IN THE MATTER OF

NORTH AMERICAN PLASTICS CORPORATION, ET AL.

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

Docket C-3526. Complaint, Sept. 7, 1994--Decision, Sept. 7, 1994

This consent order prohibits, among other things, an Illinois corporation and its officer from making unsubstantiated degradability or environmental benefit representations about their plastic bags in the future.

Appearances

For the Commission: *Brinley H. Williams, Phillip Broyles* and *Christian White.*

For the respondents: *Jeannie Lamar, Peterson & Ross,* Chicago, IL.

COMPLAINT

The Federal Trade Commission, having reason to believe that North American Plastics Corporation, a corporation, and Harold V. Engh, Jr., individually and as an officer of said corporation, 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 in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent North American Plastics Corporation is a Delaware corporation with its office and principal place of business at 921 Industrial Drive, Aurora, Illinois.

Respondent Harold V. Engh, Jr., is an officer of said corporation. In his capacity as an officer, he formulates, directs and controls the acts and practices of said corporation, and his business address is the same as that of the corporation.

PAR. 2. Respondents have advertised, offered for sale, sold and distributed plastic trash bags to the public under such trade names as "EnviroGard."

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

PAR. 4. Respondents have disseminated or caused to be disseminated advertisements and promotional materials for EnviroGard bags, including, but not necessarily limited to, the package label attached hereto as Exhibit A and the promotional materials attached hereto as Exhibits B and C.

The package labeling and promotional materials for EnviroGard plastic bags, attached hereto as Exhibits A, B and C, include one or all of the following statements on the package:

- BIODEGRADABLE [Exhibits A, B and C]
- Other degradable-type trash bags don't break down in landfills because they depend on harsh chemical additives that work only in sunlight. [Exhibit A]
- Works when other degradables don't! [Exhibit B]
- Naturally Biodegradable [Exhibit B]
- SAFE & NATURAL: EnviroGard Biodegradable trash bags are formulated with cornstarch. They degrade naturally upon contact with soil micro-organisms. Unlike our so called "Degradable" competition, EnviroGard degrades without sunlight. [Exhibit C]

PAR. 5. Through the statements referred to in paragraph four, and others in package labeling not specifically set forth herein, respondents have represented, directly or by implication, that:

(1) Compared to other plastic bags, EnviroGard bags offer a significant environmental benefit when consumers dispose of them as trash that is buried in a landfill; and

(2) EnviroGard bags will completely break down, decompose and return to nature in a reasonably short period of time after consumers dispose of them as trash that is buried in a landfill.

PAR. 6. Through the statements and representations referred to in paragraphs four and five, and others not specifically set forth herein, respondents have represented, directly or by implication, that at the time they made such representations, respondents possessed and relied upon a reasonable basis for such representations.

PAR. 7. In truth and in fact, at the time respondents made such representations, respondents did not possess and rely upon a reason-

able basis for such representations. Therefore, the representation set forth in paragraph six was, and is, false and misleading.

PAR. 8. The acts and practices of respondents as alleged 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.

EXHIBIT A

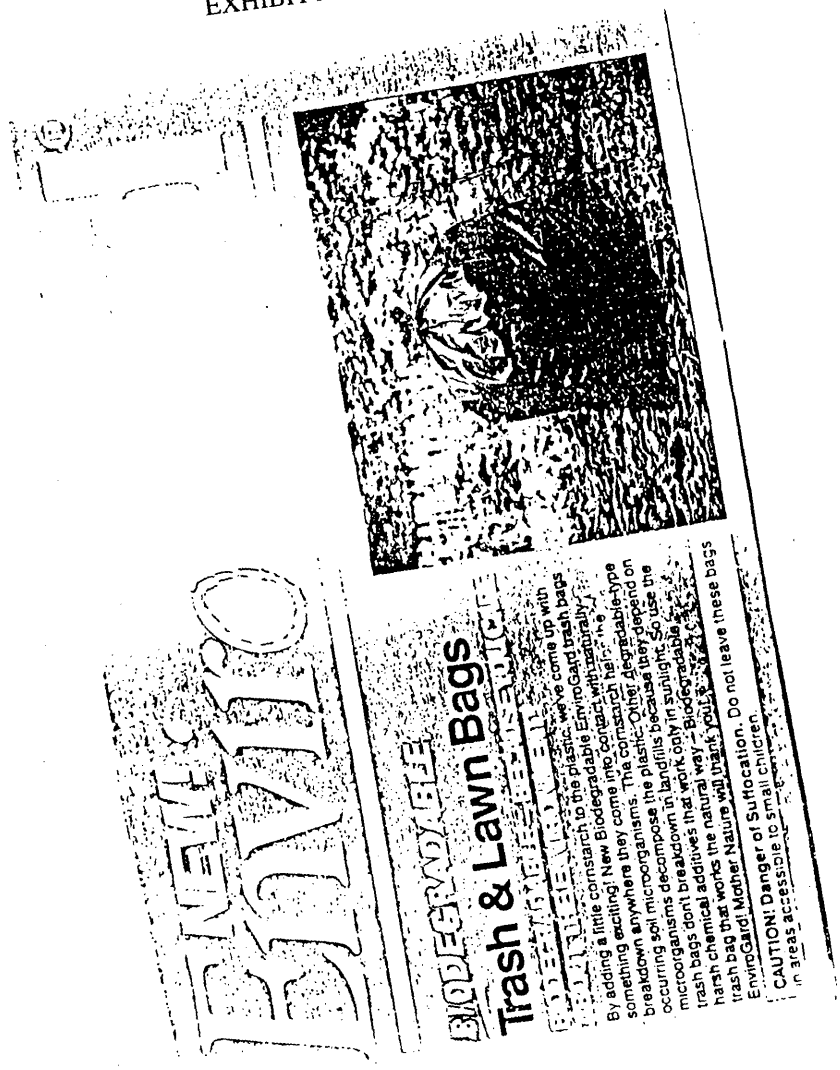

EXHIBIT B

EXHIBIT

EnviroGard® BIODEGRADABLE Trash Bags

GOOD BUSINESS For You & The Environment

EXHIBIT C

NEW! EnviroGard™

BIODEGRADABLE Trash Bags

NATURALLY PROFITABLE!

and good for the environment too.

- **SAFE & NATURAL:** EnviroGard Biodegradable trash bags are formulated with cornstarch. They degrade naturally upon contact with soil micro-organisms. Unlike our so called "Degradable" competition, EnviroGard degrades without sunlight.
- **SUPPORTS RECYCLING:** EnviroGard products and packaging contain recycled materials and are themselves recyclable.
- **USES LESS PLASTIC:** EnviroGard contains cornstarch, so less plastic is used in its manufacture.
- **OUTSTANDING VALUE:** EnviroGard Biodegradable trash bags are profit makers, costing the same or less than several leading brands that are only degradable – Not BIODEGRADABLE.

Stock #	Description	Pack-Case	Pack-Box	Ship Weight
72513	Tall Kitchen Bags 13 gallon – 24" x 30"	12	25	8.0
77013	Tall Kitchen Bags 13 gallon – 24" x 30"	1	20	3.7
71530	Trash & Lawn Bags 30 gallon – 30" x 36"	12	15	17.0
74030	Trash & Lawn Bags 30 gallon – 30" x 36"	1	40	3.47
71033	Large Trash & Lawn Bags 33 gallon – 33" x 40"	12	10	17.1
73033	Large Trash & Lawn Bags 33 gallon – 33" x 40"	1	30	3.17
70839	Lawn & Leaf Bags 6 bushel – 33" x 44"	12	8	15.4
72439	Lawn & Leaf Bags 6 bushel – 33" x 44"	1	24	3.31
70833	Compost Bags 33 gallon – 33" x 40"	12	8	16.0
71530	Clear Recycling Bags 30 gallon – 30" x 36"	12	15	17.0

The essential ingredient in EnviroGard Biodegradable trash bags, 012440 PGH, has been formulated exclusivoly for North American Plastics Corp. by Archer Daniels Midland Co.

NORTH AMERICAN PLASTICS CORP.
921 Industrial Drive
Aurora, IL 60506
Phone: 708/896 6200
Outside Illinois: 800/323 5964
Fax: 708/896 5127

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Cleveland 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 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 aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, 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 Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments received, 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 North American Plastics Corporation is a Delaware corporation with its office and principal place of business at 921 Industrial Drive, Aurora, Illinois.

Respondent Harold V. Engh, Jr., is an officer of said corporation. In his capacity as an officer, he formulates, directs and controls the acts and practices of said corporation, and his business address is the same as that of the corporation.

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.

ORDER

DEFINITION

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

"Plastic bag" means any plastic grocery sack, or any plastic "disposer" bag, including, but not limited to, trash bags, lawn bags and kitchen bags, that is offered for sale, sold or distributed to the public by respondents, their successors and assigns, under the "North American Plastics" or "EnviroGard" brand name, or any other brand name of respondents, their successors and assigns; and also means any plastic bag sold or distributed to the public by third parties under private labeling agreements with respondents, their successors and assigns.

I.

It is ordered, That respondent North American Plastics Corporation, a corporation, its successors and assigns, and its officers, and Harold V. Engh, Jr., individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, labeling, offering for sale, sale or distribution of any plastic bag, 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, by words, depictions or symbols:

(A) That any such plastic bag is "degradable," "biodegradable," or "photodegradable," or

(B) Through the use of "degradable," "biodegradable," or "photodegradable," or any other substantially similar term or expression, that the degradability of any such plastic bag offers any environmental benefit when consumers dispose of them as trash that is buried in a sanitary landfill or incinerated,

unless at the time of making such representation, respondents possess and rely upon a reasonable basis for such representation, consisting of competent and reliable scientific evidence that substantiates such

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.

II.

It is further ordered, That respondents North American Plastics Corporation, a corporation, its successors and assigns, and its officers, and Harold V. Engh, Jr., individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, labeling, offering for sale, sale or distribution of any North American Plastics Corporation product, including, but not limited to, any plastic bags and their packaging, 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 such product offers any environmental benefit, 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 such representation.

III.

Nothing in this order shall prevent respondents from using any of the terms cited in Part I, or similar terms or expressions, if necessary to comply with any federal rule, regulation, or law governing the use of such terms in advertising or labeling.

IV.

It is further ordered, That, for three (3) years from the date that the representations to which they pertain are last disseminated, respondents shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

(A) All materials relied upon to substantiate any representation covered by this order; and

(B) All tests, reports, studies, surveys or other materials in its possession or control that contradict, qualify or call into question such representation or the basis upon which respondent relied for such representation.

V.

It is further ordered, That respondent North American Plastics Corporation shall distribute a copy of this order within sixty (60) days after service of this order upon it to each of its operating divisions and to each of its officers, agents, representatives or employees engaged in the preparation of labeling and advertising and placement of newspaper, periodical, broadcast and cable advertisements covered by this order.

VI.

It is further ordered, That respondent North American Plastics Corporation shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation, 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.

VII.

It is further ordered, That respondent Harold V. Engh, Jr., shall promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. In addition, for a period of five (5) years from the service date of this order, he shall promptly notify the Commission of each affiliation with a new business or employment whose activities relate to the manufacture, sale or distribution of plastic products, or of his affiliation with a new business or employment in which his own duties and responsibilities relate to the manufacture, sale or distribution of plastic products. When so required under this paragraph, each such notice shall include the individual respondent's new

business address and a statement of the nature of the business or employment in which respondent is newly engaged, as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

VIII.

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

By the Commission.[1]

[1] Prior to leaving the Commission, former Commissioner Owen registered her vote in the affirmative for the Complaint and Decision and Order in this matter.

IN THE MATTER OF

MACY'S NORTHEAST, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE MAGNUSON-MOSS WARRANTY ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3527. Complaint, Sept. 13, 1994--Decision, Sept. 13, 1994

This consent order requires, among other things, the New York-based retail department store subsidiaries to comply with the Pre-Sale Availability Rule under the Magnuson-Moss Warranty Act, to deliver a copy of the consent order to retail store managers involved in consumer sales, to inform their retail store managers of their compliance responsibilities, and to develop and implement a program for instructing their sales personnel about the availability and location of manufacturers' warranty information.

Appearances

For the Commission: *Jeffrey Klurfeld, Gerald Wright* and *Christian White.*

For the respondents: *Carol Hecht Katz,* in-house counsel, New York, N.Y.

COMPLAINT

Pursuant to the provisions of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301 *et seq.*, and Rule 702, 16 CFR Part 702, promulgated thereunder, and the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Macy's Northeast, Inc., Macy's South, Inc., Macy's California, Inc., and Bullock's, Inc., corporations ("respondents"), wholly-owned subsidiaries of R. H. Macy & Co., Inc., a Delaware corporation, have violated the provisions of said Acts and Rule 702 promulgated under the Magnuson-Moss Warranty Act, and it appearing to the Commission that a proceeding by it would be in the public interest, alleges:

PARAGRAPH 1. The definitions of terms contained in Section 101 of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301, and in

Rule 702, 16 CFR 702.1 promulgated thereunder, shall apply to the terms used in this complaint.

PAR. 2. Respondent Macy's Northeast, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 151 W. 34th Street, New York, New York.

Respondent Macy's South, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 151 W. 34th Street, New York, New York.

Respondent Macy's California, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 50 O'Farrell Street, San Francisco, California.

Respondent Bullock's, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 50 O'Farrell Street, San Francisco, California.

PAR. 3. Respondents are now and have been engaged in the operation of retail department stores in New York, California and various other states. In the operation of their retail stores, respondents are now and have been distributing, advertising, offering for sale and selling, among other items, wearing apparel, consumer electronics, watches, home furnishings, housewares and small appliances, all of which are consumer products. Therefore, respondents are both suppliers and sellers of consumer products.

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

PAR. 5. In the ordinary course and conduct of their aforesaid business, respondents regularly sell or offer for sale consumer products for purposes other than resale or use in the ordinary course of the buyer's business. Therefore, respondents are sellers of consumer products.

PAR. 6. On or after March 12, 1987, respondents, in the ordinary course of their business as sellers of consumer products actually costing more than $15 and manufactured on or after January 1, 1977, have failed to make the texts of written warranties readily available for examination by prospective buyers prior to sale through utiliza-

tion of one or both of the following methods required by 16 CFR 702.3(a), as amended:

1. Displaying the text of the warranty in close proximity to the warranted product;
2. Furnishing the text of the warranty upon request prior to sale and placing signs reasonably calculated to elicit the prospective buyer's attention in prominent locations in the store or department advising such prospective buyers of the availability of warranties upon request.

PAR. 7. Respondents' failures to comply with the provisions of 16 CFR 702, as amended, constituted and now constitute violations of the Magnuson-Moss Warranty Act and, pursuant to Section 110(b) thereof, unfair or deceptive practices under Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the San Francisco 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 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 aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and no comments having been filed

thereafter by interested parties pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Macy's Northeast, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 151 W. 34th Street, New York, New York.

Respondent Macy's South, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 151 W. 34th Street, New York, New York.

Respondent Macy's California, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 50 O'Farrell Street, San Francisco, California.

Respondent Bullock's, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 50 O'Farrell Street, San Francisco, California.

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.

ORDER

The definitions of terms contained in Section 101 of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301, and in Rule 702, 16 CFR 702.1, promulgated thereunder, shall apply to the terms of this order.

I.

It is ordered, That respondents Macy's Northeast, Inc., Macy's South, Inc., Macy's California, Inc., and Bullock's, Inc., corporations, their successors and assigns, and their officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device in connection with the sale or offering for sale of any consumer product in or affecting commerce, do forthwith cease and desist from failing to make a text of any written

warranty on a consumer product actually costing more than $15 readily available for examination by prospective buyers prior to sale through utilization of one or more means specified in 16 CFR 702.3(a), as amended.

II.

It is further ordered, That respondents shall, within thirty (30) days of the date of service of this order, deliver to each current retail store manager and assistant or operations manager engaged in the sale of consumer products on behalf of respondents, a copy of this order to cease and desist.

III.

It is further ordered, That respondents shall, within thirty (30) days of the date of service of this order, instruct all current retail store managers and assistant or operations managers engaged in the sale of consumer products on behalf of respondents as to their specific obligations and duties under the Magnuson-Moss Warranty Act (15 U.S.C. 2301) and this order.

IV.

It is further ordered, That respondents shall, for a period of not less than four (4) years from the date of service of this order, instruct all future retail store managers and assistant or operations managers who will be engaged in the sale of consumer products on behalf of respondents, before they assume said responsibilities for respondents, as to their specific obligations and duties under the Magnuson-Moss Warranty Act (15 U.S.C. 2301) and this order.

V.

It is further ordered, That respondents shall, within thirty (30) days of the date of service of this order, develop and implement a program to instruct their sales personnel about the availability and location of warranty information.

VI.

