IN THE MATTER OF

DETROIT AUTO DEALERS ASSOCIATION, INC., ET AL.

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

Docket 9189. Complaint, Dec. 20, 1984--Decision, April 20, 1994*

This consent order requires, among other things, one hundred and forty four Detroit-area automobile dealerships, owners and managers, and dealer associations (including respondents associated with the sale of GM, Ford, Lincoln-Mercury and Volkswagen vehicles, and respondents associated with the sale of Chrysler, Plymouth and Dodge vehicles) to stay open a specified minimum number of hours a week. In addition, the order prohibits the respondents from entering into, continuing or carrying out any agreement to establish, fix or maintain any hours of operation.

Appearances

For the Commission: *Ernest A. Nagata, Morris A. Bloom* and *Joseph Eckhaus.*

For the respondents: *Martin Crandall, Stringari, Fritz, Kreger, Ahearn & Hunsinger, P.C.*, Detroit, MI. *Howard O'Leary, Dykema, Gossett, Spencer, Goodnow & Trigg*, Washington, D.C. *Lawrence Raniszesk, Colombo & Colombo*, Bloomfield Hill, MI. *Christopher Macavoy, Collier, Shannon & Scott*, Washington, D.C. *Fred L. Woodworth, Dykema, Gossett, Spencer, Goodnow & Trigg*, Detroit, MI. *Glenn Mitchell, Stein, Mitchell & Mezines*, Washington, D.C. *John Youngblood, Abbott, Nicholson, Quilter, Esshaki & Youngblood*, Detroit, MI.

DECISION AND ORDER

The Federal Trade Commission having issued its two count complaint charging the respondents named in the complaint issued in this matter on December 20, 1984, with violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

---

* Complaint previously published at 108 FTC 193 (1986).

The respondents identified in Attachments A, B, C, D and E to this order, their attorney, and counsel for the Commission having thereafter executed agreements containing a consent order for Count I of the complaint, an admission by the identified respondents of all the 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 by respondents that the law has been violated as alleged in Count I of such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn Count I of the of the complaint from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having thereafter considered the matter and 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 dealers identified in Attachments A and C are all corporations with their principal places of business located at the addresses shown in Attachments A and C.

2. Individual respondents identified in Attachments B and D are officers of various dealers, as shown in Attachments B and D, and as such they formulate, direct and control the acts and practices of the dealers for which they are officers.

3. Respondent associations identified in Attachment E are incorporated trade associations for motor vehicle dealers with their principal places of business located at the addresses shown in Attachment E.

4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding as it relates to Count I of the complaint and of the respondents listed, in Attachments A, B, C, D and E, and the proceeding is in the public interest.

ORDER

It is ordered, That for the purposes of this order, the following definitions shall apply:

1. "*Person*" means any natural person, corporation, partnership, association, joint venture, trust, or other organization or entity, but not governmental entities.

2. "*Dealer*" means any person who receives on consignment or purchases motor vehicles for sale or lease to the public, and any director, officer, employee, representative or agent of any such person.

3. "*Dealer association*" means any trade, civic, service, or social association whose membership is composed primarily of dealers.

4. "*Detroit area*" means the Detroit, Michigan metropolitan area, comprising Macomb County, Wayne County and Oakland County in the State of Michigan.

5. "*Hours of operation*" means the times during which a dealer is open for business to sell or lease motor vehicles.

6. "*Weekday hours*" means the hours of 9:00 a.m. to 6:00 p.m. Monday through Friday.

7. "*Non-weekday hours*" means hours other than 9:00 a.m. to 6:00 p.m. Monday through Friday.

8. "*Major holidays*" means New Year's Day, Memorial Day, July 4, Labor Day, Thanksgiving and Christmas, and includes the date federal courts close in observance of these specified holidays if such holiday falls on a Sunday.

9. "*Holiday weeks*" means any week that contains a major holiday, Christmas Eve or New Year's Eve.

10. "*Daylight Savings Time*" means the legal time during the period described in 15 U.S.C. 260a.

11. "*Standard Time*" means the legal time during any period other than the period described in 15 U.S.C. 260a.

12. "*Unsafe Area*" means any area that is unsafe for both customers and dealership employees after dark.

13. "*Group I Dealership and Individual Respondent*" means any corporation listed in Addendum A to the order, including its officers, directors, representatives, agents, divisions, subsidiaries and successors and assigns, and any individual listed in Addendum B to the order.

14. "*Group II Dealership and Individual Respondent*" means any corporation listed in Addendum C to the order, including its officers, directors, representatives, agents, divisions, subsidiaries and successors and assigns, and any individual listed in Addendum D to the order.

15. "*Association Respondent*" means any association listed in Addendum E to the order, the officers, directors, representatives, agents, divisions, subsidiaries, successors and assigns of any listed association.

16. "*Respondent*" means any dealership, individual, or association respondent.

17. "*Consenting Respondent*" means any dealership, individual, or association respondent listed in any addendum to this order.

18. "*Non-association Respondent*" means any dealership or individual respondent. The term "non-association respondent" does not include any individual respondent who does not own or operate a dealership in the Detroit area.

I.

It is further ordered, That each consenting respondent shall cease and desist from, directly or indirectly or through any corporate or other device, entering into, continuing, or carrying out any agreement, contract, combination, or conspiracy, in or affecting commerce (as "commerce" is defined in the Federal Trade Commission Act), with any other respondent or other dealer or dealer association in the Detroit area to establish, fix, maintain, adopt, or adhere to any hours of operation.

II.

It is further ordered, That each consenting respondent shall cease and desist from, directly or indirectly or through any corporate or other device, performing any of the following acts or practices or encouraging, inducing, or requiring any person to perform any of the following acts or practices, or entering into, continuing, or carrying out any agreement, contract, combination, or conspiracy with any other person in the Detroit area to do or perform any of the following acts or practices:

A. Exchanging information or communicating with any other respondent or other dealer or dealer association in the Detroit area concerning hours of operation, except to the extent necessary to comply with any order of the Federal Trade Commission, and except, after two (2) years from the date this order becomes final, to the

extent necessary to incorporate individual dealers' hours of operation in lawful joint advertisements; provided, however, (i) that nothing in this Part II.A of the order shall prohibit joint advertisements incorporating individual dealers' hours of operation, when such individual dealers are legally operated, directly or indirectly, under common control; and (ii) that nothing in this Part II.A of the order shall prohibit joint advertisements incorporating individual dealers' hours of operation for special events such as tent sales, mall sales, or annual sales when hours of operation are extended.

B. Requesting, recommending, coercing, influencing, inducing, encouraging, or persuading, or attempting to request, recommend, coerce, influence, induce, encourage, or persuade, any other respondent or other dealer or dealer association in the Detroit area to maintain, adopt or adhere to any hours of operation.

III.

It is further ordered, That each Group I dealership and individual respondent shall, commencing ten (10) days after this order becomes final and continuing for a period of one (1) year, maintain a minimum of sixty-two (62) hours of operation per week for the sale and lease of motor vehicles; provided, however, that each Group I dealership and individual respondent shall have the option of maintaining less than sixty-two (62) hours of operation during the weeks that contain one of the major holidays, Christmas Eve or New Year's Eve; provided further that during such holiday weeks each Group I dealership and individual respondent shall maintain an adjusted minimum number of hours of operation, determined by subtracting (1) the number of hours of operation ordinarily in effect for the day of the week on which the major holiday occurs, and (2) in the case of holiday weeks containing Christmas Eve or New Year's Eve, one-half the number of hours of operation ordinarily in effect for the day of the week on which Christmas Eve or New Year's Eve occurs, from sixty-two (62). Each Group I dealership and individual respondent shall post conspicuously its hours of operation at each of its places of business subject to this order in a manner and location readily visible to the public from outside the main entrance of the dealership's showroom. Each Group I dealership and individual respondent shall conduct its sales and lease operation during any non-weekday hours in all respects in the same manner as during weekday hours, except

that the motor vehicle sales force and supporting sales force on duty during non-weekday hours may be reduced to a number sufficient to meet the market demand during such non-weekday hours; provided, however, that the sales force and supporting sales staff shall at all such times be sufficient in number and authority to consummate fully all sales and lease transactions, in the same manner as during weekday hours.

IV.

It is further ordered, That each Group II dealership and individual respondent shall, commencing ten (10) days after this order becomes final and continuing for a period of one (1) year, maintain a minimum of sixty-two (62) hours of operation per week during daylight savings time and fifty-eight (58) hours of operation per week during standard time for the sale and lease of motor vehicles; provided, however, that each Group II dealership and individual respondent shall have the option of maintaining less than sixty-two (62) hours of operation during daylight savings time, or less than fifty-eight (58) hours of operation during standard time, during the weeks that contain one of the major holidays, Christmas Eve or New Year's Eve; provided further that during such holiday weeks each Group II dealership and individual respondent shall maintain an adjusted minimum number of hours of operation, determined by subtracting (1) the number of hours of operation ordinarily in effect for the day of the week on which the major holiday occurs, and (2) in the case of holiday weeks containing Christmas Eve or New Year's Eve, one-half the number of hours of operation ordinarily in effect for the day of the week on which Christmas Eve or New Year's Eve occurs, from sixty-two (62), during daylight savings time, or from fifty-eight (58), during standard time. Each Group II dealership and individual respondent shall post conspicuously its hours of operation at each of its places of business subject to this order in a manner and location readily visible to the public from outside the main entrance of the dealership's showroom. Each Group II dealership and individual respondent shall conduct its sales and lease operation during any non-weekday hours in all respects in the same manner as during weekday hours, except that the motor vehicle sales force and supporting sales staff on duty during non-weekday hours may be reduced to a number sufficient to meet the market demand during such non-weekday hours; provided,

however, that the sales force and supporting sales staff shall at all such times be sufficient in number and authority to consummate fully all sales and lease transactions, in the same manner as during weekday hours.

The requirements of Parts III and IV of this order to maintain minimum weekly hours of operation shall not apply to any individual respondent who does not own or operate a dealership in the Detroit area.

V.

It is further ordered, That in the event the proceeding in Docket No. 9189 against any non-association respondent results in a final adjudicated order in accordance with Section 5(g)-(k) of the Federal Trade Commission Act, 15 U.S.C. 45, or in a subsequent consent order requiring such non-association respondent to maintain fewer minimum weekly hours of operation than required by Part III of this order, then each consenting respondent subject to Part III of this order shall be bound only by the minimum weekly hours of operation obligations set forth in such subsequent order against any non-association respondent; provided, however, that this Part V shall not apply to an order for dismissal against any non-association respondent, or to an order based on a finding (1) that any non-association respondent had entered into a labor agreement incorporating fewer hours of operation than required by Part III of this order, (2) that any non-association respondent is located in an unsafe area, or (3) that-the minimum hours requirement of any non-association respondent should be less than the requirements set forth in Part III of this order based on the unique circumstances of that respondent.

VI.

It is further ordered, That in the event the proceeding in Docket 9189 against any non-association respondent results in a final adjudicated order in accordance with Section 5(g)-(k) of the Federal Trade Commission Act, 15 U.S.C. 45, or in a subsequent consent order requiring such non-association respondent to maintain fewer minimum weekly hours of operation than required by Part IV of this order, then each consenting respondent subject to Part IV of this

order shall be bound only by the minimum weekly hours of operation obligations set forth in such subsequent order against any non-association respondent; provided, however, that this Part VI shall not apply to an order for dismissal against any non-association respondent, or to an order based on a finding (1) that any non-association respondent had entered into a labor agreement incorporating fewer hours of operation than required by Part IV of this order or (2) that the minimum hours requirement of any non-association respondent should be less than the requirements set forth in Part IV of this order based on the unique circumstances of that respondent.

VII.

It is further ordered, That each Group I dealership and individual respondent, as well as each Group II dealership and individual respondent, shall, while Parts III and Part IV of this order are in effect, disclose its hours of operation in all of its advertising, except that such disclosure is not required in joint-dealer advertisements conducted through an association or in advertisements offering for sale a single, particular motor vehicle. In any print advertisements, the disclosure shall be made in a clear and prominent manner in the same type style as that in which the principal portion of the text of the advertisement appears and in twelve point or larger bold type so that it can be readily noticed. In television advertisements, the disclosure shall be presented in both the audio and visual portions. During the audio portion of the disclosure in television and radio advertisements, no other sounds, including music, shall occur and the rate of speech shall be the same as for the other parts of the advertisement. The audio portion of the disclosure in television and radio advertisements need not state the dealership's hours of operation on a day-by-day-basis so long as the disclosure states clearly and prominently the evenings in which the dealership is open and any Saturday hours.

VIII.

It is further ordered, That each association respondent shall, for a period of five (5) years from the date this order becomes final, cause to be made minutes of all business meetings of its membership,

its board of directors, and its committees. Such minutes shall (i) identify all persons attending such meeting, (ii) include a certification, signed by the presiding officer and the secretary under penalty of perjury, that states whether hours of operation were discussed at the meeting, and (iii) summarize what was discussed at the meeting. If hours of operation were discussed at any business meeting subject to this order, then the minutes of such meeting shall identify the participants in the discussion of hours of operation and state in detail the substance of the discussion(s). Each association respondent shall retain such minutes (including, but not limited to, the required certifications) for a period of five (5) years from the date the minutes were created. Such minutes shall be provided to the Commission upon request.

IX.

It is further ordered, That each association respondent shall:

A. Within sixty (60) days from the date this order becomes final, amend its bylaws, rules and regulations to eliminate any provision inconsistent with any provision of this order;

B. Within sixty (60) days from the date this order becomes final, amend its bylaws, rules and regulations to incorporate: (1) a provision that prohibits its members from discussing at any formal or informal membership, board of directors, or committee meeting the hours of operation of any dealer, except to the extent necessary to comply with any order of the Federal Trade Commission; and (2) a provision that requires expulsion from membership of any member who violates such prohibition;

C. Within ten (10) days after the amendment of any bylaws, rules or regulations pursuant to this order, furnish a copy of such amended bylaws, rules or regulations to all members, and within ten (10) days of any new member joining an association respondent, furnish to such new member a copy of the bylaws, rules and regulations of association respondent; and

D. Within sixty (60) days after receiving information from any source concerning a potential violation of any bylaw, rule, or regulation required by Part IX.B. of this order, investigate the potential violation, record the findings of the investigation, and expel for a period of one (1) year any member who is found to have

violated any of the bylaws, rules or regulations required by Part IX.B. of this order.

X.

It is further ordered, That each association respondent shall, for a period of five (5) years from the date this order becomes final, provide to the Commission the name and address of any member expelled pursuant to the requirements of Part IX.D. of this order within ten (10) days after such expulsion.

XI.

It is further ordered, That within ten (10) days after the date this order becomes final, each Group I dealership and individual respondent, as well as each Group II dealership and individual respondent, shall provide a copy of the order to each of its employees involved in motor vehicle sales or leasing in the Detroit area and each association respondent shall provide a copy of the order to each of its officers, directors, members and employees. For a period of five (5) years from the date this order becomes final, each Group I dealership and individual respondent, as well as each Group II dealership and individual respondent, shall provide a copy of the order to each new employee involved in motor vehicle sales or leasing in the Detroit area, and each association respondent shall provide a copy to each new member, within ten (10) days after the date the employee is hired or the new member joins the association respondent.

XII.

It is further ordered, That each consenting respondent shall, within ninety (90) days after this order becomes final and annually thereafter for a period of five (5) years, file with the Commission a verified written report setting forth in detail the manner and form in which it has complied with this order.

The requirements of this Part XII to file a compliance report with the Commission shall not apply to any individual respondent who does not own or operate a dealership in the Detroit area; provided, however, that such individual respondent shall, within ninety (90) days after this order becomes final, file with the Commission a

verified written report stating that he does not own or operate a dealership in the Detroit area; provided further that if circumstances change whereby such individual respondent does own or operate a dealership in the Detroit area, then that individual respondent shall notify the Commission at the earliest practicable date prior to any such change and begin complying with the requirements of Part XII of this order.

XIII.

It is further ordered, That for a period of five (5) years from the date this order becomes final, each consenting respondent that is not an individual shall notify the Commission at least thirty (30) days prior to any proposed change in corporate status (such as dissolution, assignment, or sale) that results in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in any corporate respondent which may affect compliance obligations arising out of the order. Each consenting respondent that is an individual shall, for five (5) years from the date the order becomes final, promptly notify the Commission of the discontinuance of his present business or employment and of any new affiliation or employment with any dealer or dealer association. Such notice shall include the individuals new business address and a statement of the nature of the business or employment in which the respondent is newly engaged, as well as a description of the individuals duties and responsibilities in connection with the new business or employment.

