. § 1B1.8,
10 self-incriminating information provided to the United States under this Plea
11 Agreement will not be used to increase the volume of affected commerce
12 attributable to ELF or in determining the applicable Guidelines range, except to the
13 extent provided for in U.S.S.G. § 1B1.8(b).

14 **SENTENCING AGREEMENT**

15 9. Under Rule 11(e)(1)(C), Fed. R. Crim. P., the United States and ELF
16 agree that the appropriate dispositions of Counts I and II are, and agree jointly to
17 recommend that the Court impose, under 18 U.S.C. § 3571(d), the following
18 sentences (“Agreed-Upon Sentences”):

19 (a) On Count I, a sentence requiring ELF to pay to the United
20 States a fine of five million dollars (\$5,000,000), payable in full before the
21 fifteenth day after the date of judgment, with no term of probation. ELF
22 understands that the Court will order it to pay a \$400 special assessment,
23 under 18 U.S.C. § 3013(a)(2)(B) and U.S.S.G. § 8E1.1, in addition to any fine
24 imposed;

25 (b) On Count II, a sentence requiring ELF to pay to the United
26 States a fine of three million, five hundred thousand dollars (\$3,500,000),
27 payable in full before the fifteenth day after the date of judgment, with no
28 term of probation. ELF understands that the Court will order it to pay a

1 \$400 special assessment, under 18 U.S.C. § 3013(a)(2)(B) and U.S.S.G.
2 § 8E1.1, in addition to any fine imposed;

3 (c) The United States and ELF understand that the payment of the
4 Agreed-Upon Sentences as set out in Paragraphs 9(a) and 9(b) will be made
5 by ATOFINA; and

6 (d) The United States and ELF also understand that the Court
7 retains complete discretion to accept or reject the Agreed-Upon Sentences in
8 this Plea Agreement. If the Court does not accept the Agreed-Upon
9 Sentences, this Plea Agreement will be void and ELF will be free to withdraw
10 its guilty pleas (Fed. R. Crim. P. 11(e)(4)). If ELF does withdraw its pleas of
11 guilty, this Plea Agreement, the guilty pleas, and any statements made in
12 connection with or in furtherance of the pleas or this Plea Agreement, or in
13 the course of discussions leading to the pleas or this Plea Agreement, shall
14 not be admissible against ELF in any criminal or civil proceeding (Fed. R.
15 Crim. P. 11(e)(6)).

16 10. Section 5K2.0 of the U.S.S.G. provides for a sentence above the range
17 established by the applicable guideline if there exists an aggravating circumstance
18 not adequately taken into consideration in formulating the Guidelines. The United
19 States will make a motion pursuant to U.S.S.G. § 5K2.0 requesting that the Court
20 make an upward departure from the sentence calculated pursuant to the Guidelines
21 for Count II and impose the agreed-upon sentence set out above. Defendant and
22 coconspirators agreed to fix the prices of the Specified OP Products as a first step
23 toward their larger goal of fixing U.S. prices for a broader range of organic peroxide
24 products used in the polystyrene end-use market. Because the defendant and
25 coconspirators succeeded in charging only certain customers the fixed prices of
26 those two products, they never implemented their larger goal of fixing the prices of
27 additional organic peroxide products in that end-use market. Thus, the applicable
28 Guidelines range in Count II does not adequately reflect the full scope, seriousness,
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1 and intended impact of the conspiracy. On this basis, the United States and
2 defendant agree that an upward departure is appropriate in this case.

3 11. The United States and ELF jointly submit that this Plea Agreement,
4 together with the record that will be created by the United States and ELF at the
5 plea and sentencing hearings, and the further disclosure described in Paragraph 12,
6 will provide sufficient information concerning ELF, the offenses charged in this
7 case, and ELF's role in the offenses to enable the meaningful exercise of sentencing
8 authority by the Court under 18 U.S.C. § 3553. The United States will not object to
9 ELF's request that the Court accept ELF's pleas of guilty and impose the sentences
10 on an expedited schedule as early as the date of arraignment, based upon the record
11 provided by ELF and the United States, under the provisions of Rule 32(b)(1), Fed.
12 R. Crim. P., U.S.S.G. § 6A1.1, and Rule 32-1(b) of the Criminal Local Rules. The
13 Court's denial of the request to impose the sentences on an expedited schedule will
14 not void this Plea Agreement.

15 12. Subject to the ongoing, full, and truthful cooperation of ELF described
16 in Paragraph 14, and before sentencing in the case, the United States will fully
17 advise the Court of the fact, manner, and extent of ELF's ongoing cooperation with
18 the United States' investigations and prosecutions, all material facts relating to
19 ELF's involvement in the charged offenses, and all other relevant conduct.

20 13. In light of the availability of civil causes of actions, which potentially
21 provide for a recovery of a multiple of actual damages, and at least one of which has
22 already been filed, see Crompton Corp. v. Clariant Corp., et al., No. 01-84-B-M2
23 (M.D. La. filed Jan. 24, 2001), the United States agrees that it will not seek a
24 restitution order for the offenses charged in the Information.