It is further ordered, That respondents shall, for a period of not less than five (5) years from the date of service of the order, maintain and upon request make available to the Federal Trade Commission for inspection and copying (i) copies of all written instructions provided by respondents to their retail store managers and assistant and operations managers and sales personnel regarding their obligations and duties under the Magnuson-Moss Warranty Act (15 U.S.C. 2301) and this order; (ii) copies of signs posted by respondents in their retail store outlets designed to elicit prospective buyers' attention to the availability of the text of written warranties for review upon request; and (iii) copies of the text of written warranties made readily available by respondents' retail store outlets for examination by prospective buyers on request.

VII.

It is further ordered, That respondents, for a period of six (6) years from the date of service of this order, shall notify the Commission at least thirty (30) days prior to any dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance obligations arising out of the order.

VIII.

It is further ordered, That respondents shall, within ninety (90) days after service of this order on them, 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

MONTGOMERY WARD & CO., INCORPORATED

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE MAGNUSON-MOSS WARRANTY ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3528. Complaint, Sept. 13, 1994--Decision, Sept. 13, 1994

This consent order requires, among other things, the Illinois-based retail department store to comply with the Pre-Sale Availability Rule under the Magnuson-Moss Warranty Act, to deliver a copy of the consent order to retail store managers involved in consumer sales, to inform their retail store managers of their compliance responsibilities, and to develop and implement a program for instructing their sales personnel about the availability and location of manufacturers' warranty information.

Appearances

For the Commission: *Jeffrey Klurfeld, Gerald Wright* and *Christian White.*

For the respondent: *Philip Delk*, in-house counsel, Chicago, IL.

COMPLAINT

Pursuant to the provisions of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301 *et seq.*, and Rule 702, 16 CFR Part 702, promulgated thereunder, and the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Montgomery Ward & Co., Incorporated, a corporation ("respondent"), has violated the provisions of said Acts and Rule 702 promulgated under the Magnuson-Moss Warranty Act, and it appearing to the Commission that a proceeding by it would be in the public interest, alleges:

PARAGRAPH 1. The definitions of terms contained in Section 101 of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301, and in Rule 702, 16 CFR 702.1 promulgated thereunder, shall apply to the terms used in this complaint.

PAR. 2. Respondent Montgomery Ward & Co., Incorporated is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at One Montgomery Ward Plaza, Chicago, Illinois.

PAR. 3. Respondent is now and has been engaged in the operation of a chain of retail department stores throughout the United States. In the operation of its retail stores, respondent is now and has been distributing, advertising, offering for sale and selling, among other items, wearing apparel, watches, consumer electronics, home furnishings, major and small appliances, power tools, auto parts and accessories, and lawn and garden equipment, all of which are consumer products. Therefore, respondent is both a supplier and seller of consumer products.

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

PAR. 5. In the ordinary course and conduct of its aforesaid business, respondent regularly sells or offers for sale consumer products for purposes other than resale or use in the ordinary course of the buyer's business. Therefore, respondent is a seller of consumer products.

PAR. 6. On or after March 12, 1987, respondent, in the ordinary course of its business as a seller of consumer products actually costing more than $15 and manufactured on or after January 1, 1977, has failed to make the texts of written warranties readily available for examination by prospective buyers prior to sale through utilization of one or both of the following methods required by 16 CFR 702.3(a), as amended:

1. Displaying the text of the warranty in close proximity to the warranted product;

2. Furnishing the text of the warranty upon request prior to sale and placing signs reasonably calculated to elicit the prospective buyer's attention in prominent locations in the store or department advising such prospective buyers of the availability of warranties upon request.

PAR. 7. Respondent's failure to comply with the provisions of 16 CFR Part 702, as amended, constituted and now constitutes a violation of the Magnuson-Moss Warranty Act and, pursuant to Section 110(b) thereof, an unfair or deceptive practice under Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent 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 respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and no comments having been filed thereafter by interested parties pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Montgomery Ward & Co., Incorporated is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at One Montgomery Ward Plaza, Chicago, Illinois.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

The definitions of terms contained in Section 101 of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301, and in Rule 702, 16 CFR 702.1, promulgated thereunder, shall apply to the terms of this order.

I.

It is ordered, That respondent Montgomery Ward & Co., Incorporated, a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device in connection with the sale or offering for sale of any consumer product in or affecting commerce, do forthwith cease and desist from failing to make a text of any written warranty on a consumer product actually costing more than $15 readily available for examination by prospective buyers prior to sale through utilization of one or more means specified in 16 CFR 702.3(a), as amended.

II.

It is further ordered, That respondent shall, within thirty (30) days of the date of service of this order, deliver to each current retail store manager engaged in the sale of consumer products on behalf of respondent, a copy of this order to cease and desist.

III.

It is further ordered, That respondent shall, within thirty (30) days of the date of service of this order, instruct all current retail store managers engaged in the sale of consumer products on behalf of respondent as to their specific obligations and duties under the Magnuson-Moss Warranty Act (15 U.S.C. 2301) and this order.

IV.

It is further ordered, That respondent shall, for a period of not less than four (4) years from the date of service of this order, instruct all future retail store mangers who will be engaged in the sale of consumer products on behalf of respondent, before they assume said responsibilities for respondent, as to their specific obligations and duties under the Magnuson-Moss Warranty Act (15 U.S.C. 2301) and this order.

V.

It is further ordered, That respondent shall, within thirty (30) days of the date of service of this order, develop and implement a program to instruct its sales personnel about the availability and location of warranty information.

VI.

It is further ordered, That respondent shall, for a period of not less than five (5) years from the date of service of the order, maintain and upon request make available to the Federal Trade Commission for inspection and copying (i) copies of all written instructions provided by respondent to its retail store managers and sales personnel regarding their obligations and duties under the Magnuson-Moss Warranty Act (15 U.S.C. 2301) and this order; (ii) copies of signs posted by respondent in its retail store outlets designed to elicit prospective buyers' attention to the availability of the text of written warranties for review upon request; and (iii) copies of the text of written warranties made readily available by respondent's retail store outlets for examination by prospective buyers on request.

VII.

It is further ordered, That respondent, for a period of six (6) years from the date of service of this order, shall notify the Commission at least thirty (30) days prior to any dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance obligations arising out of the order.

VIII.

It is further ordered, That respondent shall, within sixty (60) days after service of this order on it, 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

SEARS, ROEBUCK AND CO.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE MAGNUSON-MOSS WARRANTY ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3529. Complaint, Sept. 13, 1994--Decision, Sept. 13, 1994

This consent order requires, among other things, the Illinois-based retail department store to comply with the Pre-Sale Availability Rule under the Magnuson-Moss Warranty Act, to deliver a copy of the consent order to retail store managers involved in consumer sales, to inform their retail store managers of their compliance responsibilities, and to develop and implement a program for instructing their sales personnel about the availability and location of manufacturers' warranty information.

Appearances

For the Commission: *Jeffrey Klurfeld, Gerald Wright* and *Christian White.*

For the respondent: *Richard Barnett*, in-house counsel, Hoffman Estates, IL.

COMPLAINT

Pursuant to the provisions of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301 *et seq.*, and Rule 702, 16 CFR 702, promulgated thereunder, and the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Sears, Roebuck and Co., a corporation ("respondent"), has violated the provisions of said Acts and Rule 702 promulgated under the Magnuson-Moss Warranty Act, and it appearing to the Commission that a proceeding by it would be in the public interest, alleges:

PARAGRAPH 1. The definitions of terms contained in Section 101 of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301, and in Rule 702, 16 CFR 702.1 promulgated thereunder, shall apply to the terms used in this complaint.

PAR. 2. Respondent Sears, Roebuck and Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 3333 Beverly Road, Hoffman Estates, Illinois.

PAR. 3. Respondent is now and has been engaged in the operation of a chain of retail department stores throughout the United States. In the operation of its retail stores, respondent is now and has been distributing, advertising, offering for sale and selling, among other items, wearing apparel, watches, consumer electronics, home furnishings, major and small appliances, power tools, and lawn and garden equipment, all of which are consumer products. Therefore, respondent is both a supplier and seller of consumer products.

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

PAR. 5. In the ordinary course and conduct of its aforesaid business, respondent regularly sells or offers for sale consumer products for purposes other than resale or use in the ordinary course of the buyer's business. Therefore, respondent is a seller of consumer products.

PAR. 6. On or after March 12, 1987, respondent, in the ordinary course of its business as a seller of consumer products actually costing more than $15 and manufactured on or after January 1, 1977, has failed to make the texts of written warranties readily available for examination by prospective buyers prior to sale through utilization of one or both of the following methods required by 16 CFR 702.3(a), as amended:

1. Displaying the text of the warranty in close proximity to the warranted product;

2. Furnishing the text of the warranty upon request prior to sale and placing signs reasonably calculated to elicit the prospective buyer's attention in prominent locations in the store or department advising such prospective buyers of the availability of warranties upon request.

PAR. 7. Respondent's failure to comply with the provisions of 16 CFR Part 702, as amended, constituted and now constitutes a violation of the Magnuson-Moss Warranty Act and, pursuant to

Section 110(b) thereof, an unfair or deceptive practice under Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent 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 respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and no comments having been filed thereafter by interested parties pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Sears, Roebuck and Co., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 3333 Beverly Road, Hoffman Estates, Illinois.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

The definitions of terms contained in Section 101 of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301, and in Rule 702, 16 CFR 702.1, promulgated thereunder, shall apply to the terms of this order.

I.

It is ordered, That respondent Sears, Roebuck and Co., a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device in connection with the sale or offering for sale of any consumer product in or affecting commerce, do forthwith cease and desist from failing to make a text of any written warranty on a consumer product actually costing more than $15 readily available for examination by prospective buyers prior to sale through utilization of one or more means specified in 16 CFR 702.3(a), as amended.

II.

It is further ordered, That respondent shall, within thirty (30) days of the date of service of this order, deliver to each current retail store manager engaged in the sale of consumer products on behalf of respondent, a copy of this order to cease and desist.

III.

It is further ordered, That respondent shall, within thirty (30) days of the date of service of this order, instruct all current retail store managers engaged in the sale of consumer products on behalf of respondent as to their specific obligations and duties under the Magnuson-Moss Warranty Act (15 U.S.C. 2301) and this order.

IV.

It is further ordered, That respondent shall, for a period of not less than four (4) years from the date of service of this order, instruct all future retail store mangers who will be engaged in the sale of consumer products on behalf of respondent, before they assume said

responsibilities for respondent, as to their specific obligations and duties under the Magnuson-Moss Warranty Act (15 U.S.C. 2301) and this order.

V.

It is further ordered, That respondent shall, within thirty (30) days of the date of service of this order, develop and implement a program to instruct its sales personnel about the availability and location of warranty information.

VI.

It is further ordered, That respondent shall, for a period of not less than five (5) years from the date of service of the order, maintain and upon request make available to the Federal Trade Commission for inspection and copying (i) copies of all written instructions provided by respondent to its retail store managers and sales personnel regarding their obligations and duties under the Magnuson-Moss Warranty Act (15 U.S.C. 2301) and this order; (ii) copies of signs posted by respondent in its retail store outlets designed to elicit prospective buyers' attention to the availability of the text of written warranties for review upon request; and (iii) copies of the text of written warranties made readily available by respondent's retail store outlets for examination by prospective buyers on request.

VII.

It is further ordered, That respondent, for a period of six (6) years from the date of service of this order, shall notify the Commission at least thirty (30) days prior to any dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance obligations arising out of the order.

VIII.

It is further ordered, That respondent shall, within sixty (60) days after service of this order on it, 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

HOME OXYGEN & MEDICAL EQUIPMENT CO., ET AL.

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

Docket C-3530. Complaint, Sept. 14, 1994--Decision, Sept. 14, 1994

This consent order prohibits, among other things, a California supplier of oxygen systems prescribed for home use from acquiring or granting, for ten years, an ownership interest in a firm that sells or leases oxygen systems in the relevant geographic market, if more than 25 percent of the pulmonologists in that market would be affiliated with the firm, and requires the respondents to notify the Commission if they acquire more than one percent of a firm that sells or leases oxygen systems anywhere.

Appearances

For the Commission: *Linda K. Badger, Kerry O'Brien* and *Jeffrey A. Klurfeld.*

For the respondents: *David T. Alexander, Jackson, Tufts, Cole & Black*, San Francisco, CA.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Home Oxygen & Medical Equipment Co., a limited partnership, Mitchell P. Tarkoff, M.D., Revels M. Cayton, M.D., Robert I. Deutsch, M.D., Leland G. Dobbs, M.D., Fredric N. Herskowitz, M.D., Jerrold A. Kram, M.D., R. Wayne Mall, M.D., Richard A. Nusser, M.D., Joel H. Richert, M.D., John E. Sailer, M.D., Herbert M. Schub, M.D., Jamil S. Sulieman, M.D., and T. Craig Williams, M.D., individually and as partners, trading and doing business as Home Oxygen & Medical Equipment Company, hereinafter sometimes referred to as the respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

DEFINITIONS

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

A. "*Durable medical equipment*" or "*DME*" means medical equipment sold, rented, or leased to customers for home use. DME includes, but is not limited to, ambulatory aids, wheelchairs, walkers, hospital beds, commodes and respiratory therapy equipment, such as oxygen systems. "DME" encompasses all aspects of supplying DME, including, but not limited to, delivering and servicing the equipment, and rendering accompanying services to customers.

B. "*Oxygen systems*" means DME used to service individuals who are unable to obtain adequate oxygen through independent breathing. Oxygen systems include, but are not limited to, oxygen gas contained in tanks; liquid oxygen stored in reservoirs and smaller, portable containers; and electrically-operated oxygen concentrators. "Oxygen systems" encompasses all aspects of supplying these oxygen systems, including, but not limited to, delivering and servicing the equipment, supplying oxygen content, and rendering accompanying services to customers.

C. "*Discharge planner*" means any nurse, social worker, respiratory therapist, or other agent of a hospital or health care provider who arranges for the provision of DME or consults with or makes recommendations to patients being discharged from hospitals concerning potential suppliers of DME.

D. "*Hospital*" means a health facility, other than a federally-owned facility, having a duly organized governing body with overall administrative and professional responsibility and an organized professional staff that provides 24-hour inpatient care, and whose primary function is to provide inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities. "Hospital" includes any affiliate, subsidiary, or partnership in which the hospital holds a ten (10) percent or greater interest.

E. "*Pulmonologist*" means a medical professional who specializes in the diagnosis and treatment of pulmonary disease, regardless of whether the medical professional has been certified as a specialist in pulmonary disease. "Pulmonologist" does not include medical professionals who specialize in the diagnosis and treatment of pa-

tients who would not use the type of oxygen systems defined herein, such as patients suffering from allergies and pediatric patients requiring oxygen systems specially designed for children.

F. "*Practicing*" means having staff privileges, including, but not limited to, active or courtesy staff privileges, at any hospital.

RESPONDENTS

PAR. 2. Respondent Home Oxygen & Medical Equipment Co., (hereinafter "Home Oxygen") is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of California. It has its principal place of business at 2456 Verna Court, San Leandro, California.

Respondent Mitchell P. Tarkoff, M.D., is an individual who has been, and is now, a general partner of Home Oxygen. As such, he formulates, or participates in the formulation of, directs and controls the acts and practices of Home Oxygen, including the acts and practices set forth in this complaint. His place of business is located at 350 30th Street, Suite 526, Oakland, California.

Respondent Revels M. Cayton, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 400 29th Street, Suite 419, Oakland, California.

Respondent Robert I. Deutsch, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 2070 Clinton Avenue, Alameda, California.

Respondent Leland G. Dobbs, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 350 30th Street, Suite 520, Oakland, California.

Respondent Fredric N. Herskowitz, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 350 30th Street, Suite 520, Oakland, California.

Respondent Jerrold A. Kram, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 350 30th Street, Suite 520, Oakland, California.

Respondent R. Wayne Mall, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 2000 Mowry Avenue, Fremont, California.

Respondent Richard A. Nusser, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 365 Hawthorne Avenue, Suite 202, Oakland, California.

Respondent Joel H. Richert, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 2557 Mowry Avenue, Suite 12, Fremont, California.

Respondent John E. Sailer, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business was located at 13851 East 14th Street, Suite 302, San Leandro, California.

Respondent Herbert M. Schub, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 2070 Clinton Avenue, Alameda, California.

Respondent Jamil S. Sulieman, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 550 South Beretania Street, Honolulu, Hawaii.

Respondent T. Craig Williams, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 13851 East 14th Street, Suite 302, San Leandro, California.

PAR. 3. The relevant product market is the market for the sale, rental, or lease of oxygen systems.

PAR. 4. The relevant geographic market is Alameda County, California, excluding the southeast portion of Alameda County referred to as the "Tri-Valley" area. The Tri-Valley area includes the cities of Livermore, Dublin and Pleasanton.

PAR. 5. Since May 18, 1984, Home Oxygen has been engaged in the purchasing, offering for sale, rental or lease of DME, including oxygen systems and related products, to the public in the relevant geographic market.