ATTACHMENT A

Dealership Respondents
Group I

Jim Causley Pontiac-GMC Truck, Inc.
38111 Gratiot Avenue
Mt. Clemens, MI 48043

Jim Presard Pontiac, Inc.
400 North Main Street
Royal Oak, MI 48067

Red Holman Pontiac-Toyota-GMC Truck Co.
a/k/a Red Holman Pontiac, Inc.
35300 Ford Road
Westland, MI 48185

Art Moran Pontiac-GMC, Inc.
a/k/a Art Moran Pontiac, GMC, Inc.
29000 Telegraph Road
Southfield, MI 48034

Rinke Pontiac-GMC Co.
a/k/a Rinke Pontiac, GMC, Inc.
27100 Van Dyke Avenue
Warren, MI 48093

Bob Sellers Pontiac-GMC, Inc.
a/k/a Bob Sellers Pontiac-GMC Truck, Inc.
38000 Grand River
Farmington Hills, MI 48335

Shelton Pontiac-Buick, Inc.
855 S. Rochester Road
Rochester, MI 48306

Jack Cauley Chevrolet, Inc.
7020 Orchard Lake Road
West Bloomfield, MI 48033

Dick Genthe Chevrolet, Inc.
15600 Eureka Road
Southgate, MI 48195

Lou LaRiche Chevrolet-Subaru, Inc.
a/k/a Lou LaRiche Chevrolet
40875 Plymouth Road
Plymouth, MI 48170

Mark Chevrolet, Inc.
33200 Michigan Avenue
Wayne, MI 48184

George Matick Chevrolet, Inc.
14001 Telegraph Road
Redford, Michigan 48239

Matthews-Hargreaves Chevrolet Co.
1616 South Main Street
Royal Oak, MI 48067

Merollis Chevrolet Sales & Service
21800 Gratiot Avenue
Eastpointe, MI 48021-2224

Ed Rinke Chevrolet-GMC Co.
a/k/a Ed Rinke Chevrolet, Inc.
26125 Van Dyke Avenue
Centerline, MI 48015-1280

Mike Savoie Chevrolet, Inc.
1900 West Maple
Troy, MI 48084

Les Stanford Chevrolet, Inc.
21711 Michigan Avenue
Dearborn, MI 48123

Tennyson Chevrolet, Inc.
32570 Plymouth Road
Livonia, MI 48150

Buff Whelan Chevrolet, Inc.
40445 Van Dyke Avenue
Sterling Heights, MI 48311-8002

Wink Chevrolet, Co.
d/b/a Bill Wink Chevrolet/GMC
10700 Ford Road
Dearborn, MI 48126

Armstrong Buick-Opel, Inc.
30500 Plymouth Road
Livonia, MI 48150

Fischer Buick-Subaru, Inc. a/k/a Fischer
Automotive Group, Inc. a/k/a Fischer Buick
Mazda-Subaru-Suzuki
1790 Maplelawn
Troy, MI 48099-0909

Tamaroff Buick-Honda, Inc.
a/k/a Tamaroff Buick Opel, Inc.
28585 Telegraph Road
Southfield, MI 48034

Audette Cadillac, Inc.
7100 Orchard Lake Road
West Bloomfield, MI 48033

Dreisbach & Sons Cadillac, Inc.
a/k/a Dreisbach and Sons Cadillac, Co.
24600 Grand River Avenue
Detroit, MI 48219

Birmingham Chrysler-Plymouth, Inc.
2100 West Maple Road
Troy, MI 48084

Lochmoor Chrysler-Plymouth, Inc.
18165 Mack Avenue
Detroit, MI 48224

Shelby Oil Company, Inc.
40755 Van Dyke Avenue
Sterling Heights, MI 48078

Roseville Chrysler-Plymouth, Inc.
25800 Gratiot Avenue
Roseville, MI 48006

Westborn Chrysler-Plymouth, Inc.
23300 Michigan Avenue
Dearborn, MI 48124

Colonial Dodge, Inc.
24211 Gratiot Avenue
E. Detroit, MI 48021

Mt. Clemens Dodge, Inc.
43774 N. Gratiot
Mt. Clemens, MI 48043

Northwestern Dodge, Inc.
10500 W. Eight Mile Road
Ferndale, MI 48220

Oakland Dodge, Inc.
101 W. Fourteen Mile Road
Madison Heights, MI 48071

Sterling Heights Dodge, Inc.
40111 Van Dyke Avenue
Sterling Heights, MI 48078

Van Dyke Dodge, Inc.
28400 Van Dyke Avenue
P.O. Box 1539
Warren, MI 48090

Avis Ford, Inc.
29200 Telegraph Road
Southfield, MI 48034

Jerry Bielfield Co.
a/k/a Jorgensen Ford, Inc.
8333 Michigan Avenue
Detroit, MI 48210

Beverly John Ford
a/k/a Fairlane Ford, Inc.
14585 Michigan Avenue
Dearborn, MI 48126

Gorno Brothers, Inc.
22025 Allen Road
Woodhaven, MI 48183

Jerome-Duncan, Inc.
8000 Ford Country Lane
Sterling Heights, MI 48313-3710

McDonald Ford Sales, Inc.
550 West Seven Mile Road
Northville, MI 48167

Pat Milliken Ford, Inc.
9600 Telegraph Road
Redford, MI 48239

Russ Milne Ford, Inc.
43870 N. Gratiot Avenue
Mt. Clemens, MI 48036

North Brothers Ford, Inc.
33300 Ford Road
Westland, MI 48185

Stark Hickey West, Inc.
24760 West Seven Mile Road
Detroit, MI 48219

Bob Thibodeau, Inc.
26333 Van Dyke Avenue
Centerline, MI 48015

Arnold Lincoln-Mercury Co.
a/k/a Arnold Lincoln Mercury Co.
29000 Gratiot Avenue
Roseville, MI 48066

Stu Evans Lincoln-Mercury, Inc. of Garden City
a/k/a Stu Evans Lincoln Mercury of Garden City
32000 Ford Road
Garden City, MI 48135

Stu Evans Lincoln-Mercury of Southgate
a/k/a Stu Evans Lincoln Mercury of Southgate
16800 Fort Street
Southgate, MI 48195

Hines Park Lincoln-Mercury, Inc.
a/k/a Hines Park Lincoln Mercury
40601 Ann Arbor Road
Plymouth, MI 48170

Krug Lincoln-Mercury, Inc.
21531 Michigan Avenue
Dearborn, MI 48124

McInerney, Inc.
d/b/a Northland Chrysler-Plymouth, Inc.
14100 West Eight Mile Road
Oak Park, MI 48237

PHP d/b/a Park Motor Sales Co.
a/k/a Park Motor Sales Co.
18100 Woodward Avenue
Detroit, MI 48203

Star Lincoln Mercury, Inc.
a/k/a Star Lincoln-Mercury
24350 Twelve Mile Road
P.O. Box 2142
Southfield, MI 48037

Charnock Oldsmobile, Inc.
24555 Michigan Avenue
Dearborn, MI 48124

Drummy Oldsmobile, Inc.
14925 East Eight Mile Road
Eastpointe, Michigan 48021

Gage Oldsmobile, Inc.
21710 Woodward
Ferndale, MI 48220-0280

Bill Rowan Oldsmobile, Inc.
a/k/a Bill Rowan Oldsmobile
15800 Eureka Road
Southgate, MI 48195

Suburban Oldsmobile-Datsun, Inc.
a/k/a Suburban Oldsmobile-Cadillac
1810 Maplelawn
Troy, MI 48099-0909

Melton Motors, Inc.
15100 Eureka
Southgate, MI 48195

Wood Motors, Inc.
15351 Gratiot Avenue
Detroit, MI 48205

Pointe Dodge, Inc.
18001 Mack Avenue
Detroit, MI 48224

ATTACHMENT B

Dealership Respondents
Group II

James-Martin Chevrolet, Inc.
a/k/a James Martin Chevrolet, Inc.
6250 Woodward Avenue
Detroit, MI 48202

Jefferson Chevrolet Co.
a/k/a Jefferson Chevrolet, Co.
2130 East Jefferson Avenue
Detroit, MI 48207

Charles Dalgleish Cadillac-Peugeot, Inc.
a/k/a Charles Dalgleish Cadillac, Inc.
6160 Cass Avenue
Detroit, MI 48202

Bill Snethkamp, Inc.
16430 Woodward Avenue
Highland Park, MI 48023

Garrity Motor Sales, Inc.
11500 Joseph Campau
Hamtramck, MI 48212

ATTACHMENT C

Individual Respondents
Group I

W. Robert Allen
c/o Matthews-Hargreaves Chevrolet Co.
1616 South Main Street
Royal Oak, MI 48067

Thomas Armstrong
a/k/a Thomas Clark Armstrong
c/o Armstrong Buick-Opel, Inc.
30500 Plymouth Road
Livonia, MI 48150

Charles Audette
c/o Audette Cadillac, Inc.
7100 Orchard Lake Road
West Bloomfield, MI 48033

Frank Audette
a/k/a Frank B. Audette
c/oAudette Cadillac, Inc.
7100 Orchard Lake Road
West Bloomfield, MI 48033

Robert F. Barnett
a/k/a Robert Barnett
3923 Maple Hill East
West Bloomfield, MI 48033

Jerry M. Bielfield
a/k/a Jerry Bielfield
19457 Suffolk
Detroit MI 48203

Robert M. Brent
32711 Van Dyke Avenue
Warren, MI 48093

Paul Carrick
c/o Autobahn Motors, Inc.
1765 South Telegraph Road
Bloomfield Hills, MI 48013

John H. Cauley
c/o Jack Cauley Chevrolet, Inc.
7020 Orchard Lake Road
West Bloomfield, MI 48033

James F. Causley, Sr.
a/k/a James F. Causley
c/o Jim Causley Pontiac-GMC Truck, Inc.
38111 Gratiot Avenue
Mt. Clemens, MI 48043

Herbert Charnock
c/o Charnock Oldsmobile, Inc.
24555 Michigan Avenue
Dearborn, MI 48124

John Cueter
2448 Washtenaw
Ypsilanti, MI 48197

Al Dittrich
5825 Highland Road
Waterford, MI 48237

Thomas S. Dreisbach
c/o Dreisbach and Sons Cadillac, Inc.
24600 Grand River Avenue
Detroit, MI 48219

Richard J. Duncan
a/k/a Richard Duncan
c/o Jerome-Duncan, Inc.
8000 Ford Country Lane
Sterling Heights, MI 48313-3710

Stewart Evans
c/o Stu Evans Lincoln Mercury of Garden City
32000 Ford Road
Garden City, MI 48135

Arnold Feuerman
c/o Arnold Lincoln Mercury Co.
29000 Gratiot Avenue
Roseville, MI 48066

Richard Flannery
a/k/a W. R. Flannery
3456 Franklin Road
Bloomfield Hills, MI 48302

John Ford
a/k/a B. J. Ford
c/o Bob Ford, Inc.
14585 Michigan Avenue
Dearborn, MI 48126

F. James Fresard
c/o Jim Fresard Pontiac, Inc.
400 North Main Street
Royal Oak, MI 48067

Frank Galeana
c/o Van Dyke Dodge, Inc.
28400 Van Dyke Avenue
P.O. Box 1539
Warren, MI 48090

Richard E. Genthe
c/o Dick Genthe Chevrolet, Inc.
15600 Eureka Road
Southgate, MI 48195

Albert A. Holman
c/o Red Holman Pontiac, Inc.
35300 Ford Road
Westland, MI 48185

George Kolb
c/o Hines Park Lincoln Mercury
40601 Ann Arbor Road
Plymouth, MI 48170

Sigmund Krug
c/o Krug Lincoln-Mercury, Inc.
21531 Michigan Avenue
Dearborn, MI 48124

Louis H. LaRiche
a/k/a Louis LaRiche
c/o Lou LaRiche Chevrolet
40875 Plymouth Road
Plymouth, MI 48170

Walter N. Lazar
P.0 Box 6594
Delray Beach, FL 33484

W. Desmond McAlister
33011 Westview Court South
Bloomfield Hills, MI 48304

Martin J. McInerney
c/o McInerney, Inc.
14100 West Eight Mile Road
Oak Park, MI 48237

George S. Matick, Jr.
c/o George Matick Chevrolet, Inc.
14001 Telegraph Road
Redford, Michigan 48239

Kenneth Meade
c/o Pointe Dodge, Inc.
18001 Mack Avenue
Detroit, MI 48224

George Melton
c/o Melton Motors, Inc.
15100 Eureka
Southgate, MI 48195

Norman A. Merollis
c/o Merollis Chevrolet Sales & Service
21800 Gratiot Avenue
Eastpointe, MI 48021-2224

W.B. (Pat) Milliken
a/k/a Pat Milliken
c/o Pat Milliken Ford, Inc.
9600 Telegraph Road
Redford, MI 48239

Russell H. Milne
c/o Russ Milne Ford, Inc.
43870 N. Gratiot Avenue
Mt. Clemens, MI 48036

Arthur C. Moran
c/o Art Moran Pontiac, GMC, Inc.
29000 Telegraph Road
Southfield, MI 48034

James E. North
a/k/a James North
c/o North Brothers Ford, Inc.
33300 Ford Road
Westland, MI 48185

James Riehl
a/k/a James E. Riehl
c/o Roseville Chrysler-Plymouth, Inc.
25800 Gratiot Avenue
Roseville, MI 48006

Roland Rinke
a /k /a Roland J. Rinke
c/o Rinke Pontiac, GMC, Inc.
27100 Van Dyke Avenue
Warren, MI 48093

Arthur J. Roshak
c/o Colonial Dodge, Inc.
24211 Gratiot Avenue
E. Detroit, MI 48021

William H. Rowan
c/o Bill Rowan Oldsmobile
15800 Eureka Road
Southgate, MI 48195

Myron P. Savoie
c/o Mike Savoie Chevrolet, Inc.
1900 West Maple
Troy, MI 48084

Robert B. Sellers
a/k/a Bob Sellers
c/o Bob Sellers Pontiac-GMC Truck, Inc.
38000 Grand River
Farmington Hills, MI 48335

C.M. (Bud) Shelton
a/k/a C.M. Shelton
c/o Shelton Pontiac-Buick, Inc.
855 S. Rochester Road
Rochester, MI 48306

Joseph B. Slatkin
c/o Sheila Rosenbauer
Harry Slatkin Builders
39935 Grand River
Novi, MI 48375

Leslie J. Stanford
c/o Les Stanford Chevrolet, Inc.
21711 Michigan Avenue
Dearborn, MI 48123

Marvin Tamaroff
a/k/a Marvin M. Tamaroff
c/o Tamaroff Buick Opel, Inc.
28585 Telegraph Road
Southfield, MI 48034

Harry Tennyson
c/o Tennyson Chevrolet, Inc.
32570 Plymouth Road
Livonia, MI 48150

Robert Thibodeau
a/k/a Bob Thibodeau, Sr.
c/o Bob Thibodeau, Inc.
26333 Van Dyke Avenue
Centerline, MI 48015

Anthony J. Viviano
c/o Sterling Heights Dodge, Inc.
40111 Van Dyke Avenue
Sterling Heights, MI 48078

Stanley A. Wilk
c/o Star Lincoln Mercury, Inc.
24350 Twelve Mile Road
P.O. Box 2142
Southfield, MI 48037

William J. Wink, Jr.
c/o Wink Chevrolet, Co.
10700 Ford Road
Dearborn, MI 48126

Donald Wood
a/k/a Donald Wood, Sr.
c/o Wood Motors, Inc.
15351 Gratiot Avenue
Detroit, MI 48205

Robert Zankl
18018 Riverside Drive
Pompano Beach, FL 33062

ATTACHMENT D

Individual Respondents
Group II

Charles Dalgleish, Jr.
a/k/a Charles H. Dalgleish, Jr.
c/o Charles Dalgleish Cadillac, Inc.
6160 Cass Avenue
Detroit, MI 48202

Douglas Dalgleish
c/o Charles Dalgleish Cadillac, Inc.
6160 Cass Avenue
Detroit, MI 48202

James A. Garrity
c/o Garrity Motor Sales, Inc.
11500 Joseph Campau
Hamtramck, MI 48212

James P. Large
c/o James Martin Chevrolet, Inc.
6250 Woodward Avenue
Detroit, MI 48202

William Snethkamp
c/o Bill Snethkamp, Inc.
16430 Woodward Avenue
Highland Park, MI 48023

James P. Tellier
c/o Jefferson Chevrolet, Co.
2130 East Jefferson Avenue
Detroit, MI 48207

Raymond R. Tessmer
c/o Jefferson Chevrolet, Co.
2130 East Jefferson Avenue
Detroit, MI 48207

ATTACHMENT E

Association Respondents

Tri County Pontiac Dealers Association, Inc.
a/k/a Tri-County Pontiac Dealers Association, Inc.
16000 W. Twelve Mile Road
Southfield, MI 48076

Greater Detroit Chevrolet Dealers Association, Inc.
100 Renaissance Center
Suite 3100
Detroit, MI 48243

Chrysler and Plymouth Dealers Association of Greater Detroit, Inc.
a/k/a Chrysler-Plymouth Dealers Association of Greater Detroit, Inc., a corporation
c/o Dykema Gossett
400 Renaissance Center
Detroit, MI 48243-1668

Greater Detroit Dodge Dealers Association, Inc.
a/k/a Southeastern Michigan Dodge Dealers Association, Inc.
13500 Telegraph Road
Taylor, MI 48180

Metro Detroit Buick Dealers Association, Inc.
100 Renaissance Center
Suite 3100
Detroit, MI 48243

Metro Detroit Cadillac Dealers Association, Inc.
100 Renaissance Center
Suite 3100
Detroit, MI 48243

Metropolitan Detroit Ford Dealers, Inc.
a/k/a Metro Detroit Ford Dealers, Inc.
30955 Northwestern Highway
Suite 250
Farmington Hills, MI 48334

Metropolitan Detroit Oldsmobile Dealers Association, Inc.
24700 Northwestern Highway
P.O. Box 307
Southfield, MI 48037-0307

Metropolitan Lincoln-Mercury Dealers Association, Inc.
1500 Woodward Avenue
Suite 300
Bloomfield Hills, MI 48303

Southeastern Michigan Volkswagen Dealers Association, Inc.
650 First National Building
Detroit, MI 48226

Metropolitan Detroit Chevrolet Dealers Advertising
Association, Inc.
100 Renaissance Center
Suite 3100
Detroit, MI 48243

Chrysler Plymouth Dealers of Greater Detroit Advertising
Association, Inc.
a/k/a Chrysler-Plymouth Dealers of Greater
Detroit Advertising Association, Inc.
c/o Dykema Gossett
400 Renaissance Center
Detroit, MI 48243-1668

Ford Dealers Advertising Fund, Inc.
a/k/a Metro Detroit Ford Dealers Advertising Fund, Inc.
30955 Northwestern Highway
Suite 250
Farmington Hills, MI 48334

Lincoln-Mercury Dealers Advertising Fund - Detroit District, Inc.
1500 Woodward Avenue
Suite 300
Bloomfield Hills, MI 48303

Tri County D.A.A., Inc.
a/k/a Tri-County D.A.A., Inc.
13500 Telegraph Road
Taylor, MI 48180

IN THE MATTER OF

DEL DOTTO ENTERPRISES, INC., ET AL.