25 **DEFENDANT'S COOPERATION**

26 14. ELF and its related entities (for purposes of this Plea Agreement,
27 "Related Entities" means collectively ELF's parents; its successors; and its
28 subsidiaries that have engaged in the sale or production of MCAA or the sale or

1 production of OP) will fully and truthfully cooperate with the United States in the
2 prosecution of this case, the current federal investigations of violations of federal
3 antitrust and related criminal laws in the MCAA industry and the OP industry, any
4 other federal investigation resulting from these current investigations, and any
5 litigation or other proceedings arising or resulting from any such investigations to
6 which the United States is a party ("Federal Proceeding"). This cooperation shall
7 include, but not be limited to:

8 (a) Producing to the United States all non-privileged documents,
9 information, and other materials, wherever located, in the possession,
10 custody, or control of ELF, or any of ELF's Related Entities, requested by the
11 United States in connection with any Federal Proceeding; and

12 (b) Using its best efforts to secure the ongoing, full, and truthful
13 cooperation, as defined in Paragraph 15, of the current or former directors,
14 officers, or employees of ELF or any of ELF's Related Entities (excluding
15 Patrick Stainton and Jacques Jourdan), including making these persons
16 available in the United States and at other mutually agreed-upon locations,
17 at ELF's expense, for interviews and testimony in grand jury, trial, and other
18 judicial proceedings in connection with any Federal Proceeding.

19 15. The ongoing, full and truthful cooperation of each person described in
20 Paragraph 14(b) will be subject to the procedures and protections of this paragraph,
21 and shall include, but not be limited to:

22 (a) Producing in the United States and at other mutually agreed-
23 upon locations all non-privileged documents, including claimed personal
24 documents, and other materials requested by the United States;

25 (b) Making himself or herself available for interviews in the United
26 States and at other mutually agreed-upon locations, upon the request of the
27 United States;

28 (c) Responding fully and truthfully to all inquiries of the United

1 States in connection with any Federal Proceeding, without falsely implicating
2 any person or intentionally withholding any non-privileged information,
3 subject to the penalties of making false statements or declarations (18 U.S.C.
4 § 1001) or obstruction of justice (18 U.S.C. § 1503);

5 (d) Otherwise voluntarily providing the United States with any
6 materials or information not requested in (a) - (c) of this paragraph that he or
7 she may have that is related to any Federal Proceeding; and

8 (e) When called upon to do so by the United States in connection
9 with any Federal Proceeding, testifying in grand jury, trial, and other judicial
10 proceedings in the United States fully, truthfully, and under oath, subject to
11 the penalties of perjury (18 U.S.C. § 1621), making false statements or
12 declarations in grand jury or court proceedings (18 U.S.C. § 1623), and
13 contempt (18 U.S.C. §§ 401-402).

14 **GOVERNMENT'S AGREEMENT**

15 16. The United States agrees to the following:

16 (a) Upon acceptance of the guilty pleas called for by this Plea
17 Agreement and imposition of the Agreed-Upon Sentences, and subject to the
18 exceptions noted in Paragraph 16(c), the United States will not bring
19 criminal charges against any current or former director, officer, or employee
20 of ELF or ELF's Related Entities (excluding Patrick Stainton and Jacques
21 Jourdan) for any act or offense committed before the Court's acceptance of
22 this Plea Agreement and while that person was acting as a director, officer,
23 or employee of ELF or ELF's Related Entities that was undertaken in
24 furtherance of any attempted or completed antitrust conspiracy involving the
25 manufacture or sale of MCAA or OP ("Relevant Offense");

26 (b) Should the United States determine that any current or former
27 director, officer, or employee of ELF or ELF's Related Entities has
28 information relevant to any Federal Proceeding, the United States may

1 request that person's cooperation under the terms of this Plea Agreement by
2 written request delivered to counsel for the individual (with a copy to the
3 undersigned counsel for ELF) or, if the individual is not known by the United
4 States to be represented, to the undersigned counsel for ELF;

5 (c) If any person requested to provide cooperation under Paragraph
6 16(b) fails to comply with his or her obligations under Paragraph 15, then the
7 terms of this Plea Agreement as they pertain to that person, and the
8 agreement not to prosecute that person in this Plea Agreement, shall be
9 rendered void;

10 (d) Except as provided in Paragraph 16(e), information provided by
11 a person described in Paragraph 16(b) to the United States under the terms
12 of this Plea Agreement pertaining to any Relevant Offense, or any
13 information directly or indirectly derived from that information, may not be
14 used in a criminal case against that person, except in a prosecution for
15 perjury (18 U.S.C. § 1621), making a false statement or declaration
16 (18 U.S.C. §§ 1001, 1623), obstruction of justice (18 U.S.C. § 1503), or
17 contempt (18 U.S.C. §§ 401-402);

18 (e) If any person who provides information to the United States
19 under this Plea Agreement fails to comply fully with his or her obligations
20 under Paragraph 15 of this Plea Agreement, the agreement in Paragraph
21 16(d) not to use that information or any information directly or indirectly
22 derived from it against that person in a criminal case shall be rendered void;

23 (f) The non-prosecution terms of this paragraph do not apply to any
24 civil liability to the United States, to any violation of the federal tax or
25 securities laws, or to any crime of violence; and

26 (g) Documents provided under Paragraphs 14(a) and 15(a) shall be
27 deemed responsive to outstanding grand jury subpoenas issued to ELF or any
28 of its Related Entities.