PAR. 6. The respondents Mitchell P. Tarkoff, M.D., Revels M. Cayton, M.D., Robert I. Deutsch, M.D., Leland G. Dobbs, M.D., Fredric N. Herskowitz, M.D., Barry R. Horn, M.D., Jerrold A. Kram, M.D., R. Wayne Mall, M.D., Richard A. Nusser, M.D., Joel H. Richert, M.D., John E. Sailer, M.D., Herbert M. Schub, M.D., Jamil S. Sulieman, M.D., and T. Craig Williams, M.D., (collectively the

"pulmonologist respondents") are now, or have been at times relevant to this complaint, pulmonologists practicing their profession within the relevant geographic market.

PAR. 7. The pulmonologist respondents have held staff positions or have had staff privileges at one or more of the following hospitals located in the relevant geographic market: Alameda Hospital, located in Alameda, California; Highland Hospital, located in Oakland, California; Humana Hospital, located in San Leandro, California; Merritt/ Peralta, located in Oakland, California; Physician's Community Hospital, located in San Leandro, California; Providence, located in Oakland, California; or Washington Hospital, located in Fremont, California.

JURISDICTION

PAR. 8. The acts and practices of respondents alleged in this complaint are and have been in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

THE INDUSTRY

PAR. 9. Patients hospitalized with certain forms of lung, heart, and other disease are unable to obtain sufficient oxygen from their normal breathing. Upon discharge from a hospital, physicians may prescribe oxygen for these patients for home use. Because oxygen is considered a drug under Food and Drug Administration regulations, oxygen for medical use can be provided to patients only pursuant to a physician's prescription.

PAR. 10. Oxygen systems vary in many respects, including, but not limited to: the type of system, the level and quality of service accompanying the equipment, and price. Patients requiring oxygen systems usually possess incomplete knowledge about oxygen systems or the companies that provide oxygen systems. As a result, patients seldom have a preference for a particular oxygen system supplier and rely on hospitals, discharge planners, health care professionals, and other individuals knowledgeable about DME to make a selection on their behalves.

PAR. 11. In general, patients requiring oxygen systems receive the services of pulmonologists or of hospital respiratory therapy departments under the supervision of pulmonologists. As a result,

pulmonologists have the ability to influence the choice of which oxygen systems supplier services these patients through a variety of means.

ACTS OR PRACTICES

PAR. 12. In 1984, Home Oxygen was formed to engage in the sale, rental or lease of oxygen systems to patients.

PAR. 13. Partnership interests in Home Oxygen were offered primarily to hospitals and pulmonologists.

PAR. 14. A majority of the pulmonologists practicing in the relevant geographic market joined as partners in Home Oxygen. In all, approximately sixty (60) percent of the pulmonologists in the relevant geographic market were investors in Home Oxygen or practiced in groups consisting of one or more of the pulmonologist respondents. Respondents' market position was further enhanced because several of the pulmonologist respondents served as medical directors of respiratory therapy departments at hospitals in the relevant geographic market.

EFFECTS

PAR. 15. Through the aggregation of competitors in the market for the provision of pulmonary services alleged in paragraphs twelve through fourteen, Home Oxygen has achieved a market share of approximately sixty (60) percent in the relevant market.

PAR. 16. As a consequence of the conduct alleged in paragraphs twelve through fourteen, a barrier to entry has been created in the relevant market.

PAR. 17. As a consequence of the conduct alleged in paragraphs twelve through fourteen, free and open competition has been inhibited in the relevant market.

VIOLATIONS

PAR. 18. Home Oxygen has acquired and maintained market power in the relevant market through the acts and practices set out and alleged in paragraphs twelve through fourteen. These alleged acts and practices of the respondents constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the

Federal Trade Commission Act, 15 U.S.C. 45. The acts or practices, or the effects thereof, are likely to continue or recur in the absence of appropriate relief.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the 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 of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, 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 Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having received a comment from the respondents describing how the respondents divested assets in conformance with the terms of the proposed order and had received therefore a minority stock interest of less than one (1) percent of the outstanding voting stock in a publicly held company, and the Commission having determined that retention of the divestiture provisions would nonetheless require respondents to divest said stock interest, and also having determined that such divestiture of said stock interest is not necessary to effectuate the remedy in this matter and that the divestiture provisions therefore can be deleted, 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 Home Oxygen & Medical Equipment Co. (hereinafter "Home Oxygen") is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of California. It has its principal place of business at 2456 Verna Court, San Leandro, California.

Respondent Mitchell P. Tarkoff, M.D., is an individual who has been, and is now, a general partner of Home Oxygen. His place of business is located at 350 30th Street, Suite 526, Oakland, California.

Respondent Revels M. Cayton, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 400 29th Street, Suite 419, Oakland, California.

Respondent Robert I. Deutsche, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 2070 Clinton Avenue, Alameda, California.

Respondent Leland G. Dobbs, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 350 30th Street, Suite 520, Oakland, California.

Respondent Fredric N. Herskowitz, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 350 30th Street, Suite 520, Oakland, California.

Respondent Jerrold A. Kram, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 350 30th Street, Suite 520, Oakland, California.

Respondent R. Wayne Mall, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 2000 Mowry Avenue, Fremont, California.

Respondent Richard A. Nusser, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 365 Hawthorne Avenue, Suite 202, Oakland, California.

Respondent Joel H. Richert, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 2557 Mowry Avenue, Suite 12, Fremont, California.

Respondent John E. Sailer, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business

was located at 13851 East 14th Street, Suite 302, San Leandro, California.

Respondent Herbert M. Schub, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 2070 Clinton Avenue, Alameda, California.

Respondent Jamil S. Sulieman, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 550 South Beretania Street, Honolulu, Hawaii.

Respondent T. Craig Williams, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 13851 East 14th Street, Suite 302, San Leandro, California.

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.

ORDER

I.

As used in this order, the following definitions shall apply:

A. "*Durable medical equipment*" or "*DME*" means medical equipment sold, rented, or leased to customers for home use. DME includes, but is not limited to, ambulatory aids, wheelchairs, walkers, hospital beds, commodes and respiratory therapy equipment, such as oxygen systems. "DME" encompasses all aspects of supplying DME, including, but not limited to, delivering and servicing the equipment, and rendering accompanying services to customers.

B. "*Oxygen systems*" means DME used to service individuals who are unable to obtain adequate oxygen through independent breathing. Oxygen systems include, but are not limited to, oxygen gas contained in tanks; liquid oxygen stored in reservoirs and smaller, portable containers; and electrically-operated oxygen concentrators. "Oxygen systems" encompasses all aspects of supplying these oxygen systems, including, but not limited to, delivering and servicing the equipment, supplying oxygen content, and rendering accompanying services to customers.

C. "*Hospital*" means a health facility, other than a federally-owned facility, having a duly organized governing body with overall

administrative and professional responsibility and an organized professional staff that provides 24-hour inpatient care, and whose primary function is to provide inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities. "Hospital" includes any affiliate, subsidiary, or partnership in which the hospital holds a ten (10) percent or greater interest.

D. "*Medical professional*" means any individual who is licensed by the State of California as a Medical Doctor.

E. "*Pulmonologist*" means a medical professional who specializes in the diagnosis and treatment of pulmonary disease, regardless of whether the medical professional has been certified as a specialist in pulmonary disease. "Pulmonologist" does not include medical professionals who specialize in the diagnosis and treatment of patients who would not use the type of oxygen systems defined herein, such as patients suffering from allergies and pediatric patients requiring oxygen systems specially designed for children.

F. "*Practicing*" means having staff privileges, including, but not limited to, active or courtesy staff privileges, at any hospital.

G. "*Relative*" means an individual who is related to the individual, as father, mother, son, daughter, brother, sister, uncle, aunt, great aunt, great uncle, first cousin, nephew, niece, husband, wife, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half-brother, half-sister, or who is the grandfather or grandmother of the spouse of the individual.

H. "*Own*" or "*Ownership interest*" means any and all stock, share, capital, equity or other interest, asset, property, license, lease, or other right or privilege, tangible or intangible, whether obtained or held, directly or indirectly, through any relative, employee or agent, or through any corporate or other device.

I. "*Affiliated with*" means having an ownership interest in the entity or being a member of the same group practice as an investor in the entity.

J. "*Relevant geographic market*" means Alameda County, California, excluding the south-east portion of Alameda County referred to as the "Tri-Valley" area. The Tri-Valley area includes the cities of Livermore, Dublin and Pleasanton.

K. "*Service area*" means the geographic area in which an entity engages in the sale, rental, or lease of oxygen systems.

II.

It is ordered, That, for a period of ten (10) years from the date of this order, no respondent shall grant or acquire, with or without valuable consideration, an ownership interest in any entity engaged in the sale, rental, or lease of oxygen systems in the relevant geographic market if, after such grant or acquisition, more than twenty-five (25) percent of the pulmonologists who practice in the relevant geographic market would be affiliated with the entity.

III.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, the individual respondents shall notify the Commission within thirty (30) days after acquiring, either directly or indirectly, or through any corporate or other device, any ownership interest in an entity engaged in the sale, rental, or lease of oxygen systems. Such notification shall include:

(a) An identification of all owners of the entity;
(b) An identification of any pulmonologist practicing in the entity's service area or intended service area who has an ownership interest in the entity;
(c) A list of all pulmonologists who practice in the entity's service area or intended service area;
(d) A description of the products or services offered, or to be offered by the entity;
(e) A copy of the entity's offering memorandum and/or prospectus; and
(f) An identification of the entity's location, including the location of any and all of the entity's parent organizations, and subsidiaries.

Respondents shall comply with requests by the Commission staff for additional information within fifteen (15) days of service of such requests.

Provided, however, that nothing in this order shall require notice for acquisitions of voting securities of any publicly traded company involved in the sale, rental, or lease of oxygen systems unless, as a result of such acquisition, the respondent would hold more than one (1) percent of such company.

IV.

It is further ordered, That the respondent Home Oxygen shall:

A. Within thirty (30) days from the date this order becomes final, distribute a copy of the complaint and order to each managerial employee;

B. For a period of five (5) years from the date this order becomes final, distribute a copy of the complaint and order to each new managerial employee within thirty (30) days of the entrance of such employee to employment;

C. For a period of five (5) years from the date this order becomes final, distribute a copy of the complaint and order to each new partner within thirty (30) days of the entrance of such partner to the partnership.

V.

It is further ordered, That:

A. Within sixty (60) days from the date this order becomes final, each respondent shall file with the Commission a verified written report of compliance with this order;

B. One year from the date this order becomes final and annually thereafter for nine (9) years, each respondent shall file with the Commission a verified written report of compliance with this order.

VI.

It is further ordered, That respondent Home Oxygen, upon written request of the staff of the Federal Trade Commission, made to Home Oxygen, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, shall permit duly authorized representatives of the Commission:

A. Reasonable access during Home Oxygen's office hours, in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, reports, and other records and documents in Home Oxygen's possession or control that relate to any matter contained in this order; and

B. An opportunity, subject to Home Oxygen's reasonable convenience, to interview general partners or employees of Home Oxygen, who may have counsel present, regarding such matters.

VII.

It is further ordered, That respondent Home Oxygen notify the Commission at least thirty (30) days prior to any proposed organizational change, such as dissolution, assignment or sale resulting in the emergence of a successor organization, or any other change in the organization that may affect compliance with the obligations arising out of the order.

Commissioner Azcuenaga and Commissioner Starek dissenting.[1]

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

Today the Commission issues three consent orders minus the divestiture requirements that were in the orders as published for public comment. By way of explanation, the Commission states that the respondents, by letter, assert that they "divested assets in conformance with the terms of the proposed order[s]" and that the Commission has determined that retaining the divestiture requirement "is not necessary to effectuate the remedy" in these matters.[1] In fact, the respondents have not divested "in conformance" with the proposed orders, and the sale that the respondents made does not accomplish the remedy that the Commission sought or otherwise cure the alleged competitive problem. The revised orders are inconsistent with the complaints on which they are based, they are inconsistent with the proposed orders that were published for comment, and, finally, they are internally inconsistent. Although I voted for the

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[1] Prior to leaving the Commission, former Commissioner Owen and former Commissioner Yao registered their votes in the affirmative for the Complaint and the Decision and Order in this matter.

[1] Decision and Order in each matter at 2.

proposed orders that were published for comment,[2] I do not join today's decision.

The theory of violation in each of the three Home Oxygen cases as alleged in the complaints is that ownership of a home oxygen supplier by the majority of pulmonologists in a particular market enables the home oxygen supplier to create barriers to entry (*i.e.*, through patient referrals by the owner-pulmonologists and the resulting inability of another oxygen supplier to obtain referrals from pulmonologists) and to inhibit competition in the home oxygen market.[3] To remedy the alleged violations, the orders that were accepted for public comment required divestitures to reduce the number of pulmonologists owning interests in a single home oxygen company "such that no greater than 25% of the pulmonologists practicing in the relevant geographic market are affiliated with" any one home oxygen company.

During the public comment period, counsel for the respondent-pulmonologists informed the Commission that the doctors had sold their home oxygen companies to a large, publicly-held, medical supply company (which I will call Newco), in exchange for shares in that company.[4] The pulmonologists in effect traded their interests in their local home oxygen partnerships for interests in a large corporation. The Commission today decides that the sale to Newco obviates the need for the divestitures that were required under the orders. The argument, as I understand it, is that the doctors hold a decidedly minor percentage of Newco (less than 1%) and that the small size of their ownership share somehow cures the competitive concerns described in the complaints.[5] I disagree.

The theory of violation in these cases does not turn on control by the physicians of the home oxygen suppliers or on the percentage of each home oxygen supply company owned by the doctors. Instead,

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[2] A copy of my concurring statement of November 1, 1993, is attached and incorporated by reference. The concerns I expressed in that statement continue.

[3] Paragraphs 12-17 of the complaints.

[4] Letter from David T. Alexander, Esq., to FTC, Jan. 18, 1994 (counsel for Home Oxygen & Medical Equipment Co. and individual doctors); letter from Robert J. Enders, Esq., to FTC, Jan. 14, 1994 (counsel for Homecare Oxygen & Medical Equipment Co. and individual doctors).

[5] *See* letter from Robert J. Enders, Esq., to the FTC, Jan. 14, 1994, at 3. According to Mr. Enders, the sale of the home oxygen company to "a publicly traded company should alleviate concerns of the Commission and its staff about pulmonologist control, through ownership, in entities engaged in the sale, rental or lease of oxygen systems."

the concern was the aggregation in a single oxygen supply company of ownership interests of a majority of pulmonologists in the relevant geographic market. The required divestiture was to reduce the number of pulmonologists having an ownership interest in any one home oxygen supplier. The sale of the home oxygen companies to Newco is unresponsive to the concern underlying the complaints, because the ownership interests of some 60% or more of the pulmonologists in the market still are aggregated in a single company.[6]

The individual doctors may have reduced incentives to refer patients to Newco, if the financial rewards of stock ownership are less than those of partnership interests.[7] The relative incentives might be important to a doctor who held both Newco shares and a home oxygen partnership, but, as I understand it, the doctors' entire partnership interests have been converted to Newco shares and the home oxygen partnerships no longer exist as separate entities. A doctor who owns an interest in Newco probably will have greater incentives to refer patients to Newco than to a company in which he or she does not own an interest.

The resolution accepted by the Commission today -- sale by the respondents of their companies to Newco in exchange for Newco shares, in lieu of divestiture to reduce the number of doctors affiliated by ownership with a single oxygen supply company -- is inconsistent with the theory of violation alleged in the complaints, because the sale to Newco does not reduce the number of doctors affiliated by ownership with a single oxygen supply company. For the same reason, the resolution accepted by the Commission is inconsistent with the remedial provisions of the orders that were published for comment and does not remedy the competitive problem.

The Commission's decision also is internally inconsistent, because each of the orders accepted today expressly bars the respondent-pulmonologists from granting or acquiring an interest in any home oxygen supplier -- if that would result in an affiliation with the supplier of more than 25% of pulmonologists in the geographic

[6] Before Newco, a majority of pulmonologists in each of two adjacent markets owned interests in two different home oxygen supply companies. Now, a majority of pulmonologists in the two adjacent markets combined own interests in one home oxygen supply company, Newco. With its acquisition of the home oxygen companies, Newco has acquired the market power that the respondents allegedly had aggregated.

[7] The home oxygen companies were partnerships, and Newco is a publicly held corporation. We have no information about actual gains to the doctors from either form of ownership on which to base a comparative analysis.

market[8] -- at the same time that it accepts the sale to Newco, which is precisely the same conduct. As a result, in each of the orders accepted today, the Commission both sanctions the arrangement resulting from the sale to Newco (*i.e.*, a home oxygen company in which more than 25% of pulmonologists have an ownership interest) and prohibits any action to create the same arrangement in the future. The public will need the wisdom of Solomon to discern what these orders portend for future enforcement.

I dissent.

[The following statement was issued in November 1993, when the orders as then proposed were published for public comment.]