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

Docket 9257. Complaint, April 19, 1993--Decision, April 21, 1994

This consent order prohibits, among other things, a California-based corporation and its officers from making false claims regarding real estate, credit, investments, or business opportunities in the future. In addition, the order prohibits the respondents from misrepresenting that any endorsement for a product or service represents the typical or ordinary experience of previous users, and from representing that any advertisement is not paid advertising.

Appearances

For the Commission: *Chris M. Couillou, Andrea L. Foster* and *Paul Davis.*

For the respondents: *George Miron, Feith & Zell*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Del Dotto Enterprises, Inc., a corporation, and David P. Del Dotto and Yolanda Del Dotto, individually and as officers of said corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Del Dotto Enterprises, Inc., ("DDE") is a California corporation whose office and principal place of business is located at 1500 J Street, Modesto, California.

Respondent David Del Dotto is president and a shareholder of DDE. Individually or in concert with others, David Del Dotto has formulated, directed, controlled, and/or participated in the business activities, policies, acts, and practices of DDE.

Respondent Yolanda Del Dotto is secretary and a shareholder of DDE. Individually or in concert with others, Yolanda Del Dotto has

formulated, directed, controlled, and/or participated in the business activities, policies, acts, and practices of DDE.

PAR. 2. Respondents have advertised, offered for sale, sold, and distributed products and services, including, but not limited to, a set of books and audio cassette tapes, collectively known as the "Cash Flow System," and computer hardware and software. These products and services were promoted by various means, including, but not limited to, through program length advertisements and at seminar presentations held at public facilities in various locations in the United States. The Cash Flow System includes information about purchasing real estate and obtaining credit.

PAR. 3. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. Respondents have disseminated or have caused to be disseminated program length advertisements for the Cash Flow System. These advertisements have included, but are not limited to, programs with the following titles: Financial Freedom and Wealth Building in America Today (Part VI) [hereinafter "Financial Freedom VI"]; Financial Freedom and Wealth Building in America Today (Part V) [hereinafter "Financial Freedom V,]; Financial Freedom and Wealth Building in America Today (Part IV) [hereinafter "Financial Freedom IV"]; How To Make Nothing But Money; Financial Freedom and Wealth Building in America Today (Part II) [hereinafter "Financial Freedom II"]; and Financial Freedom and Wealth Building in America Today [hereinafter "Financial Freedom"]. These advertisements contain the following statements, among others:

A. "Volume 8 is the government loan book, which teaches you all about government loans, how to get loans for as little as 3% interest, how any homeowner can go out, and immediately get a loan for $17,500, and countless more loan programs that are available to you right now." [Quoted from Financial Freedom VI, Financial Freedom V, Financial Freedom IV, How to Make Nothing But Money, Financial Freedom II, and Financial Freedom]

B. "How anybody who owns a home can get a loan for $17,500!" [Quoted from Financial Freedom VI, Financial Freedom V, Financial Freedom IV, How to Make Nothing But Money, Financial Freedom II, and Financial Freedom]

C. "In Volume 8, this is one of my favorite books, because this is my government loan book. It will teach you all about how to get loans for as little as 1% to 3% interest; and where to go to the government to get 'em. And not only that, how would you like to have a loan for $17,500 to upgrade your house, and do

the work yourself and actually put money into your pocket. This volume will show you how to do that." [Quoted from Financial Freedom II]

D. "Volume 3 is one of my favorite courses. This is the credit course. Now what I teach you in this book is I teach you how to get good credit. It's very important: how to clear up your negative credit and how to co-mortgage with other people. Not only that, it also contains how to get over $100,000 of unsecured credit for all of you out there that need credit cards." [Quoted from Financial Freedom VI and How to Make Nothing But Money]

E. "Volume 3 is the credit course that will teach you how to qualify for bank loans, how to establish good credit, how to co-mortgage with other people, and how to apply for over $100,000 of unsecured credit." [Quoted from Financial Freedom VI, Financial Freedom V, Financial Freedom IV, How to Make Nothing But Money, Financial Freedom II, and Financial Freedom]

F. "You're going to receive the 'National Foreclosure Network Wholesale Buyer's Guide.' This booklet contains invaluable information on over 100,000 discounted foreclosure vacation timeshare properties, over 16,000 resolution trust foreclosures throughout the nation, over 3,000 tax sale properties that can be purchased for under $1000, and hundreds of V.A. homes that can be purchased with only $500." [Quoted from Financial Freedom IV]

G. "Dave Del Dotto's toll-free telephone consultants are available to personally assist you in all deals." [Quoted from Financial Freedom VI, Financial Freedom V, and Financial Freedom Part IV]

H. "How to get loans for as little as 3% interest." [Quoted from Financial Freedom VI, Financial Freedom V, Financial Freedom IV, How to Make Nothing But Money, Financial Freedom II, and Financial Freedom]

I. "Now Volume 8, this is one of my favorite books, because this is my government loan book. It will teach you all about how to get loans for as little as 1% to 3% interest. How anybody can go, go to the government and get a loan for $17,500 to upgrade their house, and you can actually put money into your pocket under this program. Folks, this will also show you how to get the government to make all your payments on your properties through Section 8 housing programs. It's available everywhere in America." [Quoted from Financial Freedom VI and How to Make Nothing But Money]

J. "You can do what hundreds of thousands of others are doing, you can get wealth, security, financial freedom and peace for the rest of your life." [Quoted from Financial Freedom VI, Financial Freedom V, Financial Freedom IV, How to Make Nothing But Money, and Financial Freedom II]

K. "Over 500,000 people, just like the ones you see on this television special, have become avid Dave Del Dotto students, and participants in his Cash Flow System, the most dynamic wealth building home study course available in the country today. I think it's important to know that you can do exactly what they're doing, and go on to achieve your dreams, and accumulate as much wealth as you're willing to work for." [Quoted from Financial Freedom VI, Financial Freedom V, Financial Freedom IV, How to Make Nothing But Money, and Financial Freedom II]

L. "We're here today at one of our national seminars and I wanted to take this opportunity to show you how people from around the nation are taking time to

come to these seminars and learn how to accomplish their goals, achieve their dreams and gain wealth building knowledge. Those are people just like yourself who've made the decision to finally go for it - to finally go for their dreams." [Quoted from Financial Freedom V and II]

M. "Hello, I'm Dave Del Dotto. Would you give up thirty minutes of your time if it could change your life from what you have now to the life that you really want to live? Would you give up thirty minutes of your time if it meant that you could pay off all your bills, buy the house and the car you've always wanted to own and have the financial freedom you've always wanted? In the next thirty minutes, I'm going to show how you can do these things. I'm even going to guarantee it." [Quoted from Financial Freedom]

N. "Those are people like you and me, and there are thousands more like them. Let me ask you something? Did you think those people are any different than you? Well let me tell you, they're not. They only did one thing that you haven't done, they called the 800 number that you see on the screen. They called these operators and they bought this Cash Flow System. And they did it for less money than it costs for the average portable color television set. They bought themselves financial freedom for the rest of their lives. This Cash Flow System is an informative collection of books and tapes that took years to develop. It works for anybody who is willing to use it. And the proof is in the fact that my students are from all walks of life, housewives, teenagers, lawyers, school teachers, immigrants, married couples, single people, even Harvard graduates." [Quoted from Financial Freedom]

O. "So I would suggest everybody right now get into the business right now if you want to make a fortune." [Quoted from Financial Freedom II]

P. "If you're really sincere about making money, the money that you need to achieve your goals, then you won't need a guarantee. But it will do for you what it did for me and what it does for thousands of people throughout the country." [Quoted from How to Make Nothing But Money]

Q. "I would recommend, for anybody out there, believe me, when I tell you this, I knew nothing about real estate two years ago. Go for it. Believe me, go for it! Get the knowledge that you need through the books and tapes that Dave Del Dotto sells, and do it. It really works. Believe me, it works." [Quoted from How to Make Nothing But Money, testimonial of Dennis Smith]

R. "I can't, you know, stress enough about how to, how to encourage you to get the tapes to do this, because I'm just an average Joe, and, and if I can learn this, believe me, you can." [Quoted from Financial Freedom VI and How to Make Nothing But Money, testimonial of Dan O'Connor]

S. "It's being done. It can be done. We're doing it. We're average people. Everyone can do this. [Quoted from Financial Freedom VI and Financial Freedom II, testimonial of Reggie Brooks]

PAR. 5. Through the use of the statements contained in advertisements and other communications, including but not necessarily limited to the advertisements referred to in paragraph four, respondents have represented, directly or by implication, that:

A. Respondents' book entitled "Treasury of Government Loans," which is volume 8 of the Cash Flow System, will teach customers how every homeowner can immediately get a government home improvement loan of $17,500;

B. Respondents' book entitled "Treasury of Government Loans" will show customers how to pocket some portion of the proceeds of a $17,500 government home improvement loan;

C. Respondents, book entitled "Your Credit, The Key to Financial Resources," which is volume 3 of the Cash Flow System, will teach customers how they can get over $100,000 of unsecured credit through credit cards;

D. The "National Foreclosure Network Wholesale Buyer's Guide" includes an extensive list of foreclosure and tax sale properties;

E. A telephone consulting service, to personally assist customers in making real estate deals, is included in the price paid for the Cash Flow System;

F. Respondents' book entitled "Treasury of Government Loans" shows customers how they can get loans for 1 to 3% under circumstances normally and expectably encountered by consumers; and

G. Respondents' book entitled "Treasury of Government Loans" will show customers how they can get the government to make all of their payments on rental property.

PAR. 6. In truth and in fact:

A. Respondents' book entitled "Treasury of Government Loans" does not teach customers how every homeowner can immediately get a government home improvement loan for $17,500. Under the pertinent loan program, Section 2 of Title I of the National Housing Act, 12 U.S.C. 1703, consumers must meet eligibility requirements including, but not necessarily limited to, creditworthiness.

B. Respondents, book entitled "Treasury of Government Loans" does not show customers how to pocket some portion of the proceeds of a $17,500 government home improvement loan. It does not contain any discussion of pocketing proceeds. In addition, the loans guaranteed under the pertinent loan program, Section 2 of Title I of National Housing Act, 12 U.S.C. 1703, are only for property improvement and are not supposed to be pocketed.

C. Respondents' book entitled "Your Credit, The Key to Financial Resources" does not teach customers how they can get over $100,000 of unsecured credit through credit cards. It does not contain any discussion of customers obtaining over $100,000 of unsecured credit through credit cards. In addition, the prerequisites for the issuance of credit cards make it virtually impossible for all but those with extremely high incomes and very good credit histories to obtain the amount of unsecured credit indicated.

D. The "National Foreclosure Network Wholesale Buyer's Guide" does not contain an extensive list of foreclosure and tax sale properties.

E. The telephone consulting service is not included in the price paid for the Cash Flow System.

F. Respondents' book entitled "Treasury of Government Loans" does not show customers how they can get loans for 1 to 3% under circumstances normally and expectably encountered by consumers. The 1% to 3% loans mentioned in respondents' books are either available in very limited circumstances or are no longer available.

G. Respondents' book entitled "Treasury of Government Loans" does not show customers how they can get the government to make all of their payments on rental property.

Therefore, the representations set forth in paragraph five were, and are, false and misleading.

PAR. 7. In their advertising and sale of the Cash Flow System, respondents have represented, directly or by implication, that respondents guarantee a refund of the purchase price. Respondents have failed to adequately disclose that respondents charge a restocking fee of 10% of the purchase price on refunds made under their guarantee. This fact would be material to consumers in their purchase decisions regarding the product. The failure to adequately disclose this fact, in light of the representation made, was, and is, a deceptive practice.

PAR. 8. Through the use of the statements contained in advertisements and other communications, including but not necessarily limited to the advertisements referred to in paragraph four, respondents have represented, directly or by implication, that:

A. Hundreds of thousands of respondents' customers have made substantial sums of money through use of the Cash Flow System;

B. Customers who attempt to use the Cash Flow System typically profit through investments in real estate; and,

C. The consumer testimonials that appear in advertisements for the Cash Flow System reflect the typical or ordinary experience of members of the public who have attempted to use the Cash Flow System.

PAR. 9. In truth and in fact:

A. Hundreds of thousands of respondents' customers have not made substantial sums of money through use of the Cash Flow System;

B. Customers who attempt to use the Cash Flow System do not typically profit through investments in real estate; and,

C. The consumer testimonials that appear in advertisements for the Cash Flow System do not reflect the typical or ordinary experience of members of the public who have attempted to use the Cash Flow System.

Therefore, the representations set forth in paragraph eight were and are, false and misleading.

PAR. 10. Through the use of the statements contained in advertisements and other communications, including but not necessarily limited to the advertisements referred to in paragraph four, respondents have represented, directly or implication, that at the time they made the representations set forth in paragraph eight, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 11. In truth and in fact, at the time they made the representations set forth in paragraph eight, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph ten was, and is, false and misleading.

PAR. 12. Through the advertising and dissemination of its program length advertisements including, but not necessarily limited to Financial Freedom, respondents have represented, directly or by implication, that these advertisements are independent television programs and are not paid commercial advertising.

PAR. 13. In truth and in fact, the advertisements referred to in paragraph twelve are not independent television programs and are

paid commercial advertising. Therefore, the representation set forth in paragraph twelve was, and is, false and misleading.

PAR. 14. Respondents have offered for sale and sold computer hardware and software to customers in various locations in the United States. In connection with these sales, respondents have represented, directly or by implication, that computer hardware and software sold to customers would be delivered to the customers within a specified period of time or a reasonable period of time.

PAR. 15. In truth and in fact, the computer hardware and software referred to in paragraph fourteen that were sold to customers have not in many instances been delivered to them within the specified period of time or within a reasonable period of time. Further, in many instances, respondents have failed to provide refunds of money paid by such customers or have failed to provide them within a reasonable period of time. Therefore, the representation set forth in paragraph fourteen was, and is, false and misleading.

PAR. 16. The acts and practices of respondents as alleged above in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorney, 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 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true 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 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, and having duly considered the comments filed thereafter by interested persons pursuant to Section 3.25(f) of its Rules, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following findings and enters the following order. In any action which may be brought under Section 19(a)(2) of the Federal Trade Commission Act, as amended, the said findings shall not be deemed conclusive within the meaning of Section 19(c)(1)(B)(i) of the Federal Trade Commission Act, as amended.

FINDINGS

1. Respondent Del Dotto Enterprises, Inc., ("DDE") is a California corporation whose office and principal place of business is located at 1500 J Street, Modesto, California.

Respondent David Del Dotto is president and a shareholder of DDE. Individually or in concert with others, David Del Dotto has formulated, directed, controlled, and/or participated in the business activities, policies, acts, and practices of DDE.

Respondent Yolanda Del Dotto is secretary and a shareholder of DDE. Individually or in concert with others, Yolanda Del Dotto has formulated, directed, controlled, and/or participated in the business activities, policies, acts, and practices of DDE.

2. 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.

3. Respondents have advertised, offered for sale, sold, and distributed products and services, including, but not limited to, a set of books and audio cassette tapes, collectively known as the "Cash Flow System," and computer hardware and software. These products and services were promoted by various means, including, but not limited to, through program-length advertisements and at seminar presentations held at public facilities in various locations in the United States. The Cash Flow System includes information about purchasing real estate and obtaining credit.

4. The acts and practices of respondents described in these findings have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

5. Respondents have disseminated or have caused to be disseminated program-length advertisements for the Cash Flow System. These advertisements have included, but are not limited to, programs with the following titles: Financial Freedom and Wealth Building in America Today (Part VI) [hereinafter "Financial Freedom VI"]; Financial Freedom and Wealth Building in America Today (Part V) [hereinafter "Financial Freedom V"]; Financial Freedom and Wealth Building in America Today (Part IV) [hereinafter "Financial Freedom IV"]; How To Make Nothing But Money; Financial Freedom and Wealth Building in America Today (Part II) [hereinafter "Financial Freedom II"]; and Financial Freedom and Wealth Building in America Today [hereinafter "Financial Freedom"]. These advertisements contain the following statements, among others:

A. "Volume 8 is the government loan book, which teaches you all about government loans, how to get loans for as little as 3% interest, how any homeowner can go out, and immediately get a loan for $17,500, and countless more loan programs that are available to you right now." [Quoted from Financial Freedom VI, Financial Freedom V, Financial Freedom IV, How to Make Nothing But Money, Financial Freedom II, and Financial Freedom]

B. "How anybody who owns a home can get a loan for $17,500!" [Quoted from Financial Freedom VI, Financial Freedom V, Financial Freedom IV, How to Make Nothing But Money, Financial Freedom II, and Financial Freedom]

C. "In Volume 8, this is one of my favorite books, because this is my government loan book. It will teach you all about how to get loans for as little as 1% to 3% interest; and where to go to the government to get 'em. And not only that, how would you like to have a loan for $17,500 to upgrade your house, and do the work yourself and actually put money into your pocket. This volume will show you how to do that." [Quoted from Financial Freedom II]

D. "Volume 3 is one of my favorite courses. This is the credit course. Now what I teach you in this book is I teach you how to get good credit. It's very important: how to clear up your negative credit and how to co-mortgage with other people. Not only that, it also contains how to get over $100,000 of unsecured credit for all of you out there that need credit cards." [Quoted from Financial Freedom VI and How to Make Nothing But Money]

E. "Volume 3 is the credit course that will teach you how to qualify for bank loans, how to establish good credit, how to co-mortgage with other people, and how to apply for over $100,000 of unsecured credit." [Quoted from Financial Freedom VI, Financial Freedom V, Financial Freedom IV, How to Make Nothing But Money, Financial Freedom II, and Financial Freedom]

F. "You're going to receive the 'National Foreclosure Network Wholesale Buyer's Guide.' This booklet contains invaluable information on over 100,000 discounted foreclosure vacation timeshare properties, over 16,000 resolution trust foreclosures throughout the nation, over 3000 tax sale properties that can be purchased for under $1000, and hundreds of V.A. homes that can be purchased with only $500." [Quoted from Financial Freedom IV]

G. "Dave Del Dotto's toll-free telephone consultants are available to personally assist you in all deals." [Quoted from Financial Freedom VI, Financial Freedom V, and Financial Freedom Part IV]

H. "How to get loans for as little as 3% interest." [Quoted from Financial Freedom VI, Financial Freedom V, Financial Freedom IV, How to Make Nothing But Money, Financial Freedom II, and Financial Freedom]

I. "Now Volume 8, this is one of my favorite books, because this is my government loan book. It will teach you all about how to get loans for as little as 1% to 3% interest. How anybody can go, go to the government and get a loan for $17,500 to upgrade their house, and you can actually put money into your pocket under this program. Folks, this will also show you how to get the government to make all your payments on your properties through Section 8 housing programs. It's available everywhere in America." [Quoted from Financial Freedom VI and How to Make Nothing But Money]

J. "You can do what hundreds of thousands of others are doing, you can get wealth, security, financial freedom and peace for the rest of your life." [Quoted from Financial Freedom VI, Financial Freedom V, Financial Freedom IV, How to Make Nothing But Money, and Financial Freedom II]

K. "Over 500,000 people, just like the ones you see on this television special, have become avid Dave Del Dotto students, and participants in his Cash Flow System, the most dynamic wealth building home study course available in the country today. I think it's important to know that you can do exactly what they're doing, and go on to achieve your dreams, and accumulate as much wealth as you're willing to work for." [Quoted from Financial Freedom VI, Financial Freedom V, Financial Freedom IV, How to Make Nothing But Money, and Financial Freedom II]

L. "We're here today at one of our national seminars and I wanted to take this opportunity to show you how people from around the nation are taking time to come to these seminars and learn how to accomplish their goals, achieve their dreams and gain wealth building knowledge. These are people just like yourself who've made the decision to finally go for it - to finally go for their dreams." [Quoted from Financial Freedom V and II]

M. "Hello, I'm Dave Del Dotto. Would you give up thirty minutes of your time if it could change your life from what you have now to the life that you really want to live? Would you give up thirty minutes of your time if it meant that you could pay off all your bills, buy the house and the car you've always wanted to own and have the financial freedom you've always wanted? In the next thirty minutes, I'm going to show how you can do these things. I'm even going to guarantee it." [Quoted from Financial Freedom]

N. "Those are people like you and me, and there are thousands more like them. Let me ask you something? Did you think those people are any different than you?