1 17. Upon acceptance of the guilty pleas called for by this Plea Agreement
2 and imposition of the Agreed-Upon Sentences, and subject to the cooperation
3 requirements of Paragraph 14, the United States agrees that it will not bring
4 further criminal charges against ELF nor will it bring any criminal charges against
5 any of its Related Entities for any Relevant Offense committed before the Court's
6 acceptance of this Plea Agreement. The non-prosecution terms of this paragraph do
7 not apply to any civil liability to the United States, to any violation of the federal
8 tax or securities laws, or to any crime of violence.

9 18. The United States agrees that, when any person travels to the United
10 States for interviews, grand jury appearances, or court appearances under this Plea
11 Agreement, the United States will take no action, based upon any offenses subject
12 to this Plea Agreement, to subject that person to arrest, service of process, or
13 prevention from departing the United States. This paragraph does not apply to an
14 individual's commission of perjury (18 U.S.C. § 1621), making false statements or
15 declarations (18 U.S.C. § 1001), making false statements or declarations in grand
16 jury or court proceedings (18 U.S.C. § 1623), obstruction of justice (18 U.S.C. §
17 1503), or contempt (18 U.S.C. §§ 401-402) in connection with any testimony
18 provided under this Plea Agreement in trial, grand jury or other judicial
19 proceedings in the United States.

20 19. ELF understands that it may be subject to administrative action by
21 federal or state agencies other than the United States Department of Justice,
22 Antitrust Division, based upon convictions resulting from this Plea Agreement, and
23 that this Plea Agreement in no way controls whatever action, if any, other agencies
24 may take. However, the United States agrees that, if requested, it will advise the
25 appropriate officials of any governmental agency considering administrative action
26 against ELF based upon any conviction resulting from this Plea Agreement of the
27 fact, manner, and extent of the cooperation of ELF and its Related Entities as a
28 matter for that agency to consider before determining what administrative action, if

1 any, to take.

2 **REPRESENTATION BY COUNSEL**

3 20. ELF has been represented by counsel and is fully satisfied that its
4 attorneys have provided competent legal representation. ELF has thoroughly
5 reviewed this Plea Agreement and acknowledges that counsel has advised it of the
6 nature of the charges, any possible defenses to the charges, and the nature and
7 range of possible sentences.

8 **VOLUNTARY PLEAS**

9 21. ELF's decision to enter into this Plea Agreement and to tender pleas of
10 guilty is freely and voluntarily made and is not the result of force, threats,
11 assurances, promises, or representations other than the representations contained
12 in this Plea Agreement. The United States has made no promises or
13 representations to ELF as to whether the Court will accept or reject this Plea
14 Agreement.

15 **VIOLATION OF PLEA AGREEMENT**

16 22. ELF agrees that, should the United States determine in good faith,
17 during the period any Federal Proceeding is pending, that ELF has failed to provide
18 full cooperation, as described in Paragraph 14, or otherwise has violated any other
19 provision of this Plea Agreement, the United States may notify counsel for ELF in
20 writing by personal or overnight delivery or facsimile transmission of its intention
21 to void its obligations under this Plea Agreement (except its obligations under this
22 paragraph). ELF may seek court review of any determination made by the United
23 States under this paragraph.

24 **ENTIRETY OF AGREEMENT**

25 23. This Plea Agreement constitutes the entire agreement between the
26 United States and ELF concerning the disposition of the criminal charges in this
27 case. This Plea Agreement cannot be modified except in writing, signed by the
28 United States and ELF.

1 24. The undersigned is authorized to enter this Plea Agreement on behalf
2 of ELF as evidenced by the Resolution of Legal Powers by the President of
3 ATOFINA attached to, and incorporated by reference in, this Plea Agreement.

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28 25. A facsimile signature shall be deemed an original signature for the
PLEA AGREEMENT -- ELF -- PAGE 14

1 purpose of executing this Plea Agreement.

2 DATED: 03/27/02

3 Respectfully submitted,

4
5 **ATOFINA**

**U.S. DEPARTMENT OF JUSTICE
ANTITRUST DIVISION**

6
7
8 BY: /s/
9 Jean-Pierre Lacroux
10 Directeur Juridique
11 ATOFINA S.A.

BY: /s/
Marc Siegel
Lisa V. Tenorio
Keslie Stewart
Dana R. Wagner
Dina Wong
Attorneys

12 450 Golden Gate Avenue
13 Box 36046, Room 10-0101
14 San Francisco, California 94102
(415) 436-6660

15 **COUNSEL FOR ATOFINA**

16
17 BY: /s/
18 Donald C. Klawiter
19 Morgan, Lewis & Bockius, LLP
20 1111 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 739-5222