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

Although I have joined in the Commission's decision to accept these consent agreements for public comment, I have reservations about the usefulness of the orders to which the respondents have consented and about the advisability, on the basis of the information we have, of charting the new territory that these cases represent. Here, I believe, sufficient evidence exists to satisfy the statutory standard of reason to believe the law has been violated but precious little more. As I have said before, the truncated record on which consent agreements ordinarily are based leaves something to be desired as a basis for establishing new Commission policy.

Antitrust analysis, as we know it today, requires a search for understanding of markets, an understanding that, experience shows, may be founded on elements that lie well below the surface of what even those in a particular industry may readily comprehend. *See, e.g., Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979). It is easy to underestimate the difficulty of showing justifications that are cognizable under the antitrust laws and sufficient to defend against the application of novel antitrust theories. The Commission may not be as well positioned as the parties to identify and understand justifications for the challenged conduct. Yet the parties may be ill-

[8] Paragraph II of each of the orders bars the respondents from granting or acquiring "an ownership interest in any entity engaged in the sale, rental, or lease of oxygen systems . . . if . . . more than twenty-five percent of the pulmonologists practicing in the relevant geographic market would be affiliated with the entity." Thus, Paragraph II of the orders would bar the very transfer that the Commission today sanctions.

equipped to undertake the esoteric analytic endeavor that modern antitrust law may demand. When neither the parties nor the Commission fully comprehends the justifications, "ignorance leads straight to condemnation," *Chicago Professional Sports Limited Partnership v. NBA*, 961 F.2d. 667, 676 (7th Cir. 1992), and condemnation without understanding may lead to consumer harm.

It is useful, indeed, advisable for the Commission to continue to evaluate new factual situations and to develop new theories under Section 5 of the Federal Trade Commission Act to remedy anticompetitive effects. But it is well, in doing so, to keep in mind the admonition of the court in *Chicago Professional Sports Limited Partnership v. NBA*, 961 F.2d. at 676, that "[e]xplanations of problematic conduct take time to develop and more time to test. . . . Understanding novel practices may require years of study and debate."

I have voted to publish the consent agreements for comment but remain mindful of these concerns.

STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

Nearly eleven months ago, over my dissent, the Commission accepted consent agreements with three groups of pulmonologists practicing in two counties in the eastern San Francisco Bay Area. Further analysis of these matters in the intervening months has not provided me with reason to believe that respondents' conduct violated Section 5 of the Federal Trade Commission Act. Therefore, I cannot agree with the Commission's decision to issue the complaints and the modified final versions of the consent orders.

I have continued to evaluate these matters with great care and an open mind since the Commission accepted the consent agreements. Nevertheless, I remain unpersuaded of the theory on which these cases rely. That theory -- stated with breezy imprecision in paragraphs 12 through 18 of the complaints -- appears to be that:

- A majority (in fact, approximately 60 percent) of the pulmonologists in each relevant geographic market[1] were investors in Home Oxygen and Homecare Oxygen;

[1] The complaints define the geographic markets as most of Alameda County for Home Oxygen, and Contra Costa County and a portion of Alameda County for Homecare Oxygen.

- The "market position" of each respondent group was "further enhanced" because several Home and Homecare pulmonologists served as medical directors of the respiratory therapy departments at some hospitals in the relevant markets;
- The "aggregation of competitors" embodied by these pulmonologist-owned firms gave Home and Homecare some sort of power[2] in an allegedly relevant market for "the sale, rental, or lease of oxygen systems" in Alameda and Contra Costa Counties;
- This "conduct" -- by which I presume the Commission means the "aggregation of competitors" into Home and Homecare and the "further enhance[ment]" of "market position" stemming from departmental directorships -- resulted in the creation of barriers to entry into the oxygen systems market and the inhibition of "free and open competition" in that market; and
- The alleged "acts and practices" allowed Home and Homecare to acquire and maintain "market power" and constitute unfair methods of competition, in violation of Section 5.

When this chain of assertions is distilled, the essential claim -- the one on which liability under Section 5 is predicated -- is that ownership of an oxygen systems company by a majority of a county's pulmonologists sufficed to confer market power in the oxygen systems business. Yet as I noted in my earlier dissent in this case, "[m]arket power is not necessarily created when a majority share of a relevant market is attained. Market power is defined as 'the ability profitably to maintain prices above competitive levels for a significant period of time.'"[3] One of my problems with the case is that neither the information gathered in this investigation nor the pro-

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[2] Inconsistencies between the Home and Homecare complaints give rise to ambiguities about this claim. Whereas the Homecare complaint (paragraph 15) alleges that the "aggregation of competitors in the market for the provision of pulmonary services" gave Homecare "market power" in the market for oxygen systems, the complaint against Home (paragraph 15) and the separate complaint against certain Home pulmonologists (paragraph 15) merely assert that this "aggregation of competitors" gave Home "a market share of approximately sixty (60) percent" in that market. Only in paragraph 18 do the latter two complaints aver that Home somehow "acquired and maintained market power in the relevant market." (The Homecare complaint contains a similar paragraph.)

[3] Statement of Commissioner Roscoe B. Starek, III ("Statement") at 2 (*quoting* U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, Section 0.1, 4 Trade Reg. Rep. (CCH) paragraph 13,104 (1992)). That Statement, which is attached hereto, also noted the Commission's formulation of the test for market power in a previous Section 5 case: "The test for market power depends on all the relevant characteristics of a market: the strength and capacity of current competitors; the potential for entry; the historic intensity of competition; and the impact of the legal or natural environment, to name just a few." *General Foods Corp.*, 103 FTC 204, 345 (1984).

posed complaints themselves persuasively explain how a majority share of pulmonology practice in Alameda and Contra Costa Counties, as "enhanced" by certain owners' leadership roles in some hospitals' respiratory therapy departments, gave rise to market power in oxygen systems.

The complaints' treatment of conditions of entry into oxygen systems illustrates (but by no means exhausts) the infirmities of the majority's approach. Rather than set forth a credible theory of entry barriers, the complaints charge -- in tautological fashion -- that "a barrier to entry has been created" purely and simply "[a]s a consequence of " the ownership structure of Home and Homecare. This says nothing about the difficulties facing prospective entrants or about the success rates of firms that operate in the markets independently of the Home and Homecare organizations, and thus leaves unanswered the question whether Home or Homecare possesses market power.[4]

I also note that the consent orders do nothing to deal with the actual conduct that must constitute the other key component (in addition to "market power") of the majority's theory in this case. I allude, of course, to "self-referral," a commonly encountered phenomenon in the medical field. Self-referral is a complex subject that requires considerable further analysis, and thus I am relieved that the orders do not prohibit self-referral but simply limit the market share of the respondent pulmonologists associated with an entity providing home oxygen. Although physician ownership of ancillary services may create an incentive to refer for services that are not medically necessary, I noted in my previous dissent that "it is critical to distinguish between the potential for anticompetitive harm and the potential for inappropriate or excessive referrals resulting from physician ownership. Regardless of market share or market power, physicians sometimes may make inappropriate treatment referrals to facilities in which they have a financial interest. While real consumer injury can

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[4] I noted in my previous dissent that "an exercise of market power [on the part of a joint venture such as Home or Homecare] is possible only when the coordination of activities within such a venture insulates the participating physicians from outside competition sufficiently that they are able to raise prices or reduce services. [paragraph] For example, in some cases, an exercise of market power may be possible if enough of the market is aggregated through the joint venture so that there is insufficient remaining market demand to sustain viable competitors. That clearly is not the case here." Statement at 4. Indeed, my earlier dissent noted the substantial number of competing oxygen system firms outside the Home and Homecare organizations in Alameda and Contra Costa Counties and the absence of evidence that any of those competitors suffer from competitive weaknesses. *Id.* at 3.

result from such 'self-referral,' this behavior is not by itself actionable under the antitrust laws. . . . [W]e should be careful to distinguish anticompetitive behavior from other forms of imperfect market performance."[5] In short, any injury involving self-referral that does not also flow from an exercise of market power is not "antitrust injury."[6]

I would of course support a challenge to an ancillary services joint venture if the facts unearthed in the investigation demonstrated that the venture was likely to have the requisite anticompetitive effects. In the matters before us, however, the complaints do not set forth a coherent theory of anticompetitive effects. I therefore respectfully dissent.[7]

ATTACHMENT

STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I respectfully dissent from the Commission's decision to accept for public comment the consent orders in these matters. The challenged conduct does appear to have the potential to be anticompetitive. Under the rule of reason, however, the evidence presented does not indicate that the conduct of the respondents was anticompetitive or that it is likely to have been anticompetitive.[1] Therefore, I do not

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[5] *Id.* at 3-4 (footnote omitted). My dissent continued: "If patients seldom question their physicians' referrals, physicians could profit from directing patients to home oxygen providers in which they have an ownership interest. But any such 'vertical control' that physicians have does not necessarily result in any horizontal market power of the ancillary ventures in which they have an interest." *Id.* at 4.

[6] *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 109-10 (1986); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

[7] Notwithstanding my conclusion that no orders should be issued, I agree with the majority inasmuch as it decided to delete the divestiture requirements from the final orders, for the reasons set forth in the third paragraph of the preamble to each Decision and Order.

[1] The challenged conduct must be analyzed under the rule of reason. The arrangements at issue cannot be characterized as naked restraints of trade subject to summary condemnation, and thus the rule of reason applies. *See NCAA v. Board of Regents*, 468, U.S. 85, 103 (1984). The joint DOJ/FTC Health Care Enforcement Guidelines indicate that the antitrust agencies will apply a rule of reason to conduct falling outside of well defined "safety zones." Statements of Antitrust Enforcement Policy in the Health Care Area, Department of Justice and Federal Trade Commission, September 15, 1993, at 10-11, 36. The six policy statements of these Guidelines do not explicitly cover the type of conduct at issue here, *i.e.*, physician-owned ancillary joint ventures. In any case, the arrangements here most likely would fall outside of any safety zone similar to those defined in the Guidelines, because they appear to have market shares of about 60% in their respective markets.

have reason to believe that the respondents have violated Section 5 of the FTC Act, as the complaints allege.

The complaints name two limited partnerships and 28 pulmonologist partners in these ventures. The complaints allege that the respondents have "acquired and maintained market power" (paragraph 18) as a consequence of the fact that a "majority" of the pulmonologists in each of the two areas in which the two partnerships operate are partners in the ventures (paragraph 14). I am concerned that this might be read to imply that the Commission will take enforcement actions against physician-owned ancillary joint ventures simply because participating physicians constitute a majority of those practicing in the relevant market, without regard to the ventures' effects or likely effects on the market.

The complaints do not challenge, and the consent agreements do not prohibit, "self-referral" of patients to entities owned by the respondent physicians.[2] However, the Analysis of Proposed Consent Order to Aid Public Comment states that the respondents were able to "acquire and maintain market power" because "pulmonologists have the ability to influence the choice of oxygen suppliers to service patients needing oxygen at home." Because pulmonologists make referrals to providers of home oxygen services, they do have the ability to influence their patients' choice of oxygen suppliers. But this "influence" does not necessarily equate to or result in any market power.

Market power is the focus of the Commission's analysis of physician-owned ancillary joint ventures. In fact, the very violation alleged in the complaints in these matters is that the ventures "acquired and maintained market power." Market power is not necessarily created when a majority share of a relevant market is attained. Market power is defined as "the ability profitably to maintain prices above competitive levels for a significant period of

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[2] The President recently signed legislation prohibiting physicians from self-referral of Medicare patients for several categories of services, including those services provided by the respondents. Omnibus Budget Reconciliation Act of 1993, Pub. L. No 103-66, ch. 2, Section 5074. Because the vast majority of home oxygen services apparently are sold to Medicare patients, it may be the case that virtually no home oxygen provider would be willing to maintain physician ownership that would cut itself off from the vast majority of market demand. If that is the case, Commission action on this matter is moot. However, I am not certain that this is true, and more importantly, this case might be viewed as precedent for Commission actions outside of the services covered by the recent legislation.

time."[3] Within the context of a case under Section 5 of the FTC Act, the Commission has argued that:

> The test for market power depends on all of the relevant characteristics of a market: the strength and capacity of current competitors; the potential for entry; the historic intensity of competition; and the impact of the legal or natural environment, to name just a few.[4]

Here, the two limited partnerships each have approximately 60% market shares in the respective counties in which they operate. Assuming, *arguendo*, that the alleged product and geographic markets are relevant antitrust markets, these market shares alone do not justify an inference of market power. In addition to the respondents, the evidence indicates that there are nine competing sellers of home oxygen in Alameda County, and eight competing sellers in Contra Costa County. Some of these firms have market shares of about 10%.

If these other firms suffer from substantial competitive weaknesses that prevent them from offering the same quality of services or the same low prices as the respondents, the respondents might be able to exercise market power through their joint ventures. I have not seen evidence that any of these competitors have such competitive weaknesses.[5]

Medicare patients, who apparently comprise the vast majority of patients purchasing home oxygen services, might be less price sensitive than third-party payers such as HMOs, and thus might appear to be vulnerable to anticompetitive behavior. Medicare's restrictive reimbursement policies may severely limit suppliers' potential ability to exercise market power. But it is doubtful that these policies eliminate the possibility of an exercise of market power in these markets.

It sometimes has been argued that physician ownership can create an incentive to refer for financial gain for services that are not

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[3] U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (1992), reprinted in 4 Trade Reg. Rep. (CCH) paragraph 13104, Section 0.1 ("Sellers with market power also may lessen competition on dimensions other than price, such as product quality, service, or innovation.")

[4] *General Foods Corp.* 103 FTC 204, 345 (1984).

[5] In fact, one major third-party payer in the region purchases home oxygen primarily from one of the respondents' ventures in one county, while in the other county it purchases home oxygen primarily from one of the respondents' competitors. While hardly dispositive on this issue, this suggests that this major customer considers the available services of the respondents' competitors to be of acceptable and comparable quality and price.

medically necessary. But it is critical to distinguish between the potential for anticompetitive harm and the potential for inappropriate or excessive referrals resulting from physician ownership. Regardless of market share or market power, physicians sometimes may make inappropriate treatment referrals to facilities in which they have a financial interest.[6] While real consumer injury can result from such "self-referral," this behavior is not by itself actionable under the antitrust laws. Of course, this does not mean that anticompetitive behavior could not occur in these markets. But we should be careful to distinguish anticompetitive behavior from other forms of imperfect market performance.

If patients seldom question their physicians' referrals, physicians could profit from directing patients to home oxygen providers in which they have an ownership interest. But any such "vertical control" that physicians have does not necessarily result in any horizontal market power of the ancillary ventures in which they have an interest. An ancillary venture can enable the participating physicians to coordinate some of their competitive activities. But an exercise of market power is possible only when the coordination of activities within such a venture insulates the participating physicians from outside competition sufficiently that they are able to raise prices or reduce services.

For example, in some cases, an exercise of market power may be possible if enough of the market is aggregated through the joint venture so that there is insufficient remaining market demand to sustain viable competitors. That clearly is not the case here. The evidence is at best ambiguous as to whether these ventures, which have been in operation since 1984, have had any anticompetitive effect.

Physician-owned ancillary joint ventures have a potential to accomplish significant cost savings that can be passed on to consumers in the form of lower prices and higher quality of care. Physicians frequently may be in the best position to recognize a potential demand for an ancillary medical service in their community, to back

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[6] The potential problem of inappropriate referrals made for financial gain is not limited to instances in which physicians have financial interests in facilities, equipment, or service providers that are physically or legally separate from their primary practices. The potential problem is present whenever a physician performs both diagnosis and treatment. Patients and third-party payers have limited information about whether treatments are medically necessary, and thus physicians frequently have some degree of discretion to recommend treatments that are not necessary.

up this perception with their own capital, and to operate and monitor the venture's performance. Clearly physicians and hospitals could have more control over the quality of a service by owning a supplier of that service than by merely writing a prescription. Evidence that physician investors frequently are passive with respect to the operation of these companies does not dismiss the potential of these ventures to accomplish substantial efficiencies.

Of course, the respondents' large scale and market share may not be necessary to achieve the potential efficiencies of such arrangements. But even incontrovertible evidence that these firms did not gain additional efficiency by growing to their current size would be relevant only after a determination that the firms had acted anticompetitively.

The orders continue to allow self-referral, and only limit the market share of the respondent pulmonologists associated with an entity providing home oxygen. Thus, the remedy does not address any harm that might result from the mere fact of self-referral.[7] The order also would allow efficiencies from self-referral to occur, but it is far from clear that the restructuring of the two ventures required under the orders would preserve all of the efficiencies that they may have been able to accomplish. Thus it may be the case that the orders reduce efficiency, do not reduce market power, and also fail to address any real harm to consumers that might result from self-referral.

The overriding reason to cast my vote against the acceptance of these consents is the precedential effect of discouraging physicians and hospitals from forming ancillary ventures, particularly in circumstances in which it may be important to achieve a high market share in order to gain efficiencies, or even to be able to introduce a service that benefits consumers in the area. Thus, enforcement actions should be limited to conduct for which anticompetitive harm is demonstrable or highly likely to occur. Because that burden has not been met, I respectfully dissent from the Commission's actions in these matters.