Well let me tell you, they're not. They only did one thing that you haven't done, they called the 800 number that you see on the screen. They called these operators and they bought this Cash Flow System. And they did it for less money than it costs for the average portable color television set. They bought themselves financial freedom for the rest of their lives. This Cash Flow System is an informative collection of books and tapes that took years to develop. It works for anybody who is willing to use it. And the proof is in the fact that my students are from all walks of life, housewives, teenagers, lawyers, school teachers, immigrants, married couples, single people, even Harvard graduates." [Quoted from Financial Freedom]

O. "So I would suggest everybody right now get into the business right now if you want to make a fortune." [Quoted from Financial Freedom II]

P. "If you're really sincere about making money, the money that you need to achieve your goals, then you won't need a guarantee. But it will do for you what it did for me and what it does for thousands of people throughout the country." [Quoted from How to Make Nothing But Money]

Q. "I would recommend, for anybody out there, believe me, when I tell you this, I knew nothing about real estate two years ago. Go for it. Believe me, go for it! Get the knowledge that you need through the books and tapes that Dave Del Dotto sells, and do it. It really works. Believe me, it works." [Quoted from How to Make Nothing But Money, testimonial of Dennis Smith]

R. "I can't, you know, stress enough about how to, how to encourage you to get the tapes to do this, because I'm just an average Joe, and, and if I can learn this, believe me, you can." [Quoted from Financial Freedom VI and How to Make Nothing But Money, testimonial of Dan O'Connor]

S. "It's being done. It can be done. We're doing it. We're average people. Everyone can do this. [Quoted from Financial Freedom VI and Financial Freedom II, testimonial of Reggie Brooks]

6. Through the use of the statements contained in advertisements and other communications, including but not necessarily limited to the advertisements referred to in finding five, respondents have represented, directly or by implication, that:

A. Respondents' book entitled "Treasury of Government Loans," which is volume 8 of the Cash Flow System, will teach customers how every homeowner can immediately get a government home improvement loan of $17,500;

B. Respondents' book entitled "Treasury of Government Loans" will show customers how to pocket some portion of the proceeds of a $17,500 government home improvement loan;

C. Respondents' book entitled "Your Credit, The Key to Financial Resources," which is volume 3 of the Cash Flow System,

will teach customers how they can get over $100,000 of unsecured credit through credit cards;

D. The "National Foreclosure Network Wholesale Buyer's Guide" includes an extensive list of foreclosure and tax sale properties;

E. A telephone consulting service, to personally assist customers in making real estate deals, is included in the price paid for the Cash Flow System;

F. Respondents' book entitled "Treasury of Government Loans" shows customers how they can get loans for 1% to 3% under circumstances normally and expectably encountered by consumers; and

G. Respondents' book entitled "Treasury of Government Loans" will show customers how they can get the government to make all of their payments on rental property.

7. The representations set forth in finding six were, and are, false and misleading because:

A. Respondents' book entitled "Treasury of Government Loans" does not teach customers how every homeowner can immediately get a government home improvement loan for $17,500. Under the pertinent loan program, Section 2 of Title I of the National Housing Act, 12 U.S.C. 1703, consumers must meet eligibility requirements including, but not necessarily limited to, creditworthiness.

B. Respondents' book entitled"Treasury of Government Loans" does not show customers how to pocket some portion of the proceeds of a $17,500 government home improvement loan. It does not contain any discussion of pocketing proceeds. In addition, the loans guaranteed under the pertinent loan program, Section 2 of Title I of National Housing Act, 12 U.S.C. 1703, are only for property improvement and are not supposed to be pocketed.

C. Respondents' book entitled "Your Credit, The Key to Financial Resources" does not teach customers how they can get over $100,000 of unsecured credit through credit cards. It does not contain any discussion of customers obtaining over $100,000 of unsecured credit through credit cards. In addition, the prerequisites for the issuance of credit cards make it virtually impossible for all but those with extremely high incomes and very good credit histories to obtain the amount of unsecured credit indicated.

D. The "National Foreclosure Network Wholesale Buyer's Guide" does not contain an extensive list of foreclosure and tax sale properties.

E. The telephone consulting service is not included in the price paid for the Cash Flow System.

F. Respondents' book entitled "Treasury of Government Loans" does not show customers how they can get loans for 1% to 3%, under circumstances normally and expectably encountered by consumers. The 1% to 3% loans mentioned in respondents' books are either available in very limited circumstances or are no longer available.

G. Respondents' book entitled "Treasury of Government Loans" does not show customers how they can get the government to make all of their payments on rental property.

8. In their advertising and sale of the Cash Flow System, respondents have represented, directly or by implication, that respondents guarantee a refund of the purchase price. Respondents have failed to adequately disclose that respondents charge a restocking fee of 10% of the purchase price on refunds made under their guarantee. This fact would be material to consumers in their purchase decisions regarding the product. The failure to adequately disclose this fact, in light of the representation made, was, and is, a deceptive practice.

9. Through the use of the statements contained in advertisements and other communications, including but not necessarily limited to the advertisements referred to in finding five, respondents have represented, directly or by implication, that:

A. Hundreds of thousands of respondents' customers have made substantial sums of money through use of the Cash Flow System;

B. Customers who attempt to use the Cash Flow System typically profit through investments in real estate; and,

C. The consumer testimonials that appear in advertisements for the Cash Flow System reflect the typical or ordinary experience of members of the public who have attempted to use the Cash Flow System.

10. The representations set forth in finding nine were, and are, false and misleading because:

A. Hundreds of thousands of respondents' customers have not made substantial sums of money through use of the Cash Flow System;

B. Customers who attempt to use the Cash Flow System do not typically profit through investments in real estate; and,

C. The consumer testimonials that appear in advertisements for the Cash Flow System do not reflect the typical or ordinary experience of members of the public who have attempted to use the Cash Flow System.

11. Through the use of the statements contained in advertisements and other communications, including but not necessarily limited to the advertisements referred to in finding five, respondents have represented, directly or by implication, that at the time they made the representations set forth in finding nine, respondents possessed and relied upon a reasonable basis that substantiated such representations.

12. At the time they made the representations set forth in finding nine, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in finding eleven was, and is, false and misleading.

13. Through the advertising and dissemination of its program-length advertisements, including but not necessarily limited to Financial Freedom, respondents have represented, directly or by implication, that these advertisements are independent television programs and are not paid commercial advertising.

14. The advertisements referred to in finding thirteen are not independent television programs and are paid commercial advertising. Therefore, the representation set forth in finding thirteen was, and is, false and misleading.

15. Respondents have offered for sale and sold computer hardware and software to customers in various locations in the United States. In connection with these sales, respondents have represented, directly or by implication, that computer hardware and software sold to customers would be delivered to the customers within a specified period of time or a reasonable period of time.

16. The computer hardware and software referred to in finding fifteen that were sold to customers have not in many instances been delivered to them or have not been delivered to them within the specified period of time or within a reasonable period of time.

Further, in many instances, respondents have failed to provide refunds of money paid by such customers or have failed to provide them within a reasonable period of time. Therefore, the representation set forth in finding fifteen was, and is, false and misleading.

17. Respondents have represented, directly or by implication, in the sale of goods and services that refunds would be made within a reasonable period of time in accordance with the terms of the guarantee or warranty offered with such goods and services.

18. Respondents have represented, directly or by implication, that refunds would be made within a reasonable period of time on goods and services returned to DDE with authorization from DDE.

19. In numerous instances, customers who have returned goods or services purchased from respondents in accordance with the terms of the offered guarantee or warranty or with authorization from DDE have not received refunds from respondents or have received refunds from respondents only after unreasonable delay and numerous requests to respondents for their refunds. Therefore, the representations set forth in findings seventeen and eighteen were, and are, false and misleading.

20. The acts and practices of respondents as alleged above in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

ORDER

As used in this order, the term "*business opportunity*" means an activity engaged in for the purpose of making a profit.

I.

It is ordered, That Del Dotto Enterprises, its successors and assigns, and its officers, and David P. Del Dotto and Yolanda Del Dotto, individually and as officers of Del Dotto Enterprises, and their respective agents, representatives, and employees, acting directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale or distribution of the Cash Flow System or any other product or service concerning investments, credit, business opportunities, or real estate, in or affecting

commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that:

A. Respondents will teach customers how every homeowner can get a government home improvement loan;

B. Every homeowner can get a loan that is insured under Section 2 of Title I of the National Housing Act, 12 U.S.C. 1703;

C. Respondents will show customers how to pocket some portion of the proceeds of a government home improvement loan;

D. Customers can pocket some portion of the proceeds of a loan that is insured under Section 2 of Title I of the National Housing Act, 12 U.S.C. 1703;

E. Respondents will teach customers how they can get over $100,000 of unsecured credit through credit cards;

F. Customers can get over $100,000 of unsecured credit through credit cards regardless of their creditworthiness and income;

G. Respondents will show customers how they can get loans for 1% to 3% under circumstances normally and expectably encountered by consumers;

H. Respondents will show customers how they can get the government to make all of their mortgage payments on rental property;

I. The government will make all of a customer's mortgage payments on rental property;

J. Hundreds of thousands of respondents' customers have made substantial sums of money through use of the Cash Flow System;

K. Customers who attempt to use the Cash Flow System typically profit through investments in real estate; and,

L. The consumer testimonials that have appeared in the advertisements for the Cash Flow System referred to in paragraph four of the complaint reflect the typical or ordinary experience of members of the public who have attempted to use the Cash Flow System.

II.

It is further ordered, That Del Dotto Enterprises, its successors and assigns, and its officers, and David P. Del Dotto and Yolanda Del Dotto, individually and as officers of Del Dotto Enterprises, and their

respective agents, representatives, and employees, acting directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale or distribution of the Cash Flow System or any other product or service concerning investments, credit, business opportunities, or real estate, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, that:

A. The book entitled "National Foreclosure Network Wholesale Buyer's Guide, includes an extensive list of foreclosure or tax sale properties; and

B. A telephone consulting service, to personally assist customers in making real estate deals, is included in the price paid for the product or service.

III.

It is further ordered, That Del Dotto Enterprises, its successors and assigns, and its officers, and David P. Del Dotto and Yolanda Del Dotto, individually and as officers of Del Dotto Enterprises, and their respective agents, representatives, and employees, acting directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale or distribution of the Cash Flow System or any other product or service concerning investments, credit, business opportunities, or real estate, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, directly or by implication, the following:

A. The availability, terms or conditions of any loan, grant or credit from any source for any purpose; and

B. The contents or scope of any product or service, including, but not limited to, any book or other writing, or audio or video tape.

IV.

It is further ordered, That Del Dotto Enterprises, its successors and assigns, and its officers, and David P. Del Dotto and Yolanda Del Dotto, individually and as officers of Del Dotto Enterprises, and their respective agents, representatives, and employees, acting directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale or distribution of the Cash Flow System or any other product or service concerning investments, credit, business opportunities, or real estate, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, the performance, benefits, efficacy or success rate of any such product or service, unless such representation is true and unless at the time of making such representation respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation. For purposes of this order, competent and reliable scientific evidence shall mean tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

V.

It is further ordered, That the respondents, Del Dotto Enterprises, a corporation, its successors and assigns, and its officers, and David P. Del Dotto and Yolanda Del Dotto, individually and as officers of Del Dotto Enterprises, and their respective agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that any endorsement (as "endorsement" is defined in 16 CFR 255.0(b)) of the product or service represents the typical or

ordinary experience of members of the public who attempt to use the product or service, unless such is the fact.

VI.

It is further ordered, That Del Dotto Enterprises, its successors and assigns, and its officers, and David P. Del Dotto and Yolanda Del Dotto, individually and as officers of Del Dotto Enterprises, and their respective agents, representatives, and employees, acting directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale or distribution of the Cash Flow System or any other product or service concerning investments, credit, business opportunities, or real estate, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, when representing to consumers the existence of a guarantee, warranty or refund policy, do forthwith cease and desist from:

a. Using the terms "Satisfaction Guarantee," "Money Back Guarantee," "Free Trial Offer," or similar representations in advertising unless they refund the full purchase price of the advertised product at the purchaser's request;

b. Failing to disclose, with such clarity and prominence as will be noticed and understood by prospective purchasers, any material limitations or conditions that apply to a guarantee, warranty or refund policy; and

c. Failing to refund money in accordance with the terms of a guarantee, warranty or refund policy within a reasonable period of time after a consumer complies with the conditions for receiving a refund. For purposes of this paragraph, "a reasonable time period" shall be:

(1) That period of time specified in respondents, solicitation if such period is clearly and conspicuously disclosed to the purchaser in the solicitation; or

(2) If no period of time is clearly and conspicuously disclosed, a period of thirty (30) days following the date that purchaser complies with the conditions for receiving a refund.

VII.

It is further ordered, That Del Dotto Enterprises, its successors and assigns, and its officers, and David P. Del Dotto and Yolanda Del Dotto, individually and as officers of Del Dotto Enterprises, and their respective agents, representatives, and employees, acting directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale or distribution of any product or service, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from creating, producing, selling, or disseminating:

A. Any advertisement that misrepresents, directly or by implication, that it is not a paid advertisement;

B. Any commercial or other video advertisement fifteen (15) minutes in length or longer or intended to fill a broadcasting or cable casting time slot of fifteen (15) minutes in length or longer that does not display visually, in a clear and prominent manner and for a length of time sufficient for an ordinary consumer to read, within the first thirty (30) seconds of the commercial and immediately before each presentation of ordering instructions for the product or service, the following disclosure:

"THE PROGRAM YOU ARE WATCHING IS A PAID ADVERTISEMENT FOR [THE PRODUCT OR SERVICE]."

Provided that, for the purposes of this provision, the oral or visual presentation of a telephone number or address for viewers to contact to place an order for the product or service shall be deemed a presentation of ordering instructions so as to require the display of the disclosure provided herein.

VIII.

It is further ordered, That Del Dotto Enterprises, its successors and assigns, and its officers, and David P. Del Dotto and Yolanda Del Dotto, individually and as officers of Del Dotto Enterprises, and their respective agents, representatives, and employees, acting directly or through any partnership, corporation, subsidiary, division, or other

device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale or distribution of any product or service, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to deliver goods, transfer interests in real estate or perform services ordered by purchasers from respondents within a reasonable time period. If delivery, transfer or performance cannot be completed within such a reasonable time period, then respondents shall clearly and conspicuously offer in writing to such purchaser, no later than at the expiration of the reasonable time period, an option either to consent to a delay in delivery, transfer or performance or to cancel his or her order and receive a full refund which shall be sent by respondents by first class mail within seven (7) working days of the date on which respondents receive such purchaser's notice of cancellation. For purposes of this paragraph, "a reasonable time period" shall be:

(a) That period of time specified in respondents' solicitation if such period is clearly and conspicuously disclosed to the purchaser in the solicitation; or

(b) If no period of time is clearly and conspicuously disclosed, a period of thirty (30) days following the date that the purchaser's order is received by respondents or by a designated agent of respondents.

IX.

It is further ordered, That for five (5) years after the last date of dissemination of any representation covered by this order, respondents, or their successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials that were relied upon in disseminating such representation; and

B. All tests, reports, studies, surveys, demonstrations or other evidence in their possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers.

X.

It is further ordered, That respondent Del Dotto Enterprises shall notify the Commission at least thirty (30) days prior to any proposed change in its corporate structure, including but not limited to dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolutions of subsidiaries or affiliates, the planned filing of a bankruptcy petition, or any other corporate change that may affect compliance obligations arising out of this order.

XI.