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[7] As I noted above, self-referral by itself is not actionable under the antitrust laws. Thus it is appropriate that any such perceived harm is not addressed, in an order resolving the allegations in these complaints.

IN THE MATTER OF

CERTAIN HOME OXYGEN PULMONOLOGISTS, ET AL.

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

Docket C-3531. Complaint, Sept. 14, 1994--Decision, Sept. 14, 1994

This consent order prohibits, among other things, four physicians who are partners in the Home Oxygen & Medical Equipment Co., a California supplier of oxygen systems prescribed for home use, from acquiring or granting, for ten years, an ownership interest in a firm that sells or leases oxygen systems in the relevant geographic market, if more than 25 percent of the pulmonologists in that market would be affiliated with the firm, and requires the respondents to notify the Commission if they acquire more than one percent of a firm that sells or leases oxygen systems anywhere.

Appearances

For the Commission: *Linda K. Badger, Kerry O'Brien, Erika Wodinsky, Mary Lou Steptoe* and *Jeffrey A. Klurfeld.*

For the respondents: *Francis Scarpulla,* San Francisco, CA.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Barry R. Horn, M.D., Alan Lifshay, M.D., Gerald L. Meyers, M.D., and Oscar R. Scherer, M.D., individually and as limited partners, in a business known as Home Oxygen & Medical Equipment Company, hereinafter sometimes referred to as the respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

DEFINITIONS

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

A. "*Home Oxygen & Medical Equipment Company*" or "*Home Oxygen*" is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of California. It has its principal place of business at 2456 Verna Court, San Leandro, California.

B. "*Durable medical equipment" or "DME*" means medical equipment sold, rented, or leased to customers for home use. DME includes, but is not limited to, ambulatory aids, wheelchairs, walkers, hospital beds, commodes and respiratory therapy equipment, such as oxygen systems. "DME" encompasses all aspects of supplying DME, including, but not limited to, delivering and servicing the equipment, and rendering accompanying services to customers.

C. "*Oxygen systems*" means DME used to service individuals who are unable to obtain adequate oxygen through independent breathing. Oxygen systems include, but are not limited to, oxygen gas contained in tanks; liquid oxygen stored in reservoirs and smaller, portable containers; and electrically-operated oxygen concentrators. "Oxygen systems" encompasses all aspects of supplying these oxygen systems, including, but not limited to, delivering and servicing the equipment, supplying oxygen content, and rendering accompanying services to customers.

D. "*Discharge planner*" means any nurse, social worker, respiratory therapist, or other agent of a hospital or health care provider who arranges for the provision of DME or consults with or makes recommendations to patients being discharged from hospitals concerning potential suppliers of DME.

E. "*Hospital*" means a health facility, other than a federally-owned facility, having a duly organized governing body with overall administrative and professional responsibility and an organized professional staff that provides 24-hour inpatient care, and whose primary function is to provide inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities. "Hospital" includes any affiliate, subsidiary, or partnership in which the hospital holds a ten (10) percent or greater interest.

F. "*Pulmonologist*" means a medical professional who specializes in the diagnosis and treatment of pulmonary disease, regardless of whether the medical professional has been certified as a specialist in pulmonary disease. "Pulmonologist" does not include medical professionals who specialize in the diagnosis and treatment of

patients who would not use the type of oxygen systems defined herein, such as patients suffering from allergies and pediatric patients requiring oxygen systems specially designed for children.

G "*Practicing*" means having staff privileges, including, but not limited to, active or courtesy staff privileges, at any hospital.

RESPONDENTS

PAR. 2. Respondent Barry R. Horn, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 3001 Colby Street, Berkeley, California.

Respondent Alan Lifshay, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 3001 Colby Street, Berkeley, California.

Respondent Gerald L. Meyers, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 3001 Colby Street, Berkeley, California.

Respondent Oscar R. Scherer, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 3001 Colby Street, Berkeley, California.

PAR. 3. The relevant product market is the market for the sale, rental, or lease of oxygen systems.

PAR. 4. The relevant geographic market is Alameda County, California, excluding the south-east portion of Alameda County referred to as the "Tri-Valley" area. The Tri-Valley area includes the cities of Livermore, Dublin and Pleasanton.

PAR. 5. Since May 18, 1984, Home Oxygen has been engaged in the purchasing, offering for sale, rental or lease of DME, including oxygen systems and related products, to the public in the relevant geographic market.

PAR. 6. The respondents are now, and have been at times relevant to this complaint, pulmonologists practicing their profession within the relevant geographic market.

PAR. 7. The respondents have staff positions or staff privileges at Alta Bates/Herrick Hospital, a hospital located in the relevant geographic market.

JURISDICTION

PAR. 8. The acts and practices of respondents alleged in this complaint are and have been in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

THE INDUSTRY

PAR. 9. Patients hospitalized with certain forms of lung, heart, and other disease are unable to obtain sufficient oxygen from their normal breathing. Upon discharge from a hospital, physicians may prescribe oxygen for these patients for home use. Because oxygen is considered a drug under Food and Drug Administration regulations, oxygen for medical use can be provided to patients only pursuant to a physician's prescription.

PAR. 10. Oxygen systems vary in many respects, including, but not limited to: the type of system, the level and quality of service accompanying the equipment, and price. Patients requiring oxygen systems usually possess incomplete knowledge about oxygen systems or the companies that provide oxygen systems. As a result, patients seldom have a preference for a particular oxygen system supplier and rely on hospitals, discharge planners, health care professionals, and other individuals knowledgeable about DME to recommend a supplier or to select a supplier on their behalves.

PAR. 11. In general, patients requiring oxygen systems receive the services of pulmonologists or of hospital respiratory therapy departments under the supervision of pulmonologists. As a result, pulmonologists have the ability to influence the choice of which oxygen systems supplier services these patients through a variety of means.

ACTS OR PRACTICES

PAR. 12. In 1984, Home Oxygen was formed to engage in the sale, rental or lease of oxygen systems to patients.

PAR. 13. Limited partnership interests in Home Oxygen were offered primarily to hospitals and pulmonologists.

PAR. 14. A majority of the pulmonologists practicing in the relevant geographic market joined as general or limited partners in Home Oxygen. The respondents were limited partners in Home

Oxygen. In all, approximately sixty (60) percent of the pulmonologists in the relevant geographic market were investors in Home Oxygen or practiced in groups consisting of one or more of the Home Oxygen pulmonologists. Home Oxygen's market position was further enhanced because several of the Home Oxygen pulmonologists served as medical directors of respiratory therapy departments at hospitals in the relevant geographic market.

EFFECTS

PAR. 15. Through the aggregation of competitors in the market for the provision of pulmonary services alleged in paragraphs twelve through fourteen, Home Oxygen has achieved a market share of approximately sixty (60) percent in the relevant market.

PAR. 16. As a consequence of the conduct alleged in paragraphs twelve through fourteen, a barrier to entry has been created in the relevant market.

PAR. 17. As a consequence of the conduct alleged in paragraphs twelve through fourteen, free and open competition has been inhibited in the relevant market.

VIOLATIONS

PAR. 18. Home Oxygen has acquired and maintained market power in the relevant market through the acts and practices set out and alleged in paragraphs twelve through fourteen. These alleged acts and practices of Home Oxygen and the Home Oxygen pulmonologists constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The acts or practices, or the effects thereof, are likely to continue or recur in the absence of appropriate relief.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the San Francisco 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 of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, 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 Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having received a comment regarding the proposed consent with Home Oxygen & Medical Equipment Company describing how the respondents divested assets in conformance with the terms of the proposed order and had received therefore a minority stock interest of less than one (1) percent of the outstanding voting stock in a publicly held company, and the Commission having determined that retention of the divestiture provisions would nonetheless require respondents to divest said stock interest, and also having determined that such divestiture of said stock interest is not necessary to effectuate the remedy in this matter and that the divestiture provisions therefore can be deleted, 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 Barry R. Horn, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 3001 Colby Street, Berkeley, California.

Respondent Alan Lifshay, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 3001 Colby Street, Berkeley, California.

Respondent Gerald L. Meyers, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 3001 Colby Street, Berkeley, California.

Respondent Oscar R. Scherer, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 3001 Colby Street, Berkeley, California.

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.

ORDER

I.

As used in this order, the following definitions shall apply:

A. "*Home Oxygen & Medical Equipment Company*" or "*Home Oxygen*" is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of California. It has its principal place of business at 2456 Verna Court, San Leandro, California.

B. "*Durable medical equipment*" or "*DME*" means medical equipment sold, rented, or leased to customers for home use. DME includes, but is not limited to, ambulatory aids, wheelchairs, walkers, hospital beds, commodes and respiratory therapy equipment, such as oxygen systems. "DME" encompasses all aspects of supplying DME, including, but not limited to, delivering and servicing the equipment, and rendering accompanying services to customers.

C. "*Oxygen systems*" means DME used to service individuals who are unable to obtain adequate oxygen through independent breathing. Oxygen systems include, but are not limited to, oxygen gas contained in tanks; liquid oxygen stored in reservoirs and smaller, portable containers; and electrically-operated oxygen concentrators. "Oxygen systems" encompasses all aspects of supplying these oxygen systems, including, but not limited to, delivering and servicing the equipment, supplying oxygen content, and rendering accompanying services to customers.

D. "*Hospital*" means a health facility, other than a federally-owned facility, having a duly organized governing body with overall administrative and professional responsibility and an organized professional staff that provides 24-hour inpatient care, and whose primary function is to provide inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with

short-term or episodic health problems or infirmities. "Hospital" includes any affiliate, subsidiary, or partnership in which the hospital holds a ten (10) percent or greater interest.

E. "*Medical professional*" means any individual who is licensed by the State of California as a Medical Doctor.

F. "*Pulmonologist*" means a medical professional who specializes in the diagnosis and treatment of pulmonary disease, regardless of whether the medical professional has been certified as a specialist in pulmonary disease. "Pulmonologist" does not include medical professionals who specialize in the diagnosis and treatment of patients who would not use the type of oxygen systems defined herein, such as patients suffering from allergies and pediatric patients requiring oxygen systems specially designed for children.

G. "*Practicing*" means having staff privileges, including, but not limited to, active or courtesy staff privileges, at any hospital.

H. "*Relative*" means an individual who is related to the individual, as father, mother, son, daughter, brother, sister, uncle, aunt, great aunt, great uncle, first cousin, nephew, niece, husband, wife, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half-brother, half-sister, or who is the grandfather or grandmother of the spouse of the individual.

I. "*Own*" or "*Ownership interest*" means any and all stock, share, capital, equity or other interest, asset, property, license, lease, or other right or privilege, tangible or intangible, whether obtained or held, directly or indirectly, through any relative, employee or agent, or through any corporate or other device.

J. "*Affiliated with*" means having an ownership interest in the entity or being a member of the same group practice as an investor in the entity.

K. "*Relevant geographic market*" means Alameda County, California, excluding the south-east portion of Alameda County referred to as the "Tri-Valley" area. The Tri-Valley area includes the cities of Livermore, Dublin and Pleasanton.

L. "*Service area*" means the geographic area in which an entity engages in the sale, rental, or lease of oxygen systems.

II.

It is ordered, That, for a period of ten (10) years from the date of this order, no respondent shall grant or acquire, with or without valuable consideration, an ownership interest in any entity engaged in the sale, rental, or lease of oxygen systems in the relevant geographic market if, after such grant or acquisition, more than twenty-five (25) percent of the pulmonologists who practice in the relevant geographic market would be affiliated with the entity.

III.

It is further ordered, That for a period of ten (10) years from the date this order becomes final, the respondents shall notify the Commission within thirty (30) days after acquiring, either directly or indirectly, or through any corporate or other device, any ownership interest in an entity engaged in the sale, rental, or lease of oxygen systems. Such notification shall include:

(a) An identification of all owners of the entity;
(b) An identification of any pulmonologist practicing in the entity's service area or intended service area who has an ownership interest in the entity;
(c) A list of all pulmonologists who practice in the entity's service area or intended service area;
(d) A description of the products or services offered, or to be offered by the entity;
(e) A copy of the entity's offering memorandum and/or prospectus; and
(f) An identification of the entity's location, including the location of any and all of the entity's parent organizations, and subsid-iaries.

Respondents shall comply with requests by the Commission staff for additional information within fifteen (15) days of service of such requests.

Provided, however, that nothing in this order shall require notice for acquisitions of voting securities of any publicly traded company involved in the sale, rental, or lease of oxygen systems unless, as a

result of such acquisition, the respondent would hold more than one (1) percent of such company.

IV.

It is further ordered, That:

A. Within sixty (60) days from the date this order becomes final, each respondent shall file with the Commission a verified written report of compliance with this order;

B. One year from the date this order becomes final and annually thereafter for nine (9) years, each respondent shall file with the Commission a verified written report of compliance with this order.

Commissioner Azcuenaga and Commissioner Starek dissenting.[1]

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

Today the Commission issues three consent orders minus the divestiture requirements that were in the orders as published for public comment. By way of explanation, the Commission states that the respondents, by letter, assert that they "divested assets in conformance with the terms of the proposed order[s]" and that the Commission has determined that retaining the divestiture requirement "is not necessary to effectuate the remedy" in these matters.[1] In fact, the respondents have not divested "in conformance" with the proposed orders, and the sale that the respondents made does not accomplish the remedy that the Commission sought or otherwise cure the alleged competitive problem. The revised orders are inconsistent with the complaints on which they are based, they are inconsistent with the proposed orders that were published for comment, and, finally, they are internally inconsistent. Although I voted for the proposed orders that were published for comment,[2] I do not join today's decision.

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[1] Prior to leaving the Commission, former Commissioner Owen and former Commissioner Yao registered their votes in the affirmative for the Complaint and the Decision and Order in this matter.

[1] Decision and Order in each matter at 2.

[2] A copy of my concurring statement of November 1, 1993, is attached and incorporated by reference. The concerns I expressed in that statement continue.

The theory of violation in each of the three Home Oxygen cases as alleged in the complaints is that ownership of a home oxygen supplier by the majority of pulmonologists in a particular market enables the home oxygen supplier to create barriers to entry (*i.e.*, through patient referrals by the owner-pulmonologists and the resulting inability of another oxygen supplier to obtain referrals from pulmonologists) and to inhibit competition in the home oxygen market.[3] To remedy the alleged violations, the orders that were accepted for public comment required divestitures to reduce the number of pulmonologists owning interests in a single home oxygen company "such that no greater than 25% of the pulmonologists practicing in the relevant geographic market are affiliated with" any one home oxygen company.

During the public comment period, counsel for the respondent-pulmonologists informed the Commission that the doctors had sold their home oxygen companies to a large, publicly-held, medical supply company (which I will call Newco), in exchange for shares in that company.[4] The pulmonologists in effect traded their interests in their local home oxygen partnerships for interests in a large corporation. The Commission today decides that the sale to Newco obviates the need for the divestitures that were required under the orders. The argument, as I understand it, is that the doctors hold a decidedly minor percentage of Newco (less than 1%) and that the small size of their ownership share somehow cures the competitive concerns described in the complaints.[5] I disagree.

The theory of violation in these cases does not turn on control by the physicians of the home oxygen suppliers or on the percentage of each home oxygen supply company owned by the doctors. Instead, the concern was the aggregation in a single oxygen supply company of ownership interests of a majority of pulmonologists in the relevant geographic market. The required divestiture was to reduce the number of pulmonologists having an ownership interest in any one home

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[3] Paragraphs 12-17 of the complaints.

[4] Letter from David T. Alexander, Esq., to FTC, Jan. 18, 1994 (counsel for Home Oxygen & Medical Equipment Co. and individual doctors); letter from Robert J. Enders, Esq., to FTC, Jan. 14, 1994 (counsel for Homecare Oxygen & Medical Equipment Co. and individual doctors).

[5] *See* letter from Robert J. Enders, Esq., to the FTC, Jan. 14, 1994, at 3. According to Mr. Enders, the sale of the home oxygen company to "a publicly traded company should alleviate concerns of the Commission and its staff about pulmonologist control, through ownership, in entities engaged in the sale, rental or lease of oxygen systems."

oxygen supplier. The sale of the home oxygen companies to Newco is unresponsive to the concern underlying the complaints, because the ownership interests of some 60% or more of the pulmonologists in the market still are aggregated in a single company.[6]

The individual doctors may have reduced incentives to refer patients to Newco, if the financial rewards of stock ownership are less than those of partnership interests.[7] The relative incentives might be important to a doctor who held both Newco shares and a home oxygen partnership, but, as I understand it, the doctors' entire partnership interests have been converted to Newco shares and the home oxygen partnerships no longer exist as separate entities. A doctor who owns an interest in Newco probably will have greater incentives to refer patients to Newco than to a company in which he or she does not own an interest.

The resolution accepted by the Commission today -- sale by the respondents of their companies to Newco in exchange for Newco shares, in lieu of divestiture to reduce the number of doctors affiliated by ownership with a single oxygen supply company -- is inconsistent with the theory of violation alleged in the complaints, because the sale to Newco does not reduce the number of doctors affiliated by ownership with a single oxygen supply company. For the same reason, the resolution accepted by the Commission is inconsistent with the remedial provisions of the orders that were published for comment and does not remedy the competitive problem.

The Commission's decision also is internally inconsistent, because each of the orders accepted today expressly bars the respondent-pulmonologists from granting or acquiring an interest in any home oxygen supplier -- if that would result in an affiliation with the supplier of more than 25% of pulmonologists in the geographic market[8] -- at the same time that it accepts the sale to Newco, which

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[6] Before Newco, a majority of pulmonologists in each of two adjacent markets owned interests in two different home oxygen supply companies. Now, a majority of pulmonologists in the two adjacent markets combined own interests in one home oxygen supply company, Newco. With its acquisition of the home oxygen companies, Newco has acquired the market power that the respondents allegedly had aggregated.

[7] The home oxygen companies were partnerships, and Newco is a publicly held corporation. We have no information about actual gains to the doctors from either form of ownership on which to base a comparative analysis.

[8] Paragraph II of each of the orders bars the respondents from granting or acquiring "an ownership interest in any entity engaged in the sale, rental, or lease of oxygen systems. . .if. . .more than twenty-five percent of the pulmonologists practicing in the relevant geographic market would be affiliated with the entity." Thus, paragraph II of the orders would bar the very transfer that the Commission today sanctions.

is precisely the same conduct. As a result, in each of the orders accepted today, the Commission both sanctions the arrangement resulting from the sale to Newco (*i.e.*, a home oxygen company in which more than 25% of pulmonologists have an ownership interest) and prohibits any action to create the same arrangement in the future. The public will need the wisdom of Solomon to discern what these orders portend for future enforcement.

I dissent.

[The following statement was issued in November 1993, when the orders as then proposed were published for public comment.]

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

Although I have joined in the Commission's decision to accept these consent agreements for public comment, I have reservations about the usefulness of the orders to which the respondents have consented and about the advisability, on the basis of the information we have, of charting the new territory that these cases represent. Here, I believe, sufficient evidence exists to satisfy the statutory standard of reason to believe the law has been violated but precious little more. As I have said before, the truncated record on which consent agreements ordinarily are based leaves something to be desired as a basis for establishing new Commission policy.

Antitrust analysis, as we know it today, requires a search for understanding of markets, an understanding that, experience shows, may be founded on elements that lie well below the surface of what even those in a particular industry may readily comprehend. *See, e.g., Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979). It is easy to underestimate the difficulty of showing justifications that are cognizable under the antitrust laws and sufficient to defend against the application of novel antitrust theories. The Commission may not be as well positioned as the parties to identify and understand justifications for the challenged conduct. Yet the parties may be ill-equipped to undertake the esoteric analytic endeavor that modern antitrust law may demand. When neither the parties nor the Commission fully comprehends the justifications, "ignorance leads straight to condemnation," *Chicago Professional Sports Limited Partnership v. NBA*, 961 F.2d 667, 676 (7th Cir. 1992), and condemnation without understanding may lead to consumer harm.

It is useful, indeed, advisable for the Commission to continue to evaluate new factual situations and to develop new theories under Section 5 of the Federal Trade Commission Act to remedy anti-competitive effects. But it is well, in doing so, to keep in mind the admonition of the court in *Chicago Professional Sports Limited Partnership v. NBA*, 961 F.2d at 676, that "[e]xplanations of problematic conduct take time to develop and more time to test. . . . Understanding novel practices may require years of study and debate."

I have voted to publish the consent agreements for comment but remain mindful of these concerns.

STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

Nearly eleven months ago, over my dissent, the Commission accepted consent agreements with three groups of pulmonologists practicing in two counties in the eastern San Francisco Bay Area. Further analysis of these matters in the intervening months has not provided me with reason to believe that respondents' conduct violated Section 5 of the Federal Trade Commission Act. Therefore, I cannot agree with the Commission's decision to issue the complaints and the modified final versions of the consent orders.

I have continued to evaluate these matters with great care and an open mind since the Commission accepted the consent agreements. Nevertheless, I remain unpersuaded of the theory on which these cases rely. That theory -- stated with breezy imprecision in paragraphs 12 through 18 of the complaints -- appears to be that:

- A majority (in fact, approximately 60 percent) of the pulmonologists in each relevant geographic market[1] were investors in Home Oxygen and Homecare Oxygen;
- The "market position" of each respondent group was "further enhanced" because several Home and Homecare pulmonologists served as medical directors of the respiratory therapy departments at some hospitals in the relevant markets;
- The "aggregation of competitors" embodied by these pulmonologist-owned firms gave Home and Homecare some sort of

[1] The complaints define the geographic markets as most of Alameda County for Home Oxygen, and Contra Costa County and a portion of Alameda County for Homecare Oxygen.

power[2] in an allegedly relevant market for "the sale, rental, or lease of oxygen systems" in Alameda and Contra Costa Counties;
- This "conduct" -- by which I presume the Commission means the "aggregation of competitors" into Home and Homecare and the "further enhance[ment]" of "market position" stemming from departmental directorships -- resulted in the creation of barriers to entry into the oxygen systems market and the inhibition of "free and open competition" in that market; and
- The alleged "acts and practices" allowed Home and Homecare to acquire and maintain "market power" and constitute unfair methods of competition, in violation of Section 5.

When this chain of assertions is distilled, the essential claim -- the one on which liability under Section 5 is predicated -- is that ownership of an oxygen systems company by a majority of a county's pulmonologists sufficed to confer market power in the oxygen systems business. Yet as I noted in my earlier dissent in this case, "[m]arket power is not necessarily created when a majority share of a relevant market is attained. Market power is defined as the ability profitably to maintain prices above competitive levels for a significant period of time."[3] One of my problems with the case is that neither the information gathered in this investigation nor the proposed complaints themselves persuasively explain how a majority share of pulmonology practice in Alameda and Contra Costa Counties, as "enhanced" by certain owners' leadership roles in some hospitals' respiratory therapy departments, gave rise to market power in oxygen systems.

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[2] Inconsistencies between the Home and Homecare complaints give rise to ambiguities about this claim. Whereas the Homecare complaint (paragraph 15) alleges that the "aggregation of competitors in the market for the provision of pulmonary services" gave Homecare "market power" in the market for oxygen systems, the complaint against Home (paragraph 15) and the separate complaint against certain Home pulmonologists (paragraph 15) merely assert that this "aggregation of competitors" gave Home "a market share of approximately sixty (60) percent" in that market. Only in paragraph 18 do the latter two complaints aver that Home somehow "acquired and maintained market power in the relevant market." (The Homecare complaint contains a similar paragraph.)

[3] Statement of Commissioner Roscoe B. Starek, III ("Statement") at 2 (quoting U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, Section 0.1, 4 Trade Reg. Rep. (CCH) paragraph 13,104 (1992)). That Statement, which is attached hereto, also noted the Commission's formulation of the test for market power in a previous Section 5 case: "The test for market power depends on all the relevant characteristics of a market: the strength and capacity of current competitors; the potential for entry; the historic intensity of competition; and the impact of the legal or natural environment, to name just a few." *General Foods Corp.*, 103 FTC 204, 345 (1984).

The complaints' treatment of conditions of entry into oxygen systems illustrates (but by no means exhausts) the infirmities of the majority's approach. Rather than set forth a credible theory of entry barriers, the complaints charge -- in tautological fashion -- that "a barrier to entry has been created" purely and simply "[a]s a consequence of" the ownership structure of Home and Homecare. This says nothing about the difficulties facing prospective entrants or about the success rates of firms that operate in the markets independently of the Home and Homecare organizations, and thus leaves unanswered the question whether Home or Homecare possesses market power.[4]

I also note that the consent orders do nothing to deal with the actual conduct that must constitute the other key component (in addition to "market power") of the majority's theory in this case. I allude, of course, to "self-referral," a commonly encountered phenomenon in the medical field. Self-referral is a complex subject that requires considerable further analysis, and thus I am relieved that the orders do not prohibit self-referral but simply limit the market share of the respondent pulmonologists associated with an entity providing home oxygen. Although physician ownership of ancillary services may create an incentive to refer for services that are not medically necessary, I noted in my previous dissent that "it is critical to distinguish between the potential for anticompetitive harm and the potential for inappropriate or excessive referrals resulting from physician ownership. Regardless of market share or market power, physicians sometimes may make inappropriate treatment referrals to facilities in which they have a financial interest. While real consumer injury can result from such 'self-referral,' this behavior is not by itself actionable under the antitrust laws . . . . [W]e should be careful to distinguish anticompetitive behavior from other forms of imperfect market

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[4] I noted in my previous dissent that "an exercise of market power [on the part of a joint venture such as Home or Homecare] is possible only when the coordination of activities within such a venture insulates the participating physicians from outside competition sufficiently that they are able to raise prices or reduce services. [paragraph] For example, in some cases, an exercise of market power may be possible if enough of the market is aggregated through the joint venture so that there is insufficient remaining market demand to sustain viable competitors. That clearly is not the case here." Statement at 4. Indeed, my earlier dissent noted the substantial number of competing oxygen system firms outside the Home and Homecare organizations in Alameda and Contra Costa Counties and the absence of evidence that any of those competitors suffer from competitive weaknesses. *Id.* at 3.

performance."[5] In short, any injury involving self-referral that does not also flow from an exercise of market power is not "antitrust injury."[6]

I would of course support a challenge to an ancillary services joint venture if the facts unearthed in the investigation demonstrated that the venture was likely to have the requisite anticompetitive effects. In the matters before us, however, the complaints do not set forth a coherent theory of anticompetitive effects. I therefore respectfully dissent.[7]

ATTACHMENT

STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I respectfully dissent from the Commission's decision to accept for public comment the consent orders in these matters. The challenged conduct does appear to have the potential to be anticompetitive. Under the rule of reason, however, the evidence presented does not indicate that the conduct of the respondents was anticompetitive or that it is likely to have been anticompetitive.[1] Therefore, I do not have reason to believe that the respondents have violated Section 5 of the FTC Act, as the complaints allege.

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[5] *Id.* at 3-4 (footnote omitted). My dissent continued: "If patients seldom question their physicians' referrals, physicians could profit from directing patients to home oxygen providers in which they have an ownership interest. But any such 'vertical control' that physicians have does not necessarily result in any horizontal market power of the ancillary ventures in which they have an interest." *Id.* at 4.

[6] *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 109-10 (1986); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

[7] Notwithstanding my conclusion that no orders should be issued, I agree with the majority inasmuch as it decided to delete the divestiture requirements from the final orders, for the reasons set forth in the third paragraph of the preamble to each Decision and Order.

[1] The challenged conduct must be analyzed under the rule of reason. The arrangements at issue cannot be characterized as naked restraints of trade subject to summary condemnation, and thus the rule of reason applies. *See NCAA v. Board of Regents*, 468, U.S. 85, 103 (1984). The joint DOJ/FTC Health Care Enforcement Guidelines indicate that the antitrust agencies will apply a rule of reason to conduct falling outside of well defined "safety zones." Statements of Antitrust Policy in the Health Care Area, Department of Justice and Federal Trade Commission, September 15, 1993, at 10-11, 36. The six policy statements of these Guidelines do not explicitly cover the type of conduct at issue here, *i.e.*, physician-owned ancillary joint ventures. In any case, the arrangements here most likely would fall outside of any safety zone similar to those defined in the Guidelines, because they appear to have market shares of about 60% in their respective markets.

The complaints name two limited partnerships and 28 pulmonologist partners in these ventures. The complaints allege that the respondents have "acquired and maintained market power" (paragraph 18) as a consequence of the fact that a "majority" of the pulmonologists in each of the two areas in which the two partnerships operate are partners in the ventures (paragraph 14). I am concerned that this might be read to imply that the Commission will take enforcement actions against physician-owned ancillary joint ventures simply because participating physicians constitute a majority of those practicing in the relevant market, without regard to the ventures' effects or likely effects on the market.

The complaints do not challenge, and the consent agreements do not prohibit, "self-referral" of patients to entities owned by the respondent physicians.[2] However, the Analysis of Proposed Consent Order to Aid Public Comment states that the respondents were able to "acquire and maintain market power" because "pulmonologists have the ability to influence the choice of oxygen suppliers to service patients needing oxygen at home." Because pulmonologists make referrals to providers of home oxygen services, they do have the ability to influence their patients' choice of oxygen suppliers. But this "influence" does not necessarily equate to or result in any market power.

Market power is the focus of the Commission's analysis of physician-owned ancillary joint ventures. In fact, the very violation alleged in the complaints in these matters is that the ventures "acquired and maintained market power." Market power is not necessarily created when a majority share of a relevant market is attained. Market power is defined as "the ability profitably to maintain prices above competitive levels for a significant period of time."[3] Within

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[2] The President recently signed legislation prohibiting physicians from self-referral of Medicare patients for several categories of services, including those services provided by the respondents. Omnibus Budget Reconciliation Act of 1993, Pub. L. No 103-66, ch. 2, Section 5074. Because the vast majority of home oxygen services apparently are sold to Medicare patients, it may be the case that virtually no home oxygen provider would be willing to maintain physician ownership that would cut itself off from the vast majority of market demand. If that is the case, Commission action on this matter is moot. However, I am not certain that this is true, and more importantly, this case might be viewed as precedent for Commission actions outside of the services covered by the recent legislation.

[3] U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (1992), reprinted in 4 Trade Reg. Rep. (CCH) paragraph 13104, Section 0.1 ("Sellers with market power also may lessen competition on dimensions other than price, such as product quality, service, or innovation.")

the context of a case under Section 5 of the FTC Act, the Commission has argued that:

> The test for market power depends on all of the relevant characteristics of a market: the strength and capacity of current competitors; the potential for entry; the historic intensity of competition; and the impact of the legal or natural environment, to name just a few.[4]

Here, the two limited partnerships each have approximately 60% market shares in the respective counties in which they operate. Assuming, *arguendo*, that the alleged product and geographic markets are relevant antitrust markets, these market shares alone do not justify an inference of market power. In addition to the respondents, the evidence indicates that there are nine competing sellers of home oxygen in Alameda County, and eight competing sellers in Contra Costa County. Some of these firms have market shares of about 10%.

If these other firms suffer from substantial competitive weaknesses that prevent them from offering the same quality of services or the same low prices as the respondents, the respondents might be able to exercise market power through their joint ventures. I have not seen evidence that any of these competitors have such competitive weaknesses.[5]

Medicare patients, who apparently comprise the vast majority of patients purchasing home oxygen services, might be less price sensitive than third-party payers such as HMOs, and thus might appear to be vulnerable to anticompetitive behavior. Medicare's restrictive reimbursement policies may severely limit suppliers' potential ability to exercise market power. But it is doubtful that these policies eliminate the possibility of an exercise of market power in these markets.

It sometimes has been argued that physician ownership can create an incentive to refer for financial gain for services that are not medically necessary. But it is critical to distinguish between the potential for anticompetitive harm and the potential for inappropriate or excessive referrals resulting from physician ownership. Regardless of market share or market power, physicians sometimes may make

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[4] *General Foods Corp.* 103 FTC 204, 345 (1984).

[5] In fact, one major third-party payer in the region purchases home oxygen primarily from one of the respondents' ventures in one county, while in the other county it purchases home oxygen primarily from one of the respondents' competitors. While hardly dispositive on this issue, this suggests that this major customer considers the available services of the respondents' competitors to be of acceptable and comparable quality and price.

inappropriate treatment referrals to facilities in which they have a financial interest.[6] While real consumer injury can result from such "self-referral," this behavior is not by itself actionable under the antitrust laws. Of course, this does not mean that anticompetitive behavior could not occur in these markets. But we should be careful to distinguish anticompetitive behavior from other forms of imperfect market performance.

If patients seldom question their physicians' referrals, physicians could profit from directing patients to home oxygen providers in which they have an ownership interest. But any such "vertical control" that physicians have does not necessarily result in any horizontal market power of the ancillary ventures in which they have an interest. An ancillary venture can enable the participating physicians to coordinate some of their competitive activities. But an exercise of market power is possible only when the coordination of activities within such a venture insulates the participating physicians from outside competition sufficiently that they are able to raise prices or reduce services.

For example, in some cases, an exercise of market power maybe possible if enough of the market is aggregated through the joint venture so that there is insufficient remaining market demand to sustain viable competitors. That clearly is not the case here. The evidence is at best ambiguous as to whether these ventures, which have been in operation since 1984, have had any anticompetitive effect.