It is further ordered, That respondents David P. Del Dotto and Yolanda Del Dotto shall, for a period of ten (10) years from the date of entry of this order, notify the Commission within thirty (30) days of the discontinuance of their present business or employment and of their affiliation with any new business or employment. Each notice of affiliation with any new business or employment shall include the respondent's new business address and telephone number, current home address, and a statement describing the nature of the business or employment and his or her duties and responsibilities. The expiration of the notice provision of this Part XI shall not affect any of the obligations arising under this order.

XII.

It is further ordered, That respondents shall:

A. Within thirty (30) days after service of this order, provide a copy of this order to each of respondents' current principals, officers, directors and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order.

B. For a period of ten (10) years from the date of entry of this order, provide a copy of this order to each of respondents' principals, officers, directors and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order who are associated with

respondents or any subsidiary, successor, or assign, within three (3) days after the person assumes his or her position.

XIII.

It is further ordered, That respondents shall, within sixty (60) days after service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

TICOR TITLE INSURANCE COMPANY, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9190. Final Order, Sept. 19, 1989--Modifying Order, April 22, 1994

This order modifies the Commission's Final Order, issued in 1989 (112 FTC 344), by deleting references to the states of New Jersey and Pennsylvania. Therefore, in accordance with the decision and judgment of the court of appeal, the order, as modified by the Commission, prohibits the companies from discussing, proposing, setting or filing any rates for title search and examination services through a rating bureau in the states of Connecticut, Wisconsin, Arizona, and Montana.

MODIFIED ORDER TO CEASE AND DESIST

The respondents having filed in the United States Court of Appeals for the Third Circuit a petition for review of the Commission's cease and desist order issued herein on September 19, 1989; and the court of appeals having rendered a decision vacating the Commission's order in its entirety; and the Commission having filed a petition for *certiorari* respecting the respondents' sale of title search and examination services in Connecticut, Wisconsin, Arizona, and Montana; and the court of appeals, after reversal and remand by the Supreme Court, having rendered a decision denying the petition for review; and the respondents' petition for a *writ of certiorari* having been denied:

Now, therefore, it is hereby ordered, That the aforesaid order to cease and desist be modified in accordance with the decision and judgment of the court of appeals to read as follows:

I.

For purposes of this order, the following definition shall apply:

a. "*Title search and examination services*" means all activities which are designed to identify and describe the ownership of a

particular parcel of real property as well as any other actual or potential rights to, encumbrances on, or interest in the property.

II.

It is ordered, That each respondent, its successors and assigns, and its officers, agents, representatives, and employees, directly or indirectly, through any corporation, subsidiary, division or other device in connection with the sale of title search and examination services in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist in Connecticut, Wisconsin, Arizona, and Montana, from discussing, proposing, setting, or filing any rates for title search and examination services through a rating bureau.

A. Provided that nothing in this order shall prohibit respondents from collectively setting or adhering to prices for title search and examination services in any state where such collective activity is engaged in pursuant to clearly articulated and affirmatively expressed state policy and where such collective activity is actively supervised by a state regulatory body.

III.

It is further ordered, That each respondent shall within thirty days after service of this order deliver a copy of this order to all its present officers, directors, and personnel having any responsibility in determining company prices as well as to the commissioner of insurance in each state listed in paragraph II of this order.

IV.

It is further ordered, That each respondent notify the Commission at least thirty days prior to any proposed change in the corporate respondent 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 which may affect compliance obligations arising out of this order.

V.

It is further ordered, That each respondent shall, within ninety days after service upon it of this order, and at such other times as the Commission shall require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

INSTITUT MERIEUX S.A.

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

Docket C-3301. Consent Order, Aug. 6, 1990--Modifying Order, April 22, 1994

This order reopens the proceeding and modifies the Commission's consent order issued on August 6, 1990 (113 FTC 742), by deleting the requirement to lease to a third party the rabies vaccine business that the company acquired when it purchased Connaught BioSciences, Inc. The Commission concluded that the record does not show any approvable lessee despite Merieux's efforts to find one, and that retaining the lease requirement imposes significant costs on Merieux and could result in adverse impact on public health needs.

ORDER REOPENING AND MODIFYING ORDER ISSUED ON AUGUST 6, 1990

On December 23, 1993, respondent Pasteur Merieux Serums et Vaccins S.A., formerly known as Institut Merieux S.A. ("Merieux"), filed a Request To Reopen the Proceeding and To Set Aside the Divestiture Obligations of the Consent Order ("Request"), pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51. In its Request, Merieux asks the Commission to reopen the proceeding and modify the consent order in Institut Merieux S.A., Docket No. C-3301 (August 6, 1990) ("order"), by setting aside subparagraphs I(3), (4) and (5), and paragraphs II through IX and XI(A) ("the divestiture provisions"). In support of its Request, Merieux argues that the modification is warranted by changed conditions of fact and by the public interest. Merieux's Request was placed on the public record for thirty days, pursuant to Section 2.51 of the Commission's Rules, and numerous comments were received.

For the reasons discussed below, the Commission has determined that the changed conditions of fact asserted by Merieux do not compel a reopening of the order, but that Merieux has demonstrated

that it is in the public interest to reopen and modify the order by setting aside the divestiture provisions.

I. The Complaint And Order

The Commission's 1990 complaint in this matter alleged that Merieux's proposal to acquire Connaught BioSciences Inc. ("Connaught") would violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and that consummation of the transaction would violate Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, by, among other things, lessening competition in the manufacture and sale of rabies vaccine in the United States. The complaint alleged that at the time Merieux offered to acquire Connaught, Merieux was the only firm selling rabies vaccine nationwide, with Connaught being one of two potential entrants.

The consent order in this matter requires Merieux to lease on a long-term basis Connaught's Toronto-based rabies vaccine business ("the business") within three (3) months after the order became final on October 15, 1990, to a lessee that receives the prior approval of the Commission. The order contains several provisions relating to the lease obligation, including: that the lease be for a minimum of 25 years, and at reasonable and customary terms; that there be a lump-sum payment under reasonable and customary terms for the existing inventory of Connaught's rabies vaccine; that the lease agreement include a commitment from the lessee to supply rabies vaccine sufficient to satisfy the Canadian demand for vaccine; and that the lease agreement be accomplished in a manner that preserves the product and business leased as a viable rabies vaccine business and as a viable competitor. *See* order paragraphs II-III, VII. The order also provides that the Commission may, in its discretion, appoint a trustee in the event Merieux has not leased the business. *See* order paragraphs IV-VI.

II. Merieux's Compliance With The Divestiture Provisions

Immediately following issuance of the order, Merieux contacted twenty-eight companies that Merieux believed to be potentially interested in entering into the ordered lease based on their knowledge of the business and of the industry generally. From October 1990

through June 1992, Merieux pursued all contacts with this initial group of candidates, which responded with varying degrees of interest, as well as with one additional party that expressed an interest in leasing the business. Ultimately, none of these firms decided to pursue a lease of the business. All contacts from interested parties ceased by fall of 1992. In September 1992, Merieux advised the Commission that it had concluded that there was no realistic possibility of leasing the business.

III. Proceedings Prior To Merieux's Request

Based upon its review of the record, the Commission determined that it was in the public interest to reopen the proceeding in Docket No. C-3301 and modify the order in this case by setting aside the divestiture provisions, and issued an order to show cause why the divestiture provisions of the order should not be set aside pursuant to Section 3.72(b)(1) of the Rules. *See* Order to Show Cause (March 9, 1993).

The Commission's determination to issue the order to show cause was based on its conclusion that accomplishment of the required lease was, for all practical purposes, a virtual impossibility, and that Merieux's failure to accomplish the required lease likely was attributable to factors beyond its control, and not to a lack of good faith effort. *See* Order to Show Cause at 2. The Commission further concluded that the costs to Merieux of further divestiture efforts were "an inequitable and unbargained-for element of the consent order." *Id.* at 2. The Commission also concluded that a trustee appointed by the Commission would be unlikely to have any greater success than Merieux in accomplishing a lease of Connaught's rabies vaccine business for the same reasons that Merieux had been unsuccessful. Finally, the Commission determined that requiring Merieux, or a trustee, to continue pursuing a potential lessee could adversely affect the viability of Connaught's rabies vaccine business, and thus, its ability to supply the Canadian rabies vaccine needs. *See* Order to Show Cause at 3.

Before expiration of the thirty-day period set forth in Section 3. 72(b)(1) of the Rules, North American Vaccine, Inc. ("NAVA"),[1]

[1] NAVA is a Canadian company formed in 1989 to consolidate the assets, liabilities and operations of American Vaccine Corporation, and certain assets and vaccine-related technologies of BioChem Pharma Inc. NAVA, headquartered in Beltsville, Maryland, is engaged in the research, development

filed a Motion for Leave to Intervene in the proceeding. *See* Motion for Leave to Intervene (March 30, 1993). Merieux opposed NAVA's motion for leave to intervene, and Commission counsel recommended that the Commission deny NAVA's motion, but defer any action on the order to show cause for a specified period. *See* Respondent's Opposition to Motion to Intervene By North American Vaccine, Inc. (April 8, 1993); Commission Counsel's Response to Motion for Leave to Intervene (April 9, 1993).

Subsequently, the Commission issued an order denying NAVA's motion for leave to intervene, but authorizing NAVA to file a brief *amicus curiae* presenting its views by May 25, 1993. *See* Order Denying Motion for Leave to Intervene (April 23, 1993). NAVA filed its *amicus* brief on May 21, 1993. Thereafter, following its review of NAVA's *amicus* brief, as well as further submissions by Merieux and Commission counsel, the Commission issued an order vacating the order to show cause and terminating the show cause proceeding, on August 17, 1993. *See* Order Vacating Order to Show Cause Issued March 9, 1993, and Terminating Show Cause Proceeding (August 17, 1993) (Commissioner Owen dissenting). That action returned this matter to nonadjudicative status.

IV. Merieux's Request

In its Request, Merieux states that it has conscientiously and diligently sought to locate a lessee, but that it has not received an offer from any party that complied with the terms of the order and demonstrated that it was reasonably likely to be a viable long-term operator of the business that would fulfill the objectives of the order. Request at 2. Merieux further asserts that NAVA, the only company to suggest possible terms for leasing the business, is a company that has never produced or sold vaccine or any other product in commercial quantities, and that the terms suggested by NAVA for entering into the lease agreement contemplated by the order were below "reasonable commercial value" and did not comply with the terms or objectives of the order. *Id.* at 3. Consequently, Merieux argues that it is unlikely that it would receive a *bona fide*, commercially reasonable offer that complies with the terms of the

---

and production of vaccines for the prevention of human infectious diseases. Its development efforts to date have focused on pediatric vaccines.

order from a company that is experienced in vaccine production and sale, and that is likely to fulfill the remedial objectives of the order.

Merieux asserts that, in issuing the order to show cause, the Commission has already determined that: (1) Merieux has made a good faith effort to comply with the order's divestiture provisions; (2) Merieux is being prejudiced in its business by the continuation of the lease obligation; (3) the fact that a potential lessee (other than NAVA) has not been located is attributable to a combination of elements beyond Merieux's control; and (4) the costs to Merieux of further divestiture efforts are an inequitable and unbargained-for element of the order. Request at 6.

Merieux argues that changed circumstances since the order was issued and public interest considerations justify eliminating the divestiture provisions. Merieux asserts that the entry of SmithKline Beecham Pharmaceuticals (USA), and the potential entry of two additional suppliers, constitute a significant change in market conditions that eliminates the competitive need for the order's lease obligation. Merieux also suggests that the continuing lease requirement may be harmful to competition at the time of a growing rabies epidemic in the United States and Canada because it adversely affects Connaught's ability to respond to the increased demand for vaccine with capital investments to upgrade and expand the business's productive capacity. Merieux further suggests that a transfer of the business to a lessee would likely have the effect of removing the business's productive capacity from the market beyond the point of exhausting marketable inventory while the lessee sought the necessary regulatory approvals. In addition to the public health considerations raised by the continuing lease obligation, Merieux cites the interests of Canada in preserving a proven source of rabies vaccine and its own good faith effort to comply with the order's lease provisions as support for modifying the order on public interest grounds.

V. NAVA'S Comment

On January 31, 1994, NAVA filed Comments of North American Vaccine, Inc. Opposing Request of Institut Merieux S.A. to Reopen

and Modify Consent Order ("NAVA Comment").[2] In its Comment, NAVA requests that the Commission deny Merieux's Request and appoint an independent trustee to negotiate the terms of a lease with NAVA. NAVA argues, among other things, that Merieux continues to "maintain and exploit its monopoly" in the United States rabies vaccine market and that competitive conditions have not materially changed in the relevant market since the Commission issued the order. NAVA Comment at 2, 25.

NAVA states that it is a qualified lessee that will fulfill the remedial purposes of the order. NAVA Comment at 11. Specifically, NAVA asserts that it: (1) can secure the necessary regulatory approvals in a timely manner; (2) has the requisite manufacturing expertise, as well as the necessary access to critical raw materials and subcontractor services, to operate the business effectively; (3) has the financial capacity to lease the business on reasonable terms and to maintain such business in Canada and expand into the United States. *Id.* at 13, 16. Finally, NAVA argues that its offer to lease the business complies with all of the terms of the consent order and is commercially reasonable, but that Merieux has refused to negotiate with NAVA in good faith. *Id.* at 17.[3]

VI. Standards for Reopening and Modification

Section 5(b) of the FTC 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 that changed conditions of law or fact" require such modification. A satisfactory showing sufficient to compel reopening is made when a request to reopen identifies significant changes in circumstances and

[2] Prior to this date, NAVA supplied extensive and detailed information voluntarily and in response to requests from Commission staff. The information supplied by NAVA concerned, among other things, NAVA's financial condition, its valuation of Connaught's rabies vaccine business, its ability to obtain necessary regulatory approvals, and its capability to operate the business in a manner consistent with the requirements of the order's divestiture provisions.

[3] On April 7, 1994, Merieux filed a Reply Memorandum responding to NAVA's Comment. Among other things, Merieux stated that it was unable to reply fully to NAVA's Comment because it had not received an unredacted version of the Comment. (NAVA filed both redacted (public) and unredacted (confidential) versions of its Comment.) Merieux also requested, both in a February 9, 1994 submission and in its Reply Memorandum, that the Commission either provide Merieux with the unredacted version of NAVA's Comment or refuse to consider that Comment. In view of the Commission's disposition of Merieux's Request, Merieux's request that it receive access to the unredacted version of NAVA's Comment or that the Commission refuse to consider that Comment is denied as moot.

shows that the changes eliminate the need for the order, or make continued application of it inequitable or harmful to competition. Louisiana-Pacific Corp., Docket No. C-2956, Letter to John C. Hart (June 5, 1986) at 4.[4] Reopening is not compelled, however, for changes in circumstances that were reasonably foreseeable at the time the consent order was entered.[5]

The Commission may also modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest requires such action. Therefore, Section 2.51 of the Commission's Rules of Practice invites respondents in petitions to reopen to show how the public interest warrants the modification. In the case of a request for modification based on public interest grounds, a petitioner must demonstrate as a threshold matter some affirmative need to modify the order. *See* Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983) at 2. If the showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. *Id.* The Commission will also consider whether the particular modification sought is appropriate to remedy the identified harm.

Whether the request to reopen is based on changed conditions or on public interest considerations, the burden is on the respondent to make the requisite satisfactory showing. The language of Section 5(b) plainly anticipates that the petitioner must make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes it clear that the petitioner has the

---

[4] *Cf. United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992), where the court noted that "[a] decision to reopen does not necessarily entail a decision to modify the order. Reopening may occur even where the petition itself does not plead facts requiring modification." *Id.*

[5] In *Louisiana-Pacific Corp.*, Docket No. C-2956, 112 FTC 547, 551 (1989), the respondent argued that reduced production capacity which caused a reduction of market power was sufficient grounds to reopen and modify the order based on the changed conditions standard. The Commission denied the respondent's petition, holding that "[m]odification of a final order is warranted when significant unanticipated changes in circumstances . . . eliminate the need for the order or make continued application of the order inequitable or harmful to competition." (Emphasis added). Likewise, in *Union Carbide Corp.*, Docket No. C-2902, 108 FTC 184 (1986), the respondent alleged that the number of national industrial gas producers was increasing and that, consequently, its market share was declining. The Commission granted in part and denied in part the respondent's petition, finding, among other things, that the respondent had "failed to show that these changes were unforeseeable, or that they reflect more than the natural evolution of the industry." 108 FTC at 187-88. *See also* Pay Less Drug Stores Northwest, Inc., Docket No. C-3039, Letter to H.B. Hummelt (Jan. 22, 1982) (changed conditions must be unforeseeable, create severe competitive hardship, and eliminate the dangers that the order sought to remedy).

burden of showing, other than by conclusory statements, why an order should be modified.[6] If the Commission determines that the petitioner has made the required showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one given the public interest in repose and the finality of Commission orders.[7]

VII. Reopening And Modifying Order Of August 6, 1990

The Commission has concluded that the changes in fact asserted by Merieux do not meet the standards for compelled reopening. Nearly all of the current factual circumstances and conditions in this matter were known and present, or were foreseeable, when Merieux executed the consent agreement and on the date the order became final. For example, although the complaint alleges that entry into the United States rabies vaccine market is "difficult or unlikely," the complaint recognizes Connaught as "one of two potential entrants." *See* Complaint paragraphs VI(9) and VII(10). Thus, new or potential entry into the United States rabies vaccine market cannot be characterized as an unforeseeable change in market conditions that would compel reopening the order.

The Commission has concluded, however, that it would be in the public interest to reopen the order and set aside the divestiture provisions. Over one year ago, on March 9, 1993, the Commission issued its order to show cause why the proceeding in Docket No. C-3301 should not be reopened to modify the order by setting aside Merieux's obligation to enter into the lease agreement mandated by the consent order. The Commission's determination to issue the order to show cause, almost two and one-half years after the order became final, was based upon its review of the record at that time. The information contained in that record suggested to the

---

[6] The Commission may properly decline to reopen an order if a request is "merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., lst Sess. 9-10 (1979). *See also* Rule 2.51(b), which requires affidavits in support of petitions to reopen and modify.

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

Commission that (i) there did not appear to be any potential lessee that was interested in Connaught's rabies vaccine business or that was likely to receive the necessary governmental approvals, and (ii) to require Merieux to continue to pursue a potential lessee could prejudice the business to the possible detriment of Canadian public health authorities and other consumers who rely on the business as a source of supply for rabies vaccine. Nevertheless, in furtherance of the Commission's interest in determining whether there was in fact a viable lessee for the business that could fulfill the remedial purposes of the order, the Commission permitted NAVA to file an *amicus* brief and, subsequently, set aside the order to show cause.

Except for NAVA, no other party interested in leasing the business has emerged since the Commission issued the order to show cause. Having reviewed Merieux's submissions, as well as the public comments received by the Commission, and all other material submitted by NAVA, *see* n.2, *supra*, the Commission is satisfied that the modification requested by Merieux is in the public interest. The Commission has determined, in this regard, that the record does not support the conclusion that NAVA would be an approvable lessee under the order,[8] or that Merieux failed to negotiate in good faith with NAVA.

The Commission thus finds that Merieux has made the required threshold showing to support reopening the order, *i.e.*, that the order's lease requirement continues to impose significant costs on Merieux and may adversely affect public health needs. The Commission also concludes that there are substantial reasons supporting modification,

---

[8] In reviewing a divestiture application to determine whether to approve a proposed acquirer (or, as in this case, a proposed lessee), the Commission typically examines several factors that evidence the prospective acquirer's capability and intention to operate the divested assets in a manner that fulfills the remedial purposes of the order. Those factors include: the acquirer's financial capability; technical, marketing, management and other relevant capabilities; business plans and other evidence of the acquirer's intention and ability to compete; and whether divestiture to the proposed acquirer will achieve the competitive relief sought by the order. In the present case the Commission has been particularly concerned to evaluate those factors in light of the public health considerations at issue in connection with the production and distribution of rabies vaccine.

Based on the extensive record on these issues, the Commission has serious reservations whether NAVA would be a viable lessee of the business, and whether the Commission would approve NAVA as a lessee even if a trustee were able to negotiate a lease with it. For example, NAVA has never produced or marketed a vaccine for commercial use; its vaccines have not yet been licensed for commercial sale; without commercial sales, its operating revenues fall far short of its operating costs; and, particularly in light of the public health concerns at issue, a lease to NAVA at this stage in its development would entail risks that the Commission would have serious reservations about accepting.

The decision whether to appoint a trustee under the order is a matter reserved for the Commission's discretion. For the aforementioned reasons, the Commission has determined that the appointment of a trustee to negotiate a lease with NAVA is unwarranted.

including the actual entry of SmithKline into the United States rabies vaccine market, which reduces the need for further relief pursuant to the order's lease requirement, and the potential adverse impact on public health needs in the United States and Canada resulting from continued application of the lease requirement. Finally, there are no countervailing public interest concerns that outweigh the reasons in support of granting the modifications requested by Merieux.

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened; and

It is further ordered, That the order in Docket No. C-3301 be, and it hereby is, modified by setting aside the following provisions: subparagraphs I(3), (4), and (5); and paragraphs II; III; IV; V; VI; VII; VIII; IX; and XI(A).

Commissioner Azcuenaga and Commissioner Starek dissenting.

CONCURRING STATEMENT OF CHAIRMAN JANET D. STEIGER

I concur in the Commission's decision to reopen and modify the consent order in this matter. I write separately only to clarify a point of possible confusion. It is suggested in a dissenting statement that the Commission has departed from precedent and from sound law enforcement practice by determining that the continued costs imposed on Merieux by the lease requirement contribute to a demonstration of affirmative need to modify the order. I fully agree that the ordinary costs of complying with an order cannot satisfy the burden of showing a need to reopen and modify that order. However, the costs here present must be construed in the context of (i) Merieux's good-faith, but unsuccessful, efforts to locate a lessee and (ii) the Commission's reservations -- three and one-half years after the consent order became final -- about approving the only lease candidate that remains. Viewed in that context, the costs imposed by continued application of the lease requirement are an inequitable and unbargained-for element of the consent order, and appropriately contribute to a determination of affirmative need for modification.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

The Commission today decides to reopen and modify the consent order in this matter, eliminating the requirement that Institut Merieux S.A. ("Merieux") divest the Connaught rabies vaccine business.[1] Although I did not support the Commission's decision in 1990 to accept this order,[2] mere disagreement with the terms of an order is not sufficient reason to disregard the Commission's established standards for reopening and modifying final orders. Merieux has not made a sufficient showing to warrant reopening, and the willingness of the Commission to eliminate the divestiture requirement on the basis of Merieux's petition evidences a lack of concern for the fate of Commission orders in which I cannot join.

Once the Commission accepts an order, it is incumbent on us to enforce it, absent a showing of changed conditions or public interest considerations sufficient to warrant reopening and modification or a confession of error. The history of this order reflects a pattern of neglect that raises serious questions about the Commission's commitment to enforcing its orders. Indeed, the disparate treatment accorded this respondent may even raise questions about arbitrary and capricious administrative action.

The consent order gave Merieux three months within which to lease the Connaught rabies vaccine business (until January 15, 1991). The order provides that after three months, Merieux shall consent to the appointment by the Commission of a trustee to accomplish the divestiture. Although Merieux did not accomplish the divestiture either within three months or in the following three and a half years, the Commission has not appointed a trustee. Even at this late date, the Commission has clear authority under the order to appoint a

---

[1] The "divestiture provisions" set aside today are unusual in several respects. Instead of full divestiture, Merieux is required to lease the acquired business for a minimum of twenty-five years. Most of the other unusual features of the order follow from the anticipated difficulties that might arise from the implementation of the required lease. *See Institut Merieux S.A.*, 113 FTC 742, 747 (1990). Some of these same difficulties are now urged as a basis for granting the petition to reopen and modify the order.

[2] Although I did not issue a statement to accompany my dissent from the consent order, I dissented because I disfavor orders, such as this one, that are difficult to administer and threaten to embroil the Commission in highly regulatory supervision of respondents. Azcuenaga, *The Evolution of International Competition Policy: A Federal Trade Commission Perspective* at 6-7 in 1992 Corporate Law Institute, International Antitrust Law and Policy (B. Hawk ed. 1993).

trustee to accomplish divestiture, and the appointment should be made.[3]

In March 1993, more than two years after the end of the three month divestiture period given Merieux, the Commission issued an order to show cause why the consent order should not be reopened and the divestiture obligation set aside. In the order to show cause, the Commission found, on the basis of Merieux's compliance reports, that Merieux "has contacted all of the parties that would have an interest in the [Connaught rabies vaccine] operation" and that each had declined to lease the facility. The Commission stated that the record, consisting primarily of the compliance reports, "establishes that accomplishment of the required lease is, for all practical purposes, a virtual impossibility, despite respondent's good faith efforts to comply with the order."

The Commission was thus prepared to relieve Merieux of its divestiture obligation when, lo and behold, immediately after the show cause order was issued, a prospective lessor appeared: North American Vaccine moved for leave to intervene in the show cause proceeding, claiming that it was interested in acquiring the Connaught rabies vaccine business that Merieux was obliged to divest. As a result, the show cause proceeding was terminated on August 17, 1993. North American and Merieux apparently having failed to come to terms, Merieux filed its petition to reopen and modify the order on December 23, 1993, again alleging the impossibility of finding a qualified divestiture candidate and bemoaning the costs of complying with the divestiture requirement in the order. The Commission, in its order granting Merieux's petition, states that the divestiture requirement "continues to impose significant costs on Merieux and may adversely affect public health needs."

Despite the clear authority available since November 6, 1990, to appoint a trustee to effect the divestiture, the Commission has taken no action to select or appoint a trustee. This failure to employ the divestiture procedures set forth in the order is unexplained in the order granting Merieux's petition to reopen and modify the consent order. In the show cause proceeding, the Commission concluded that appointment of a trustee was unlikely to be successful in light of

[3] The trustee, a neutral party, has incentives to identify prospective acquirers and to report when none is available. We can draw some conclusions about "good faith" and impossibility of divestiture from the evidence that a trustee's search provides.

Merieux's representation that it had unsuccessfully contacted all potential purchasers. North American Vaccine's appearance as an interested buyer, however, undercuts any basis for the finding that Merieux had contacted all potential purchasers. Accordingly, a trustee should be appointed now regardless of whether a divestiture to North American can be achieved.

I. Standard for Reopening an Order

The order reopening and modifying the consent order states, correctly, that Merieux "must demonstrate as a threshold matter some affirmative need to modify the order," citing Damon Corp., Docket C-2916, Letter to Joel C. Hoffman, Esq. (March 29, 1983). The Commission then concludes that Merieux has made the requisite showing, because the lease requirement "continues to impose significant costs on Merieux and may adversely affect public health needs." Order Reopening and Modifying Order at 9.

In the past, the Commission has squarely rejected arguments that the costs of compliance provide a basis for reopening and modifying an order. The notion that the costs to a respondent from a divestiture requirement under a final order of the Commission may be sufficient basis for reopening and modifying the order is inconsistent with precedent, sound law enforcement, and previous pronouncements of the Commission in this case.

The order granting the petition to reopen is silent on the nature and amount of the costs that have moved the Commission to this extraordinary decision to cite costs as a basis for granting the petition. We are left to consider the usual costs of complying with a divestiture requirement in an order. One cost is forgoing the profits from a business that the respondent acquired and presumably would like to keep. As the Commission pointed out in *Louisiana-Pacific Corporation*, 112 FTC 547, 569 (1989), "[s]ome loss of prospective profits attributable to particular assets is . . . reasonably foreseeable whenever the Commission requires a divestiture to remedy the alleged anticompetitive effects of a proposed acquisition. This is not sufficient reason to forestall imposition of a divestiture order in the first place, *see United States v. E.I. duPont de Nemours & Co.*, 366

U.S. 316 (1961), or to avoid compliance with the order after the fact."[4]

The costs of compliance also include the costs of identifying and negotiating with prospective acquirers and of maintaining the viability of the business to be divested. These costs clearly are contemplated at the time the order is entered and cannot be the basis for an "affirmative need" to reopen the order. Merieux also would have been required to bear the cost of a trustee appointed under the order, yet another example of clearly foreseeable and foreseen costs of compliance. In precedent and in logic, the usual costs of complying with an order cannot satisfy the burden of showing a need to reopen and modify the order. As in Louisiana-Pacific, "[i]n effect," Merieux has argued that "the divestiture requirement should be modified because Louisiana-Pacific [here Merieux] should not have agreed to the order in the first place." 112 FTC at 570.

From a law enforcement perspective, reopening and modifying the order on the basis of the costs of complying with the order threatens the integrity of every order on the Commission's books. I doubt there is any such thing as a costless law enforcement order. At a minimum, virtually every outstanding divestiture order would be subject to reopening and modification under the standard that the Commission employs today.

The alleged "public health needs" are of similarly unpersuasive origin. Although the Commission does not explain what is meant by "public health needs," presumably it refers to Merieux's claim that the divestiture obligation creates a disincentive for it to invest in the Connaught rabies vaccine business. The Connaught rabies vaccine business, you will recall, is the business that Merieux acquired in a transaction that the Commission alleged violated Section 7 of the Clayton Act and that the order requires Merieux to divest in settlement of the allegations of the complaint. The possibility that Merieux might have disincentives to invest in a business that it agreed to divest, in settlement of a complaint, surely was evident to the Commission and to Merieux when the order was issued. We

---

[4] *See also RSR Corp.*, 88 FTC 800, 895, *aff'd*, 602 F.2d 1317 (9th Cir. 1979), *cert. denied*, 445 U.S. 927 (1980) ("[T]he possibility that a corporation . . . may suffer some loss of value as a result of actions necessary to redress the results of the corporation's illegal conduct can be of no relevance to the determination of proper relief in a Section 7 case. . . . The antitrust laws would deserve little respect if they permitted those who violated them to escape with the fruits of their misconduct on grounds that imposition of an effective remedy would incidentally result in even a substantial monetary loss." (Citation omitted.))

must assume that the possibility was not thought to threaten the public health when the order was entered, and it is not clear why the threat should now arise.

Finally, the Commission's finding of affirmative need appears to be inconsistent with previous statements of the Commission in this case. In the 1993 show cause order, the Commission declined to treat the foreseeable costs of complying with the order as exceptional. Instead, in 1993, the Commission carefully distinguished the costs of accomplishing a "virtually impossible" divestiture (impossibility was an "unbargained-for element of the consent order") from the "costs ordinarily imposed by an order." Order To Show Cause at 2 n.2. In the standard used today, the costs of complying are divorced from the 1993 "virtual impossibility" standard, and we are left with nothing more than the "costs ordinarily imposed" by compliance with an order.

II. Reasons for the Order Modification

Having decided that Merieux has demonstrated an affirmative need for reopening, the Commission then concludes that it is in the public interest to reopen the order and set aside the divestiture requirement. According to the Commission, the modification is warranted by the "entry of SmithKline into the United States rabies vaccine market, which reduces the need for further relief pursuant to the order's lease requirement." Order Reopening and Modifying Order at 10. In the alternative, the Commission suggests that setting aside the divestiture requirement is warranted by its "potential adverse impact" on public health needs. Neither of these theories withstands even a brief examination.

The entry of SmithKline or some other competitor in the U.S. rabies vaccine market was anticipated when the order was entered. Indeed, paragraph 8 of the complaint alleges that Connaught is one of two potential entrants in the rabies vaccine market. Although the complaint does not identify SmithKline, clearly additional and imminent entry was anticipated. The Commission, to its credit, recognizes that SmithKline's entry is not an "unforeseeable change in market conditions that would compel reopening the order." Order Reopening and Modifying Order at 8. It is not clear, however, why the realization of entry that was anticipated in the complaint should "reduce[] the need" for the divestiture required in the order. The

Commission in 1990 foresaw entry by two firms (which, because Connaught was one of the two potential entrants, would result, if the Commission did not challenge the acquisition, in a two-firm market: (1) Merieux/Connaught, and (2) a new entrant). It nevertheless required divestiture (which, if effected, would result in a three-firm market). The Commission in 1994 sees entry by one firm and decides to set aside the divestiture requirement (which leaves us with a two-firm market: (1) Merieux/Connaught, and (2) SmithKline). Now if two firms were not enough to insure a competitive market in 1990, but two firms are enough in 1994, then what is our guiding principle?

The Commission may have concluded that two firms now suffice to produce a competitive market, and it is possible that I would not take issue with that conclusion on a careful analysis of a particular market. But we have no serious analysis of competition in the rabies vaccine market, and the Commission does not make an explicit finding that two firms are sufficient for competition. Indeed, the record contains little evidence about the state of competition in the rabies vaccine market, and the little evidence that is available tends to undermine any claim that the entry of SmithKline has eliminated competitive concerns.

The record contains some anecdotal evidence, in the form of customer complaints about high prices and deteriorating service. The Arkansas State Epidemiologist opposes the order modification, on the ground that the price of rabies vaccine has more than doubled and service has declined. The Kentucky Department of Health Services complains about the escalating price of rabies vaccine and the precarious availability of the product. The Texas Department of Health expresses similar concerns, stating that the price in Texas for rabies vaccine has doubled and that there have been vaccine shortages. These concerns, expressed in 1994 by customers for rabies vaccine, are consistent with the decision of the Commission in 1990, expressed in the order, that relief was necessary, and they tend to show that relief still is necessary.

The alleged effects of the divestiture requirement on "public health needs" are not articulated by the Commission, and we are left with Merieux's claim that the divestiture order has created a disincentive for it to invest in the Connaught rabies vaccine business. It should be noted that the order does not bar Merieux from investing

in and upgrading the business,[5] and Merieux would be free to negotiate whatever return on the investment an acquirer was willing to pay.[6] What is noteworthy here is that the claimed disincentive, which clearly existed from the day that Merieux agreed to the consent order and was both foreseeable and foreseen,[7] should now provide a ground for setting aside the divestiture requirement. It is fundamental in *Damon Corp.*, *supra*, *Louisiana-Pacific*, 112 FTC at 569, and other cases discussing the Commission's standard for reopening and modifying orders that under the public interest standard, the respondent must demonstrate that the order has consequences that were not contemplated when the order was entered. There simply is no basis for concluding here that the foreseeable burden of compliance with the order outweighs the need for the remedy provided in the order.

III. A Divestiture Candidate?

Procedurally, the question whether North American Vaccine would be an acceptable acquirer under the divestiture order is not before the Commission. Given the history of this order, however, and Merieux's claims that the divestiture obligation should be set aside, it is appropriate to consider the qualifications of North American Vaccine not for the purpose of deciding whether it is an acceptable acquirer but rather for the purpose of evaluating Merieux's petition. The appearance of North American Vaccine makes abundantly clear that Merieux did not contact all of the parties that would have an interest in the Connaught rabies vaccine business and it raises questions about Merieux's good faith in its search for an acquirer under the order. If North American Vaccine is qualified or appears likely to be qualified to take a lease under the order, then we can no longer assume that performance under the order is impossible.

---

[5] In addition, of course, Merieux has no comparable disincentive to invest in its non-Connaught rabies vaccine business.

[6] As a sole supplier, Merieux has not been subject to the discipline of competition. Although the Commission appears entirely willing to accept Merieux's version of its incentives without investigating the underlying facts, it seems entirely possible that the absence of competition explains the failure, if any, to make necessary capital investments.

[7] Section VII of the order addresses this concern. It sets forth a long list of specific requirements designed to prevent deterioration of the assets to be divested, including a requirement to maintain and preserve the assets of the rabies vaccine business so that it "can be leased and operated as an effective and viable business in accordance with the requirements of this order."

The appearance of North American Vaccine underscores the importance of seeking a trustee to accomplish divestiture before setting aside the principal remedial provision of a final order of the Commission.