Physician-owned ancillary joint ventures have a potential to accomplish significant cost savings that can be passed on to consumers in the form of lower prices and higher quality of care. Physicians frequently may be in the best position to recognize a potential demand for an ancillary medical service in their community, to back up this perception with their own capital, and to operate and monitor the venture's performance. Clearly physicians and hospitals could have more control over the quality of a service by owning a supplier of that service than by merely writing a prescription. Evidence that physician investors frequently are passive with respect to the opera-

[6] The potential problem of inappropriate referrals made for financial gain is not limited to instances in which physicians have financial interests in facilities, equipment, or service providers that are physically or legally separate from their primary practices. The potential problem is present whenever a physician performs both diagnosis and treatment. Patients and third-party payers have limited information about whether treatments are medically necessary, and thus physicians frequently have some degree of discretion to recommend treatments that are not necessary.

tion of these companies does not dismiss the potential of these ventures to accomplish substantial efficiencies.

Of course, the respondents' large scale and market share may not be necessary to achieve the potential efficiencies of such arrangements. But even incontrovertible evidence that these firms did not gain additional efficiency by growing to their current size would be relevant only after a determination that the firms had acted anticompetitively.

The orders continue to allow self-referral, and only limit the market share of the respondent pulmonologists associated with an entity providing home oxygen. Thus, the remedy does not address any harm that might result from the mere fact of self-referral.[7] The order also would allow efficiencies from self-referral to occur, but it is far from clear that the restructuring of the two ventures required under the orders would preserve all of the efficiencies that they may have been able to accomplish. Thus it may be the case that the orders reduce efficiency, do not reduce market power, and also fail to address any real harm to consumers that might result from self-referral.

The overriding reason to cast my vote against the acceptance of these consents is the precedential effects of discouraging physicians and hospitals from forming ancillary ventures, particularly in circumstances in which it may be important to achieve a high market share in order to gain efficiencies, or even to be able to introduce a service that benefits consumers in the area. Thus, enforcement actions should be limited to conduct for which anticompetitive harm is demonstrable or highly likely to occur. Because that burden has not been met, I respectfully dissent from the Commission's actions in these matters.

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[7] As I noted above, self-referral by itself is not actionable under the antitrust laws. Thus it is appropriate that any such perceived harm is not addressed in an order resolving the allegations in these complaints.

IN THE MATTER OF

HOMECARE OXYGEN & MEDICAL EQUIPMENT COMPANY, ET AL.

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

Docket C-3532. Complaint, Sept. 14, 1994--Decision, Sept. 14, 1994

This consent order prohibits, among other things, a California supplier of oxygen systems prescribed for home use from acquiring or granting, for ten years, an ownership interest in a firm that sells or leases oxygen systems in the relevant geographic market, if more than 25 percent of the pulmonologists in that market would be affiliated with the firm, and requires the respondents to notify the Commission if they acquire more than one percent of a firm that sells or leases oxygen systems anywhere.

Appearances

For the Commission: *Linda K. Badger, Kerry O'Brien* and *Jeffrey A. Klurfeld.*

For the respondents: *Robert J. Enders, Weissburg & Aronson, Inc.*, Los Angeles, CA.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Homecare Oxygen & Medical Equipment Company, a limited partnership, Michael L. Cohen, M.D., Harry J. MacDannald, M.D., Gerald R. Del Rio, M.D., Ravinder N. Gupta, M.D., Gregory D. Anderson, M.D., David S. Safianoff, M.D., Richard S. Kops, M.D., Richard A. Bordow, M.D., Herman R. Bruch, M.D., Frederick J. Nachtwey, M.D., and Jorge A. Salazar-Suero, M.D., individually and as partners, trading and doing business as Homecare Oxygen & Medical Equipment Company, hereinafter sometimes referred to as the respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

DEFINITIONS

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

A. "*Durable medical equipment*" or "*DME*" means medical equipment sold, rented, or leased to customers for home use. DME includes, but is not limited to, ambulatory aids, wheelchairs, walkers, hospital beds, commodes and respiratory therapy equipment, such as oxygen systems. "DME" encompasses all aspects of supplying DME, including, but not limited to, delivering and servicing the equipment, and rendering accompanying services to customers.

B. "*Oxygen systems*" means DME used to service individuals who are unable to obtain adequate oxygen through independent breathing. Oxygen systems include, but are not limited to, oxygen gas contained in tanks; liquid oxygen stored in reservoirs and smaller. portable containers; and electrically-operated oxygen concentrators. "Oxygen systems" encompasses all aspects of supplying these oxygen systems, including, but not limited to, delivering and servicing the equipment, supplying oxygen content, and rendering accompanying services to customers.

C. "*Discharge planner*" means any nurse, social worker, respiratory therapist, or other agent of a hospital or health care provider who arranges for the provision of DME or consults with or makes recommendations to patients being discharged from hospitals concerning potential suppliers of DME.

D. "*Hospital*" means a health facility, other than a federally-owned facility, having a duly organized governing body with overall administrative and professional responsibility and an organized professional staff that provides 24-hour inpatient care, and whose primary function is to provide inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities. "Hospital" includes any affiliate, subsidiary, or partnership in which the hospital holds a ten (10) percent or greater interest.

E. "*Pulmonologist*" means a medical professional who specializes in the diagnosis and treatment of pulmonary disease, regardless of whether the medical professional has been certified as a specialist in pulmonary disease. "Pulmonologist" does not include medical professionals who specialize in the diagnosis and treatment of

patients who would not use the type of oxygen systems defined herein, such as patients suffering from allergies and pediatric patients requiring oxygen systems specially designed for children.

F. "*Practicing*" means having staff privileges, including, but not limited to, active or courtesy staff privileges, at any hospital.

RESPONDENTS

PAR. 2. Respondent Homecare Oxygen & Medical Equipment Company (hereinafter "Homecare") is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of California. It has its principal place of business at 4041 Pike Lane, Suite C, Concord, California.

Respondent Michael L. Cohen, M.D., is an individual who has been, and is now, a general partner of Homecare. As such, he formulates, or participates in the formulation of, directs and controls the acts and practices of Homecare, including the acts and practices set forth in this complaint. His place of business is located at 130 La Casa Via, Building 2, Suite 208, Walnut Creek, California.

Respondent Harry J. MacDannald, M.D., is an individual who has been, and is now, a general partner of Homecare. As such, he formulates, or participates in the formulation of, directs and controls the acts and practices of Homecare, including the acts and practices set forth in this complaint. His place of business is located at 130 La Casa Via, Building 2, Suite 208, Walnut Creek, California.

Respondent Gerald R. Del Rio, M.D., is an individual who has been, and is now, a limited partner in Homecare. His place of business is located at 2220 Gladstone, No. 3, Pittsburg, California.

Respondent Ravinder N. Gupta, M.D., is an individual who has been, and is now, a limited partner in Homecare. His place of business is located at 3741 Sunset Lane, Antioch, California.

Respondent Gregory D. Anderson, M.D., is an individual who has been, and is now, a limited partner in Homecare. His place of business is located at 130 La Casa Via, Building 2, Suite 208, Walnut Creek, California.

Respondent David S. Safianoff, M.D., is an individual who has been, and is now, a limited partner in Homecare. His place of business is located at 2222 East Street, Suite 300, Concord, California.

Respondent Richard S. Kops, M.D., is an individual who has been, and is now, a limited partner in Homecare. His place of business is located at 2222 East Street, Suite 300, Concord, California.

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Respondent Frederick J. Nachtwey, M.D. is an individual who has been, and is now, a limited partner in Homecare. His place of business is located at 2000 Vale Road, San Pablo, California.

Respondent Jorge A. Salazar-Suero, M.D., is an individual who has been, and is now, a limited partner in Homecare. His place of business is located at 2211 East Street, Concord, California.

PAR. 3. The relevant product market is the market for the sale, rental, or lease of oxygen systems.

PAR. 4. The relevant geographic market is Contra Costa County, California, including the southeast portion of Alameda County referred to as the "Tri-Valley" area. The Tri-Valley area includes the cities of Livermore, Dublin and Pleasanton.

PAR. 5. Since January 1, 1984, Homecare has been engaged in the purchasing, offering for sale, rental or lease of DME, including oxygen systems and related products, to the public in the relevant geographic market.

PAR. 6. The respondents, Michael L. Cohen, M.D., Harry J. MacDannald, M.D., Gerald R. Del Rio M.D., Ravinder N. Gupta, M.D., Gregory D. Anderson, M.D., David S. Safianoff, M.D., Richard S. Kops, M.D., Richard A. Bordow, M.D., Herman R. Bruch, M.D., Frederick J. Nachtwey, M.D., and Jorge A. Salazar-Suero, M.D., (collectively the "pulmonologist respondents") are now, and have been at all times relevant to this complaint, pulmonologists practicing their profession within the relevant geographic market.

PAR. 7. The pulmonologist respondents hold staff positions or have staff privileges at one or more of the following hospitals located in the relevant geographic market: Mount Diablo Medical Center, located in Concord, California; John Muir Medical Center, located in Walnut Creek, California; Los Medanos Community Hospital, located in Pittsburg, California; Delta Memorial Hospital, located in Antioch, California; Brookside Hospital, located in San Pablo,

California; Merrithew Memorial, located in Martinez, California; and Doctors' Hospital of Pinole, located in Pinole, California.

JURISDICTION

PAR. 8. The acts and practices of respondents alleged in this complaint are and have been in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

THE INDUSTRY

PAR. 9. Patients hospitalized with certain forms of lung, heart, and other disease are unable to obtain sufficient oxygen from their normal breathing. Upon discharge from a hospital, physicians may prescribe oxygen for these patients for home use. Because oxygen is considered a drug under Food and Drug Administration regulations, oxygen for medical use can be provided to patients only pursuant to a physician's prescription.

PAR. 10. Oxygen systems vary in many respects, including, but not limited to: the type of system, the level and quality of service accompanying the equipment, cost, and price. Patients requiring oxygen systems usually possess incomplete knowledge about oxygen systems or the companies that provide oxygen systems. As a result, patients seldom have a preference for a particular oxygen system supplier and rely on hospitals, discharge planners, health care professionals, and other individuals knowledgeable about DME to recommend a supplier or to select a supplier on their behalves.

PAR. 11. In general, patients requiring oxygen systems receive the services of pulmonologists or of hospital respiratory therapy departments under the supervision of pulmonologists. As a result, pulmonologists have the ability to influence the choice of which oxygen system and which supplier will be used by these patients through a variety of means.

ACTS OR PRACTICES

PAR. 12. In 1984, Homecare was formed to engage in the sale, rental or lease of oxygen systems to patients.

PAR. 13. Partnership interests in Homecare were offered primarily to hospitals and pulmonologists.

PAR. 14. A majority of the pulmonologists practicing in the relevant geographic market joined as partners in Homecare. In all, approximately sixty (60) percent of the pulmonologists in the relevant geographic market were investors in Homecare or practiced in groups consisting of one or more of the pulmonologist respondents. Respondents' market position was further enhanced because several of the pulmonologist respondents served as medical directors of respiratory therapy departments at hospitals in the relevant geographic market. The pulmonologist respondents, therefore, collectively possessed market power in the market for the provision of pulmonary services.

EFFECTS

PAR. 15. Through the aggregation of competitors in the market for the provision of pulmonary services alleged in paragraphs twelve through fourteen, Homecare has obtained market power in the relevant market.

PAR. 16. As a consequence of the conduct alleged in paragraphs twelve through fourteen, a barrier to entry has been created in the relevant market.

PAR. 17. As a consequence of the conduct alleged in paragraphs twelve through fourteen, free and open competition has been inhibited in the relevant market.

VIOLATIONS

PAR. 18. Homecare has acquired and maintained market power in the relevant market through the acts and practices set out and alleged in paragraphs twelve through fourteen. These alleged acts and practices of the respondents constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The acts or practices, or the effects thereof, are likely to continue or recur in the absence of appropriate relief.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption

hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the San Francisco 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 of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, 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 Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having received a comment from the respondents describing how the respondents divested assets in conformance with the terms of the proposed order and had received therefore a minority stock interest of less than one (1) percent of the outstanding voting stock in a publicly held company, and the Commission having determined that retention of the divestiture provisions would nonetheless require respondents to divest said stock interest, and also having determined that such divestiture of said stock interest is not necessary to effectuate the remedy in this matter and that the divestiture provisions therefore can be deleted, 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 Homecare Oxygen & Medical Equipment Company (hereinafter "Homecare") is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of California. It has its principal place of business at 4041 Pike Lane, Suite C, Concord, California.

Respondent Michael L. Cohen, M.D., is an individual who has been, and is now, a general partner of Homecare. His place of

business is located at 130 La Casa Via, Building 2, Suite 208, Walnut Creek, California.

Respondent Harry J. MacDannald, M.D., is an individual who has been, and is now, a general partner of Homecare. His place of business is located at 130 La Casa Via, Building 2, Suite 208, Walnut Creek, California.

Respondent Gerald R. Del Rio, M.D., is an individual who has been, and is now, a limited partner in Homecare. His place of business is located at 2220 Gladstone, No. 3, Pittsburg, California.

Respondent Ravinder N. Gupta, M.D., is an individual who has been, and is now, a limited partner in Homecare. His place of business is located at 3741 Sunset Lane, Antioch, California.

Respondent Gregory D. Anderson, M.D., is an individual who has been, and is now, a limited partner in Homecare. His place of business is located at 130 La Casa Via, Building 2, Suite 208, Walnut Creek, California.

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Respondent Frederick J. Nachtwey, M.D., is an individual who has been, and is now, a limited partner in Homecare. His place of business is located at 2000 Vale Road, San Pablo, California.

Respondent Jorge A. Salazar-Suero, M.D., is an individual who has been, and is now, a limited partner in Homecare. His place of business is located at 2211 East Street, Concord, California.

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.

ORDER

I.

As used in this order, the following definitions shall apply:

A. "*Durable medical equipment*" or "*DME*" means medical equipment sold, rented, or leased to customers for home use. DME includes, but is not limited to, ambulatory aids, wheelchairs, walkers, hospital beds, commodes and respiratory therapy equipment, such as oxygen systems. "DME" encompasses all aspects of supplying DME, including, but not limited to, delivering and servicing the equipment, and rendering accompanying services to customers.

B. "*Oxygen systems*" means DME used to service individuals who are unable to obtain adequate oxygen through independent breathing. Oxygen systems include, but are not limited to, oxygen gas contained in tanks; liquid oxygen stored in reservoirs and smaller, portable containers; and electrically-operated oxygen concentrators. "Oxygen systems" encompasses all aspects of supplying these oxygen systems, including, but not limited to, delivering and servicing the equipment, supplying oxygen content, and rendering accompanying services to customers.

C. "*Hospital*" means a health facility, other than a federally-owned facility, having a duly organized governing body with overall administrative and professional responsibility and an organized professional staff that provides 24-hour inpatient care, and whose primary function is to provide inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities. "Hospital" includes any affiliate, subsidiary, or partnership in which the hospital holds a ten (10) percent or greater interest.

D. "*Medical professional*" means any individual who is licensed by the State of California as a Medical Doctor.

E. "*Pulmonologist*" means a medical professional who specializes in the diagnosis and treatment of pulmonary disease, regardless of whether the medical professional has been certified as a specialist in pulmonary disease. "Pulmonologist" does not include medical professionals who specialize in the diagnosis and treatment of patients who would not use the type of oxygen systems defined here-

in, such as patients suffering from allergies and pediatric patients requiring oxygen systems specially designed for children.

F. "*Practicing*" means having staff privileges, including, but not limited to, active or courtesy staff privileges, at any hospital.

G. "*Relative*" means an individual who is related to the individual, as father, mother, son, daughter, brother, sister, uncle, aunt, great aunt, great uncle, first cousin, nephew, niece, husband, wife, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half-brother, half-sister, or who is the grandfather or grandmother of the spouse of the individual.

H. "*Own*" or "*Ownership interest*" means any and all stock, share, capital, equity or other interest, asset, property, license, lease, or other right or privilege, tangible or intangible, whether obtained or held, directly or indirectly, through any relative, employee or agent, or through any corporate or other device.

I. "*Affiliated with*" means having an ownership interest in the entity or being a member of the same group practice as an investor in the entity.

J. "*Relevant geographic market*" means Contra Costa County, California, including the south-east portion of Alameda County referred to as the "Tri-Valley" area. The Tri-Valley area includes the cities of Livermore, Dublin and Pleasanton.

K. "*Service area*" means the geographic area in which an entity engages in the sale, rental, or lease of oxygen systems.

L. "*Intended service area*" means the service area that the entity plans to have the capacity to service during its first several years of operation.

II.

It is ordered, That, for a period of ten (10) years from the date of this order, no respondent shall grant or acquire, with or without valuable consideration, an ownership interest in any entity engaged in the sale, rental, or lease of oxygen systems in the relevant geographic market if, after such grant or acquisition, more than twenty-five (25) percent of the pulmonologists practicing in the relevant geographic market would be affiliated with the entity.

III.