North American Vaccine apparently has not had access to information that would enable it fully to assess the Connaught rabies vaccine business. A trustee, with "full and complete access" under the order "to the personnel, books, records and facilities of Connaught's rabies vaccine business," Merieux's cooperation, and "such financial or other information relevant to the assets to be leased as such trustee may reasonably request" (consent order at paragraph VI.D), would be in a position to develop a record on which North American Vaccine's qualifications could be assessed. With the trustee's recommendation in hand, the Commission would be in a far better position to decide whether the divestiture requirement should be enforced or set aside.

Based on the information that is available, the majority appears too willing to conclude that North American Vaccine is not an acceptable acquirer under the order. According to the Commission, in reviewing a potential divestiture, the Commission should consider "the acquirer's financial capability, technical, marketing, management and other relevant capabilities; business plans and other evidence of the acquirer's intention and ability to compete," in addition to whether "divestiture to the proposed acquirer will achieve the competitive relief sought by the order." Order Reopening and Modifying Order at 9 n.8. North American Vaccine appears to be well qualified on all counts. The reasons that the Commission gives for rejecting North American Vaccine as a potential acquirer are not persuasive.

First, the Commission states that North American's revenues have fallen short of its "operating costs" (Order Reopening and Modifying Order, note 8), presumably reflecting adversely on North American's financial ability to make the acquisition. This focus on historical revenue for a start-up company that is in the process of developing vaccines and obtaining regulatory approval for them is misleading. The company appears quite capable of making the acquisition. Because North American Vaccine is developing vaccines and obtaining regulatory approvals and not yet marketing vaccines, it had losses of about $11 million in 1992 and $12 million in 1993. Despite these losses, North American Vaccine had $17

million on hand in cash and cash equivalents and $38 million in securities as of December 31, 1993, according to its 1993 10K Report, filed with the Securities and Exchange Commission. North American's current financial reserves seem sufficient to fund the acquisition and to continue its new product development for a number of years, and the company recently filed a registration statement with the SEC concerning a proposed new stock offering that should provide an even more comfortable cash cushion.

In addition, North American Vaccine seems well qualified in terms of its technical, marketing and managerial abilities. Given its experience in developing new vaccines, it likely would be capable of continuing an existing process for producing the rabies vaccine. North American recently hired a former Merck executive with experience in manufacturing, testing, release and registration of biological products. Hiring managerial and technical talent from an established producer is a common and effective way for a young firm to acquire expertise rapidly. North American has not yet submitted a detailed business plan (in part, because it has not had full access to the Connaught plant), but it has submitted a general marketing outline that appears more sophisticated than what we often see in connection with divestiture applications.

Merieux has expressed some reservations about the difficulty of obtaining regulatory approval for the transfer of licenses to North American Vaccine. Vaccines are subject to strict regulation in the United States and Canada, and the Commission was fully aware of the regulations when it accepted the consent order. Indeed, the Commission addressed that issue in paragraph II.D of the consent order, which requires Merieux to use its best efforts to secure an FDA product license for Connaught's vaccine and directs that Merieux "shall assist in securing such license for the lessee as a part of the lease agreement." Presumably, the Commission thought this was an adequate safeguard when it entered the order and, absent a reason to change that view, the Commission should hold Merieux to this agreement to assist in securing the license. Further, North American has recognized the possibility of regulatory delay and has proposed a plan to stockpile what would appear to be more than sufficient inventory to continue to supply the vaccine during any reasonably foreseeable interim delay in obtaining a license.

Third, and perhaps most important for competition, North American Vaccine is a new entrant into the vaccine market. It is

independent of Merieux and, unlike a monopolist supplier, it has every incentive to invest in and upgrade the Connaught facility in order to expand production and revive competition in this market. But we need not decide today whether North American Vaccine is an acceptable acquirer of the Connaught rabies vaccine business. A trustee can and should make a recommendation on that question. What does seem clear is that we know enough about North American Vaccine to refer this matter to a trustee for further review.

The evidence of increasing prices and supply shortages provided by state public health officials supports the Commission's 1990 determination that a violation of Section 7 of the Clayton Act occurred and that relief in this market is necessary. By the criteria usually employed by the Commission in reviewing potential acquirers, North American Vaccine appears to be an excellent, possibly ideal, candidate to effect the remedy the Commission chose to impose in this case. The Commission's order granting Merieux's petition to set aside its obligation to divest the rabies vaccine business places into question well established precedent that sets standards for the reopening and modification of orders, raises a question whether any candidate now or ever could meet the Commission's exacting standards for potential acquirers and, if so, fails to suggest what those standards might be, and perhaps most troubling, suggests a lack of will to enforce Commission orders. This in turn may have other adverse effects. Respondents under Commission order may be less likely to fulfill their obligations under the order, and promising new competitors may be less willing to step forward and bid on assets subject to divestiture order.

Although my original view of the inadequacy of the order remains unchanged, that order having been imposed, I cannot join in today's decision, which seriously undermines the Commission as an institution. I dissent.

SEPARATE STATEMENT OF COMMISSIONER DEBORAH K. OWEN

I write separately to clarify my views on Institut Merieux, a matter that has spanned my career at the Federal Trade Commission.

The Commission's opinion accompanying the instant order modification makes clear our continuing dedication to the sanctity of Commission orders, and our view that extraordinary circumstances alone will justify alleviation. This case, like the recent Promodes

matter, presents the Commission with the sad dilemma of a well-intentioned remedy which later proves totally impractical to fulfill for reasons apparently beyond anyone's control. The issue, then, is how much writhing will we demand of the respondents in their efforts to comply, and how many fruitless years of staff resources will we expend to effectuate a remedy that simply cannot be realized?[1]

The Commission has had inordinate opportunity to exercise its trustee option. At the earliest, it could have acted over three years ago; or it could have been prompted since that time upon receipt of any one of ten compliance reports submitted by respondent. The most logical opportunity, of course, was in March, 1993, in lieu of the Order to Show Cause. But the Commission consciously determined that a trustee appointment would not be appropriate in light of the excruciating, unsuccessful efforts of Institut Merieux to license the business. If there was sufficient information about NAVA's potential to warrant terminating the Show Cause proceeding, or indeed now to question Merieux's good faith and the Commission's previous assessment thereof, one wonders why the Commission found that information insufficient to justify appointing a trustee last year.

The mere fact that a self-proclaimed qualifier for the business arrived on the scene at the auspicious and coincidental point of the Commission's Order to Show Cause is not, in and of itself, cause for the Commission to question Merieux's good faith effort to locate a licensee, nor this agency's own previous judgment with respect thereto. It is not unprecedented in Commission history for a competitor (itself, or via an entity in which it has a financial interest) to attempt to use Commission process to disadvantage a rival. It is not unheard of for an applicant to overestimate its credentials. Thus, the mere appearance of a licensee alone should not be enough for the Commission to conclude that the search was flawed. Rather, we must look objectively at the search itself to see wherein it may have been lacking. The fact that many established, experienced companies

---

[1] I supported the Commission's 1990 order in Promodes, as well as the subsequent order modifications. Promodes S.A., FTC Dkt. No. D-9228, Order Granting Request to Reopen and Modify Order Issued May 17, 1990 (Jan. 28, 1994) (setting aside paragraphs II.A.3. and II.A.6.) (Commissioner Owen concurring in part and dissenting in part); Order Reopening and Modifying Order Issued May 17, 1990 (May 21, 1993)(setting aside paragraphs II.A.1. and II.A.2.) (Commissioner Owen concurring in part and dissenting in part). In this case, while I opposed taking action against Merieux at the outset, as noted in my statement last year, my belief that the order should be modified is based on "separate reasons." *See* Order Vacating Show Cause Proceeding (Aug. 17, 1993) (Comm. Owen dissenting).

chose to forgo entry via the "advantage" of the Commission-mandated license suggests that a reasonable business reaction may very well have been that, for some reason or another, the license was simply not a viable deal. In short, no qualified licensee wanted it. Despite Merieux's detailed articulation of its efforts in its compliance reports and in conversations with staff, I am not aware that anyone has identified with any specificity precisely what avenue it was that Merieux failed to pursue, what part of the maze it left unexplored. I personally am unable to discern one.

This brings us to the spurned suitor. As I noted in my statement last year, the information available as to the qualifications of this licensee left me underwhelmed. Now having the benefit of extensive financial information, and expert analysis thereof, I feel even more confident in my judgment, based on my own business experience.

I fear one outcome of this case may be to discourage the Commission from approaching remedies in merger cases with calculated flexibility. I do not believe that divestitures or deal-cratering are the only avenues available to us. The Commission's initiative in recent years to minimize our intrusion into legitimate business activities by refusing to demand in remedies more than we need to serve our purposes is a commendable achievement. Yes, there will be the rare occasion when the remedy does not work; but as our recent Promodes case illustrates, there are also rare cases where traditional remedies fail for reasons beyond everyone's control. The respective overall benefits of both approaches far outweigh the occasional disadvantage. Nor do I believe that creative remedies should be eschewed because we may be duped by the respondents with all their expertise. This curious reasoning would appear to undermine our credentials to take any kind of action whatsoever.

At some point, our inexhaustible search for perfection must give way to reality. Any further prolongation of these proceedings will simply encourage applicants in other matters to postpone their expressions of interest until well after the tardy bell has rung. An additional nine months of trusteeship, while paling beside the Jurassic Period, is, in my observation, an onerous limbo in the fast-paced world of business, particularly where it follows a multi-year delay. The Commission has many important considerations to balance in a situation like this, but ultimately, in the interests of encouraging others to settle, a final resolution must accrue, albeit not

our first choice. When an order, after lengthy effort on both sides, proves unworkable, we should not expect contortions on the part of respondents and staff that would rival Barnum & Bailey.

In my closing words on this difficult, sensitive matter, I would like to pay particular tribute to our Compliance Division and the assisting economists and accountants. Although I have not always agreed with them on their ultimate recommendations, I found their work on this matter highly professional, fastidious, and reasoned. I greatly appreciate their help.

DISSENTING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I respectfully dissent from the Commission's decision to reopen and modify the consent order in this matter. The Commission issued this consent order in 1990, settling charges that Institut Merieux's acquisition of the rabies vaccine business of Connaught Bioscience would violate Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 45 U.S.C. 45.[1] The core remedial provision in the consent order requires Institut Merieux to lease the acquired rabies vaccine business on a long-term basis to a Commission approved lessee.[2] The consent order further provides that, should Institut Merieux fail to lease the business "at customary and reasonable terms,[3] within three months of the date the order becomes final, the Commission may appoint a trustee to lease the business "at the best price and terms available consistent with this order's absolute obligation to lease Connaught's rabies vaccine business."[4] In its decision to reopen and modify this consent order, the Commission eliminates Institut Merieux's "absolute obligation" to lease the rabies vaccine business. I agree with Commissioner Azcuenaga that, under the circumstances, the more appropriate course of action would have been to appoint a trustee to lease the business.

Even assuming *arguendo* that Institut Merieux has made the threshold "affirmative need" showing, I disagree with the majority

---

[1] 113 FTC 742 (1990).

[2] The core provision of the consent order requires the respondent, *inter alia*, (i) to lease Connaught's rabies vaccine business for a minimum of 25 years to a Commission-approved lessee and (ii) to use "best efforts to secure from the [FDA] a product license for Connaught's rabies vaccine" for the lessee. *See* 113 FTC at 747-48 (consent order paragraph II).

[3] *Id.* at 747 (consent order paragraph II (A)).

[4] *Id.* at 748 (consent order paragraph IV).

that the public interest requires eliminating the core remedial obligation from the consent order.[5] The majority cites three reasons favoring the modification:[6] (i) Institut Merieux's inability to identify an interested potential lessee that is likely to receive the necessary governmental approvals; (ii) SmithKline Beecham's "actual entry" into the relevant market; and (iii) "the potential adverse impaction public health needs in the United States and Canada resulting from continued a placation of the lease requirement." In light of countervailing public interest concerns, I am unpersuaded that any of these factors militates strongly in favor of vacating the core obligations of the consent order. On the record before the Commission, the reasons opposing the requested modification outweigh the reasons favoring the modification.

The record before the Commission should cast into substantial doubt Institut Merieux's assertion that no viable lessee is likely to be found. This record is considerably larger and more complicated than the record as of March 1993, when the Commission issued an Order to Show Cause why the proceeding in Docket No. C-3301 should not be reopened and modified to set aside the lease obligation. The Commission instituted the show cause proceeding based, in large part, on Institut Merieux's apparent inability to lease its rabies vaccine business. Until North American Vaccine filed its Motion for Leave to Intervene in that proceeding, there appeared to be little reason to believe that a lessee would be found or that a trustee would have any greater success than Institut Merieux in this endeavor. North American Vaccine's Motion and subsequent filings as an amicus curiae, however, directly implicated the central issue in the show cause proceeding, namely, whether it is reasonably likely that any firm will be able to execute a lease for the rabies vaccine business that will receive the Commission's approval. Consequently, in August 1993, the Commission terminated the show cause proceeding.

North American Vaccine's continuing expression of interest in Connaught's rabies vaccine business suggests that the reasons for terminating that proceeding continue to apply. Moreover, for the reasons stated by Commissioner Azcuenaga and on the record before us, I believe that North American Vaccine cannot be dismissed as

---

[5] I concur in the conclusion of the majority that Institut Merieux has not made a satisfactory showing that changed conditions of fact warrant reopening.

[6] These are in addition to the costs imposed on Institut Merieux by maintaining the obligation. These costs form the basis of Institut Merieux's affirmative need showing.

lacking the potential to be an acceptable acquirer. The uncertainty regarding North American Vaccine and the potential for executing an acceptable lease can be resolved only through the appointment of a trustee.

SmithKline's "entry" cannot reasonably be said to reduce the need for further relief. The Commission issued the Section 7 complaint in the face of imminent potential entry and the acknowledged existence of the Michigan production facility whose rabies vaccine SmithKline will distribute.[7] Thus, there is nothing new about SmithKline's "entry" for purposes of evaluating competition under Section 7 of the Clayton Act or of modifying an order under the Commission's standards.

Consistent with the Commission's 1990 complaint, some evidence suggests a lessening of competition in the relevant market since the acquisition.[8] Thus, however one characterizes SmithKline's activities or the current structure of the relevant market, certain measures of market performance indicate that antitrust relief remains necessary. Having issued an order on which the respondent has failed to perform the core remedial obligation, the Commission should strongly presume the continuing necessity of relief. Institut Merieux has not effectively carried its burden of rebutting this presumption.[9]

Nothing in the record supports the conclusion that modification is necessary to avoid a "potential adverse impact on public health needs." One concern may be that an inexperienced lessee will not operate the facility efficiently. On the other hand, now that the Commission has vacated the lease requirements from the consent order, the Commission could not prevent Institut Merieux from closing the Connaught facility tomorrow -- a result clearly at odds with public health needs. Moreover, the obligation "to supply rabies vaccine sufficient to satisfy the Canadian demand" would have

---

[7] *See* 113 FTC at 744.

[8] Comments of North American Vaccine, Inc. Opposing Request of Institut Merieux S.A. to Reopen and Modify Consent Order at 2, 25; Letter from Reginald F. Finger, Director, Division of Epidemiology, Department for Health Services, Commonwealth of Kentucky, to office of the Secretary, Federal Trade Commission (Jan. 27, 1994); Letter from Suzanne R. Jenkins, President, National Association of State Public Health Veterinarians, Inc., to Office of the Secretary, Federal Trade Commission (Jan. 24, 1994); Letter from Christopher G. Atchison, Director, Department of Public Health, State of Iowa, to Office of the Secretary, Federal Trade Commission (Jan. 24, 1994).

[9] The burden is not a light one given the public interest in repose and finality of government antitrust orders. *See Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981) (strong public interest considerations support repose and finality).

applied only to the lessee; it does not apply to Institut Merieux.[10] Whatever uncertainties existed about a lessee, the Commission's decision to vacate the lease requirement leaves Institut Merieux free to restrict output further or to terminate production at the Connaught facility altogether. In addition, to the extent that the "potential adverse impact" arises from Institut Merieux's asserted disincentive to invest in the Connaught facility, I concur in Commissioner Azcuenaga's conclusion that Institut Merieux has not made a satisfactory showing.

I disagree most strongly with the majority's conclusion that "there are no countervailing public interest concerns that outweigh the reasons in support of granting the modifications." The overriding public interest concern here should be the continuing necessity of the relief given the state of competition in the relevant market. In addition, the public interest in enforcement of final orders weighs heavily against the modifications at this time. Of course, the marginal decision at this stage is whether to appoint a trustee. Even if one agrees with the majority's public interest calculus, and even if the trustee fails to execute the lease, the appointment of a trustee simply maintains the status quo for another nine months. Confronted with evidence consistent with a substantial lessening of competition and with evidence casting doubt on Institut Merieux's assertions regarding the likelihood of finding a lessee, the Commission should take the relatively obvious next step of appointing a trustee to effectuate Institut Merieux's "absolute obligation" to execute the required lease. Unless and until it appears that an independent trustee is unable to execute the required lease with North American Vaccine or any other firm, vacating the lease requirement does not appear to be in the public interest.

The Commission's experience with this consent order is a lesson in the perils of accepting non-standard relief in merger consent orders. The consent order here departed from the traditional "divestiture of a going concern" model in a number of respects, some of which undermined its likely effectiveness from the beginning.[11] As finally approved, the order was much more likely than standard

---

[10] *See* 113 FTC at 748 (proviso to consent order paragraph IV).

[11] For example, assuming *arguendo* that the lease is considered an analytical equivalent of divestiture, Merieux is subject to a requirement to lease the business "at reasonable and customary terms" rather than the usual requirement to divest "at no minimum price." As another example, the order provides that the lease "shall include a commitment from the lessee to supply rabies vaccine sufficient to satisfy Canadian demand for rabies vaccine," which obviously limits the pool of acceptable licensees and makes the lease less attractive.

divestiture orders to fail. In general, the Commission should enter into non-standard relief in merger cases only with great trepidation. Firms entering into transactions creating exploitable market power have strong incentives to induce the Commission to accept relief (i) that cannot be implemented or (ii) that is consistent with a course of action that the firm would have undertaken in any event. Because the respondent firm always has a comparative advantage over the Commission in its knowledge and understanding of the relevant business, the firm has considerable latitude to shape nonstandard relief to its advantage. Substantial deviations from the standard divestiture model in this case have brought us to this very unsatisfactory result.

IN THE MATTER OF

UNOCAL CORPORATION, ET AL.

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

Docket C-3493. Complaint, April 28, 1994--Decision, April 28, 1994

This consent order prohibits, among other things, the companies from making claims about the attributes or performance of any gasoline without first having competent and reliable scientific evidence to substantiate their claims. In addition, the respondents are required to mail their credit-card customers, in certain states, a notice advising consumers to check their owner's manual to determine the proper octane level of gasoline to purchase.

Appearances

For the Commission: *Russell S. Deitch* and *Sue L. Frauens.*

For the respondents: *William C.* Mac*Leod, Jr., Collier, Shannon, Rill & Scott*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondents Unocal Corporation, Union Oil Company of California and Leo Burnett Company, Inc., corporations, hereinafter sometimes referred to as respondents, have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it would be in the public interest, hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. Respondent Unocal Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware. Respondent's office and principal place of business is located at 1201 West Fifth Street, Los Angeles, California.

Respondent Union Oil Company of California is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California. Respondent's office and principal

place of business is located at 1201 West Fifth Street, Los Angeles, California. It is a wholly-owned subsidiary of Unocal Corporation.

PAR. 2. Respondents Unocal Corporation and Union Oil Company of California advertise, offer for sale, sell, and distribute gasoline and other petroleum products, including Unocal 92 and 89 octane gasolines.

PAR. 3. Respondent Leo Burnett Company, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware. Respondent's office and principal place of business is located at 35 West Wacker Drive, Chicago, Illinois.

PAR. 4. Respondent Leo Burnett Company, Inc., at all times relevant to this complaint, was an advertising agency of Unocal Corporation, and prepared and disseminated advertisements to promote the sale of Unocal gasoline.

PAR. 5. Respondents Unocal Corporation, Union Oil Company of California and Leo Burnett Company, Inc., at all times mentioned herein, have maintained a substantial course of business, including the acts and practices hereinafter set forth, which are in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 6. Respondents Unocal Corporation and Union Oil Company of California have disseminated or have caused to be disseminated advertisements for Unocal 92 and 89 octane gasolines, including, but not necessarily limited to, the attached Exhibits A, B, and C. The aforesaid advertisements contain the following statements:

1. ...With the high cost of falling in love these days you can't trust your investment to just any gasoline. That's why Seventy-Six developed our Ninety-two Unleaded. It's the highest level octane gasoline you can buy to help your car run better, longer. Because after all isn't love supposed to last forever? (Complaint Exhibit A.)

2. When some people buy gasoline economy is all that matters. While others will pay any price for performance. Fortunately, Seventy-Six created a gasoline for the rest of us. Eighty-nine Octane Unleaded. A mid-grade gasoline two octanes higher than regular. To help your car run better longer. But at a price below premium. Eighty-nine Octane Unleaded. A gasoline that's as good for your car as it is for your wallet. (Complaint Exhibit B.)

3. Unocal's unleaded 89 octane gasoline is as good for your car as it is for your wallet. ...Unocal's 89 unleaded is two octanes higher than regular unleaded to keep your car running better, longer. At a cost less than premium. Compared to

regular unleaded, our 89 octane will give your car smoother starts and stops, help reduce engine knocks and pings. So, move up to our 89 unleaded. See what its two octane advantage can do for your car.

(On the Back)

Premium Performance Without A Premium Price

[Depiction of a gasoline pump containing the wording 89 OCTANE Performance Plus 89] (Complaint Exhibit C.)

PAR. 7. Respondent Leo Burnett Company, Inc. has disseminated or has caused to be disseminated advertisements for Unocal 92 and 89 octane gasolines, including but not necessarily limited to the attached Exhibits A and B.

PAR. 8. Through the use of the statements contained in the advertisements referred to in paragraphs six and seven, including but not necessarily limited to the advertisement attached as Exhibit A, respondents Unocal Corporation, Union Oil Company of California and Leo Burnett Company, Inc. have represented, directly or by implication, that Unocal 92 octane gasoline provides superior engine performance and longevity as compared to regular unleaded gasoline, that would be significant to consumers, for automobiles generally.

PAR. 9. Through the use of the statements contained in the advertisements referred to in paragraphs six and seven, including but not necessarily limited to the advertisements attached as Exhibits B and C, respondents Unocal Corporation, Union Oil Company of California and Leo Burnett Company, Inc. have represented, directly or by implication, that Unocal 89 octane gasoline provides superior engine performance and longevity as compared to regular unleaded gasoline, that would be significant to consumers, for automobiles generally.

PAR. 10. Through the use of statements contained in the advertisements referred to in paragraphs six and seven, including but not necessarily limited to the advertisements attached as Exhibits A, B, and C, respondents Unocal Corporation, Union Oil Company of California and Leo Burnett Company, Inc. have represented, directly or by implication, that at the time they made the representations set forth in paragraphs eight and nine, respondents Unocal Corporation, Union Oil Company of California and Leo Burnett Company, Inc.

possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 11. In truth and in fact, at the time respondents made the representations set forth in paragraphs eight and nine, respondents Unocal Corporation, Union Oil Company of California and Leo Burnett Company, Inc. did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph ten was, and is, false and misleading.

PAR. 12. Respondent Leo Burnett Company Inc. knew or should have known that the representation set forth in paragraph ten was, and is, false and misleading.

PAR. 13. The dissemination by respondents Unocal Corporation, Union Oil Company of California and Leo Burnett Company, Inc. of the aforesaid false and misleading representations, as herein alleged, constituted, and now constitutes, unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

Commissioner Owen noted in the affirmative, but dissented as to Exhibit A, paragraph eight, and all references in the complaint to 92 octane.

EXHIBIT A

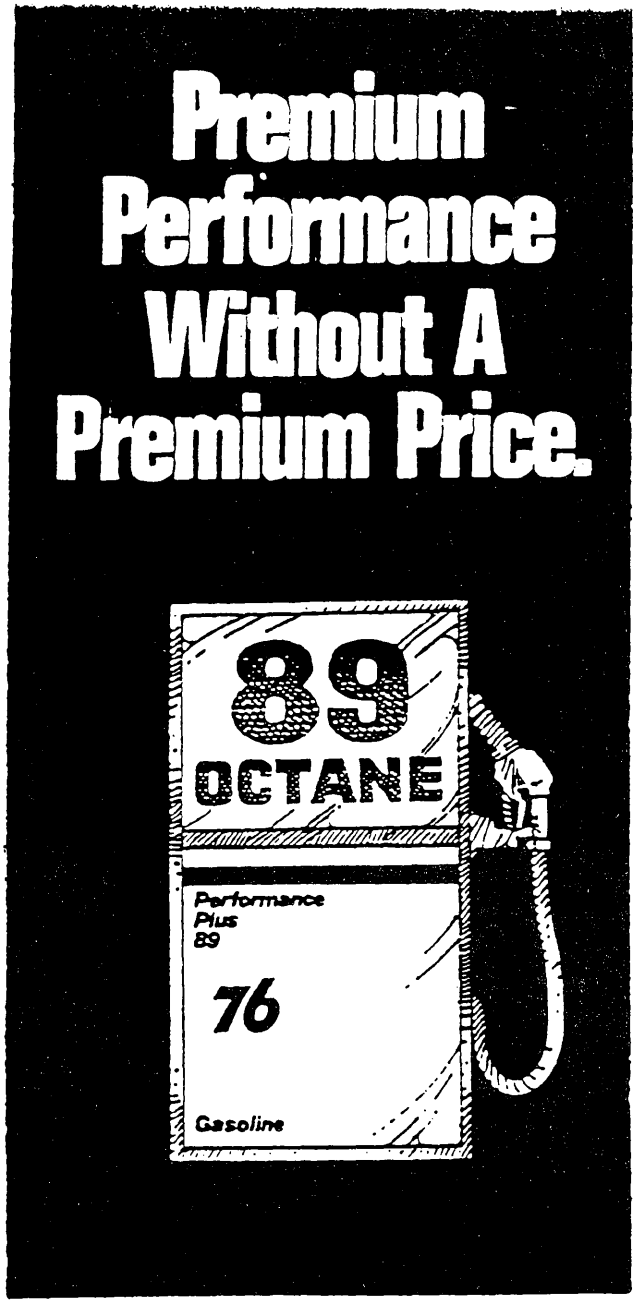
Premium Performance Without A Premium Price.
89
OCTANE
Performance Plus 89
76
Gasoline

EXHIBIT B


(MUSIC: UNDER THROUGHOUT)
1. SINGER: I'M IN LOVE AGAIN.
2. ...
3. AND THE SPRING IS COMIN'...
4. I'M IN LOVE AGAIN. (CONTINUES UNDER)
5. (AVO): With the high cost...
6. of falling in love...
7. these days...
8. you can't trust your investment to just any gasoline.
9. That's why Seventy-Six...
10. developed our Ninety-two...
11. Unleaded.
12. It's the highest level octane gasoline you can buy...
13. to help your car run better, longer. Because after a
14. isn't love supposed to last forever?
15. Come to Seventy-Six. Where

EXHIBIT B


(MUSIC: UNDER THROUCHOUT)
1. (AVO): When some people buy gasoline....economy is all that matters.
2. While others will pay any price for performance.
3. Fortunately, Seventy-Six created a gasoline for the rest of us.
89
4. Eighty-nine Octane Unleaded.
5. A mid-grade gasoline...
6. two octanes higher than regular.
7. To help your car run better...
8. longer.
9. ...
10. But at a price below premium.
11. Eighty-nine Octane Unleaded.
12. A gasoline that's as good for your car...
13. as it is for your wallet.
14. ...
15. At Seventy-Six, where you find people who care about cars.

EXHIBIT C

Unocal's unleaded 89 octane gasoline is as good for your car as it is for your wallet.

Our 89 octane has long been an exclusive grade to 76. Today, Unocal is still the *only* company offering an unleaded 89 octane mid-grade. Unocal's 89 unleaded is two octanes higher than regular unleaded to keep your car running better, longer. At a cost less than premium.

Compared to regular unleaded, our 89 octane will give your car smoother starts and stops, help reduce engine knocks and pings. So, move up to our 89 unleaded. See what its two octane advantage can do for your car.

UNOCAL 76

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the above caption, and the respondents having been furnished thereafter with a copy of a draft complaint which the Los Angeles Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation 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 complaint, a statement that the signing of the 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 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, 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 Unocal Corporation is a Delaware corporation, with its office and principal place of business at 1201 West Fifth Street, Los Angeles, California.

2. Respondent Union Oil Company of California is a California corporation, with its office and principal place of business at 1201 West Fifth Street, Los Angeles, California.

3. Respondent Leo Burnett Company, Inc. is a Delaware corporation, with its office and principal place of business at 35 West Wacker Drive, Chicago, Illinois.

4. 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.

It is ordered, That respondents Unocal Corporation, Union Oil Company of California and Leo Burnett Company, Inc., corporations, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, packaging, offering for sale, sale or distribution of Unocal 92 and 89 octane gasolines or any other gasoline in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, directly or by implication, about:

A. The superiority of Unocal 92 or 89 octane in providing engine power or acceleration for any automobile;

B. The superiority of Unocal 92 or 89 octane in prolonging the longevity of an engine for any automobile; or

C. The relative or absolute attributes or performance of any gasoline with respect to vehicle engine power, acceleration, longevity, or any other performance characteristic;

unless at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation. For purposes of this order, "competent and reliable scientific evidence" shall mean tests, analysis, research, studies or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

Provided that, nothing in this order shall prohibit respondents from truthfully representing the numerical octane rating of any gasoline.

Provided further that, it shall be a defense hereunder that respondent Leo Burnett Company, Inc. neither knew nor had reason to know of an inadequacy of substantiation for the representation.

II.

It is further ordered, That for three (3) years after the date of the last dissemination of the representation to which they pertain, respondents Unocal Corporation, Union Oil Company of California and Leo Burnett Company, Inc. shall maintain and upon request make available to the Federal Trade Commission or its staff for inspection and copying:

A. All materials relied upon to substantiate any claim or representation covered by this order; and

B. All tests, reports, studies or surveys in respondents' possession or control that contradict any representation covered by this order.

III.

It is further ordered, That respondents Unocal Corporation, Union Oil Company of California and Leo Burnett Company, Inc. shall forthwith distribute a copy of this order to all operating divisions, subsidiaries, franchisees, officers, managerial employees, and all of their employees or agents engaged in the preparation or placement of advertisements or promotional materials covered by this order and shall obtain from each such employee a signed statement acknowledging receipt of the order.

IV.

It is further ordered, That respondents Unocal Corporation, Union Oil Company of California and Leo Burnett Company, Inc. shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation(s) such as a 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(s) that may affect compliance obligations under this order.

V.

It is further ordered, That respondents Unocal Corporation, Union Oil Company of California and Leo Burnett Company, Inc.

shall, within sixty (60) days after service upon them of this order and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

VI.

It is further ordered, That respondents Unocal Corporation and Union Oil Company of California shall mail to the last known address of all consumers who hold an active Unocal credit card on the date this order becomes final, and who reside in any of the states of Oregon, Washington, Nevada, California, or Hawaii, an exact copy of the Notice which is incorporated by reference as Appendix A.

The mailing shall not include any other documents that contradict or in any way mitigate the information in the Notice. Respondents Unocal Corporation and Union Oil Company of California shall bear all costs of printing and disseminating the Notice. The Notice shall be mailed by first class mail within 30 days of the date the order becomes final.

Commissioner Owen noted in the affirmative, but dissented as to Exhibit A, paragraph eight, and all references in the complaint to 92 octane.

APPENDIX A

NOTICE

IMPORTANT INFORMATION ABOUT THE
OCTANE NEEDS OF YOUR CAR

As a Unocal customer, you probably know that Unocal offers three grades of unleaded gasoline at its service stations: 87 octane regular, 89 octane mid-grade, and 92 octane premium. The 89 and 92 octane grades are formulated primarily for vehicles that are designed to operate on higher octanes (high-performance vehicles) and for vehicles that may be experiencing engine knocking and pinging.

In July 1991, the Federal Trade Commission issued a brochure that advises consumers to purchase the lowest octane gasoline that their cars can use without engine knocking or pinging. The brochure notes that "many experts believe that most cars do not need a high octane gasoline to perform properly and efficiently." The brochure also advises consumers to "first check your owner's manual for the recommended octane level." According to the brochure, if your vehicle runs without knocking or pinging it generally does not need, and will not perform better with, higher octane gasoline.

The octane requirements of your vehicle can vary over time or under certain weather, altitude and driving conditions. If your car is knocking or pinging at the octane level recommended in your owner's manual, you may need a higher octane gasoline.

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

I concur in the Commission's action to issue as final an administrative complaint against, and consent order involving, Unocal Corporation and its advertising agency, Leo Burnett Company, Inc., for allegedly making unsubstantiated octane performance and longevity claims. However, based on the ad itself and the available extrinsic evidence, I do not find reason to believe that Exhibit A to the complaint (commonly referred to as the "Love Is Forever" ad) conveys the message alleged in paragraph 8, that Unocal 92 octane provides significantly superior engine performance and longevity for automobiles generally, as opposed to for high performance automobiles. Accordingly, I respectfully dissent as to Exhibit A, paragraph 8, and all references to 92 octane gasoline in the administrative complaint.

STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III
CONCURRING IN PART AND DISSENTING IN PART

I concur in the decision to charge Unocal Corporation with unsubstantiated representations regarding its 89 octane and 92 octane gasoline. I further concur in the decision to charge Leo Burnett Company, Inc. ("Leo Burnett") with unsubstantiated representations regarding Unocal's 92 octane gasoline.

On both factual and legal grounds, however, I dissent from issuance of this complaint insofar as it charges Leo Burnett with liability for the Unocal 89 octane claims. Complaint paragraphs 9, 11 and 12. In recent years, the Commission has prosecuted three advertising agencies for very significant, even egregious violations of Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45. Here, the record supports the conclusion that Leo Burnett made substantial, good faith pre-dissemination efforts to determine whether the 89 octane claim was substantiated. Therefore, the inclusion of the 89 octane allegation in the complaint represents a significant and unnecessary departure from recent precedent regarding advertising agency liability.

Section 5(b) of the FTC Act, 15 U.S.C. 45(b), requires the Commission to make a two-step determination before issuing a complaint. It must conclude, first, that it has reason to believe that an unfair or deceptive act or practice has been committed and, second, that a proceeding would be in the public interest. The record supports the conclusion that Leo Burnett requested, and was presented with, facts in support of the claim for 89 octane gasoline, although it also possessed some information that would tend to undermine the general nature of the benefit provided by 89 octane gasoline. The Commission previously has held that where an advertising agency requested and relied upon evidence that provided some scientific basis for a claim requiring complex scientific substantiation, possession of additional information tending to undermine the substantiation did not put the agency on notice that substantiation was inadequate. *Bristol-Myers Co.*, 102 FTC 21, 365-66 (1983). Given this precedent, and on the record before us, I am not able to conclude that there is reason to believe that Leo Burnett engaged in actionable conduct in connection with the 89 octane claims.

Moreover, elimination of the 89 octane charge from the complaint would have simplified the complaint without the need for any significant change in order coverage.[1] Under these circumstances, it does not appear that it is in the public interest to include this charge in the complaint.

[1] Although it appears appropriate to exempt Leo Burnett from Parts IA and IB of the order insofar as those provisions specifically pertain to engine power, acceleration and longevity claims for 89 octane gasoline, Part IC nevertheless fences in these (and other) performance claims regarding any gasoline.