It is further ordered, That for a period of ten (10) years from the date this order becomes final, the individual respondents shall notify the Commission within thirty (30) days after acquiring, either directly or indirectly, or through any corporate or other device, any ownership interest in an entity engaged in the sale, rental, or lease of oxygen systems. Such notification shall include:

(a) An identification of all owners of the entity;
(b) An identification of any pulmonologist practicing in the entity's service area or intended service area who has an ownership interest in the entity;
(c) A list of all pulmonologists practicing in the entity's service area or intended service area;
(d) A description of the products or services offered, or to be offered by the entity;
(e) A copy of the entity's offering memorandum and/or prospectus; and
(f) An identification of the entity's location, including the location of any and all of the entity's parent organizations, and subsidiaries.

Respondents shall comply with requests by the Commission staff for additional information within fifteen (15) days of service of such requests.

Provided, however, that nothing in this order shall require notice for acquisitions of voting securities of any publicly traded company involved in the sale, rental, or lease of oxygen systems unless, as a result of such acquisition, the respondent would hold more than one (1) percent of such company.

IV.

It is further ordered, That the respondent Homecare shall:

A. Within thirty (30) days from the date this order becomes final, distribute a copy of the complaint and order to each managerial employee;

B. For a period of five (5) years from the date this order becomes final, distribute a copy of the complaint and order to each new managerial employee within thirty (30) days of the entrance of such employee to employment;

C. For a period of five (5) years from the date this order becomes final, distribute a copy of the complaint and order to each new partner within thirty (30) days of the entrance of such partner to the partnership.

V.

It is further ordered, That:

A. Within sixty (60) days from the date this order becomes final, each respondent shall file with the Commission a verified written report of compliance with this order;

B. One year from the date this order becomes final and annually thereafter for nine (9) years, each respondent shall file with the Commission a verified written report of compliance with this order.

VI.

It is further ordered, That respondent Homecare, upon written request of the staff of the Federal Trade Commission, made to Homecare, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, shall permit duly authorized representatives of the Commission:

A. Reasonable access during Homecare's office hours, in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, reports, and other records and documents in Homecare's possession or control that relate to any matter contained in this order; and

B. An opportunity, subject to Homecare's reasonable convenience, to interview general partners or employees of Homecare, who may have counsel present, regarding such matters.

VII.

It is further ordered, That respondent Homecare notify the Commission at least thirty (30) days prior to any consummation of an organizational change, such as dissolution, assignment or sale resulting in the emergence of a successor organization, or any other change in the organization that may affect compliance with the obligations arising out of the order.

Commissioner Azcuenaga and Commissioner Starek dissenting.[1]

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

Today the Commission issues three consent orders minus the divestiture requirements that were in the orders as published for public comment. By way of explanation, the Commission states that the respondents, by letter, assert that they "divested assets in conformance with the terms of the proposed order[s]" and that the Commission has determined that retaining the divestiture requirement "is not necessary to effectuate the remedy" in these matters.[1] In fact, the respondents have not divested "in conformance" with the proposed orders, and the sale that the respondents made does not accomplish the remedy that the Commission sought or otherwise cure the alleged competitive problem. The revised orders are inconsistent with the complaints on which they are based, they are inconsistent with the proposed orders that were published for comment, and, finally, they are internally inconsistent. Although I voted for the proposed orders that were published for comment,[2] I do not join today's decision.

The theory of violation in each of the three Home Oxygen cases as alleged in the complaints is that ownership of a home oxygen supplier by the majority of pulmonologists in a particular market enables the home oxygen supplier to create barriers to entry (*i.e.*, through patient referrals by the owner-pulmonologists and the resulting inability of another oxygen supplier to obtain referrals from

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[1] Prior to leaving the Commission, former Commissioner Owen and former Commissioner Yao registered their votes in the affirmative for the Complaint and the Decision and Order in this matter.

[1] Decision and Order in each matter at 2.

[2] A copy of my concurring statement of November 1, 1993, is attached and incorporated by reference. The concerns I expressed in that statement continue.

pulmonologists) and to inhibit competition in the home oxygen market.[3] To remedy the alleged violations, the orders that were accepted for public comment required divestitures to reduce the number of pulmonologists owning interests in a single home oxygen company "such that no greater than 25% of the pulmonologists practicing in the relevant geographic market are affiliated with" any one home oxygen company.

During the public comment period, counsel for the respondent-pulmonologists informed the Commission that the doctors had sold their home oxygen companies to a large, publicly-held, medical supply company (which I will call Newco), in exchange for shares in that company.[4] The pulmonologists in effect traded their interests in their local home oxygen partnerships for interests in a large corporation. The Commission today decides that the sale to Newco obviates the need for the divestitures that were required under the orders. The argument, as I understand it, is that the doctors hold a decidedly minor percentage of Newco (less than 1%) and that the small size of their ownership share somehow cures the competitive concerns described in the complaints.[5] I disagree.

The theory of violation in these cases does not turn on control by the physicians of the home oxygen suppliers or on the percentage of each home oxygen supply company owned by the doctors. Instead, the concern was the aggregation in a single oxygen supply company of ownership interests of a majority of pulmonologists in the relevant geographic market. The required divestiture was to reduce the number of pulmonologists having an ownership interest in any one home oxygen supplier. The sale of the home oxygen companies to Newco is unresponsive to the concern underlying the complaints, because the ownership interests of some 60% or more of the pulmonologists in the market still are aggregated in a single company.[6]

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[3] Paragraphs 12-17 of the complaints.

[4] Letter from David T. Alexander, Esq., to FTC, Jan. 18, 1994 (counsel for Home Oxygen & Medical Equipment Co. and individual doctors); letter from Robert J. Enders, Esq., to FTC, Jan. 14, 1994 (counsel for Homecare Oxygen & Medical Equipment Co. and individual doctors).

[5] *See* letter from Robert J. Enders, Esq., to the FTC, Jan. 14, 1994, at 3. According to Mr. Enders, the sale of the home oxygen company to "a publicly traded company should alleviate concerns of the Commission and its staff about pulmonologist control, through ownership, in entities engaged in the sale, rental or lease of oxygen systems."

[6] Before Newco, a majority of pulmonologists in each of two adjacent markets owned interests in two different home oxygen supply companies. Now, a majority of pulmonologists in the two adjacent

The individual doctors may have reduced incentives to refer patients to Newco, if the financial rewards of stock ownership are less than those of partnership interests.[7] The relative incentives might be important to a doctor who held both Newco shares and a home oxygen partnership, but, as I understand it, the doctors' entire partnership interests have been converted to Newco shares and the home oxygen partnerships no longer exist as separate entities. A doctor who owns an interest in Newco probably will have greater incentives to refer patients to Newco than to a company in which he or she does not own an interest.

The resolution accepted by the Commission today -- sale by the respondents of their companies to Newco in exchange for Newco shares, in lieu of divestiture to reduce the number of doctors affiliated by ownership with a single oxygen supply company -- is inconsistent with the theory of violation alleged in the complaints, because the sale to Newco does not reduce the number of doctors affiliated by ownership with a single oxygen supply company. For the same reason, the resolution accepted by the Commission is inconsistent with the remedial provisions of the orders that were published for comment and does not remedy the competitive problem.

The Commission's decision also is internally inconsistent, because each of the orders accepted today expressly bars the respondent-pulmonologists from granting or acquiring an interest in any home oxygen supplier -- if that would result in an affiliation with the supplier of more than 25% of pulmonologists in the geographic market[8] -- at the same time that it accepts the sale to Newco, which is precisely the same conduct. As a result, in each of the orders accepted today, the Commission both sanctions the arrangement resulting from the sale to Newco (*i.e.*, a home oxygen company in which more than 25% of pulmonologists have an ownership interest)

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markets combined own interests in one home oxygen supply company, Newco. With its acquisition of the home oxygen companies, Newco has acquired the market power that the respondents allegedly had aggregated.

[7] The home oxygen companies were partnerships, and Newco is a publicly held corporation. We have no information about actual gains to the doctors from either form of ownership on which to base a comparative analysis.

[8] Paragraph II of each of the orders bars the respondents from granting or acquiring "an ownership interest in any entity engaged in the sale, rental, or lease of oxygen systems . . . if . . . more than twenty-five percent of the pulmonologists practicing in the relevant geographic market would be affiliated with the entity." Thus, paragraph II of the orders would bar the very transfer that the Commission today sanctions.

and prohibits any action to create the same arrangement in the future. The public will need the wisdom of Solomon to discern what these orders portend for future enforcement.

I dissent.

[The following statement was issued in November 1993, when the orders as then proposed were published for public comment.]

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

Although I have joined in the Commission's decision to accept these consent agreements for public comment, I have reservations about the usefulness of the orders to which the respondents have consented and about the advisability, on the basis of the information we have, of charting the new territory that these cases represent. Here, I believe, sufficient evidence exists to satisfy the statutory standard of reason to believe the law has been violated but precious little more. As I have said before, the truncated record on which consent agreements ordinarily are based leaves something to be desired as a basis for establishing new Commission policy.

Antitrust analysis, as we know it today, requires a search for understanding of markets, an understanding that, experience shows, may be founded on elements that lie well below the surface of what even those in a particular industry may readily comprehend. *See, e.g., Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979). It is easy to underestimate the difficulty of showing justifications that are cognizable under the antitrust laws and sufficient to defend against the application of novel antitrust theories. The Commission may not be as well positioned as the parties to identify and understand justifications for the challenged conduct. Yet the parties may be ill-equipped to undertake the esoteric analytic endeavor that modern antitrust law may demand. When neither the parties nor the Commission fully comprehends the justifications, "ignorance leads straight to condemnation," *Chicago Professional Sports Limited Partnership v. NBA*, 961 F.2d 667, 676 (7th Cir. 1992), and condemnation without understanding may lead to consumer harm.

It is useful, indeed, advisable for the Commission to continue to evaluate new factual situations and to develop new theories under Section 5 of the Federal Trade Commission Act to remedy anticompetitive effects. But it is well, in doing so, to keep in mind the

admonition of the court in *Chicago Professional Sports Limited Partnership v. NBA*, 961 F.2d at 676, that "[e]xplanations of problematic conduct take time to develop and more time to test. . . . Understanding novel practices may require years of study and debate."

I have voted to publish the consent agreements for comment but remain mindful of these concerns.

STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

Nearly eleven months ago, over my dissent, the Commission accepted consent agreements with three groups of pulmonologists practicing in two counties in the eastern San Francisco Bay Area. Further analysis of these matters in the intervening months has not provided me with reason to believe that respondents' conduct violated Section 5 of the Federal Trade Commission Act. Therefore, I cannot agree with the Commission's decision to issue the complaints and the modified final versions of the consent orders.

I have continued to evaluate these matters with great care and an open mind since the Commission accepted the consent agreements. Nevertheless, I remain unpersuaded of the theory on which these cases rely. That theory -- stated with breezy imprecision in paragraphs 12 through 18 of the complaints -- appears to be that:

- A majority (in fact, approximately 60 percent) of the pulmonologists in each relevant geographic market[1] were investors in Home Oxygen and Homecare Oxygen;
- The "market position" of each respondent group was "further enhanced" because several Home and Homecare pulmonologists served as medical directors of the respiratory therapy departments at some hospitals in the relevant markets;
- The "aggregation of competitors" embodied by these pulmonologist-owned firms gave Home and Homecare some sort of

[1] The complaints define the geographic markets as most of Alameda County for Home Oxygen, and Contra Costa County and a portion of Alameda County for Homecare Oxygen.

power[2] in an allegedly relevant market for "the sale, rental, or lease of oxygen systems" in Alameda and Contra Costa Counties;
- This "conduct" -- by which I presume the Commission means the "aggregation of competitors" into Home and Homecare and the "further enhance[ment]" of "market position" stemming from departmental directorships -- resulted in the creation of barriers to entry into the oxygen systems market and the inhibition of "free and open competition" in that market; and
- The alleged "acts and practices" allowed Home and Homecare to acquire and maintain "market power" and constitute unfair methods of competition, in violation of Section 5.

When this chain of assertions is distilled, the essential claim -- the one on which liability under Section 5 is predicated -- is that ownership of an oxygen systems company by a majority of a county's pulmonologists sufficed to confer market power in the oxygen systems business. Yet as I noted in my earlier dissent in this case, "[m]arket power is not necessarily created when a majority share of a relevant market is attained. Market power is defined as 'the ability profitably to maintain prices above competitive levels for a significant period of time.'"[3] One of my problems with the case is that neither the information gathered in this investigation nor the proposed complaints themselves persuasively explain how a majority share of pulmonology practice in Alameda and Contra Costa Counties, as "enhanced" by certain owners' leadership roles in some hospitals' respiratory therapy departments, gave rise to market power in oxygen systems.

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[2] Inconsistencies between the Home and Homecare complaints give rise to ambiguities about this claim. Whereas the Homecare complaint (paragraph 15) alleges that the "aggregation of competitors in the market for the provision of pulmonary services" gave Homecare "market power" in the market for oxygen systems, the complaint against Home (paragraph 15) and the separate complaint against certain Home pulmonologists (paragraph 15) merely assert that this "aggregation of competitors" gave Home "a market share of approximately sixty (60) percent" in that market only in paragraph 18 do the latter two complaints aver that Home somehow "acquired and maintained market power in the relevant market." (The Homecare complaint contains a similar paragraph.)

[3] Statement of Commissioner Roscoe B. Starek, III ("Statement") at 2 (quoting U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, Section 0.1, 4 Trade Reg. Rep. (CCH) paragraph 13,104 (1992)). That Statement, which is attached hereto, also noted the Commission's formulation of the test for market power in a previous Section 5 case: "The test for market power depends on all the relevant characteristics of a market: the strength and capacity of current competitors; the potential for entry; the historic intensity of competition; and the impact of the legal or natural environment, to name just a few." *General Foods Corp.*, 103 FTC 204, 345 (1984).

The complaints, treatment of conditions of entry into oxygen systems illustrates (but by no means exhausts) the infirmities of the majority's approach. Rather than set forth a credible theory of entry barriers, the complaints charge -- in tautological fashion -- that "a barrier to entry has been created" purely and simply "[a]s a consequence of" the ownership structure of Home and Homecare. This says nothing about the difficulties facing prospective entrants or about the success rates of firms that operate in the markets independently of the Home and Homecare organizations, and thus leaves unanswered the question whether Home or Homecare possesses market power.[4]

I also note that the consent orders do nothing to deal with the actual conduct that must constitute the other key component (in addition to "market power") of the majority's theory in this case. I allude, of course, to "self-referral," a commonly encountered phenomenon in the medical field. Self-referral is a complex subject that requires considerable further analysis, and thus I am relieved that the orders do not prohibit self-referral but simply limit the market share of the respondent pulmonologists associated with an entity providing home oxygen. Although physician ownership of ancillary services may create an incentive to refer for services that are not medically necessary, I noted in my previous dissent that "it is critical to distinguish between the potential for anticompetitive harm and the potential for inappropriate or excessive referrals resulting from physician ownership. Regardless of market share or market power, physicians sometimes may make inappropriate treatment referrals to facilities in which they have a financial interest. While real consumer injury can result from such 'self-referral,' this behavior is not by itself actionable under the antitrust laws . . . . [W]e should be careful to distinguish anticompetitive behavior from other forms of imperfect

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[4] I noted in my previous dissent that "an exercise of market power [on the part of a joint venture such as Home or Homecare] is possible only when the coordination of activities within such a venture insulates the participating physicians from outside competition sufficiently that they are able to raise prices or reduce services. [paragraph] For example, in some cases, an exercise of market power may be possible if enough of the market is aggregated through the joint venture so that there is insufficient remaining market demand to sustain viable competitors. That clearly is not the case here." Statement at 4. Indeed, my earlier dissent noted the substantial number of competing oxygen system firms outside the Home and Homecare organizations in Alameda and Contra Costa Counties and the absence of evidence that any of those competitors suffer from competitive weaknesses. *Id.* at 3.

market performance."[5] In short, any injury involving self-referral that does not also flow from an exercise of market power is not "antitrust injury."[6]

I would of course support a challenge to an ancillary services joint venture if the facts unearthed in the investigation demonstrated that the venture was likely to have the requisite anticompetitive effects. In the matters before us, however, the complaints do not set forth a coherent theory of anticompetitive effects. I therefore respectfully dissent.[7]

ATTACHMENT

STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I respectfully dissent from the Commission's decision to accept for public comment the consent orders in these matters. The challenged conduct does appear to have the potential to be anticompetitive. Under the rule of reason, however, the evidence presented does not indicate that the conduct of the respondents was anticompetitive or that it is likely to have been anticompetitive.[1] Therefore, I do not have reason to believe that the respondents have violated Section 5 of the FTC Act, as the complaints allege.

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[5] *Id.* at 3-4 (footnote omitted). My dissent continued: "If patients seldom question their physicians' referrals, physicians could profit from directing patients to home oxygen providers in which they have an ownership interest. But any such 'vertical control' that physicians have does not necessarily result in any horizontal market power of the ancillary ventures in which they have an interest." *Id.* at 4.

[6] *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 109-10 (1986); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

[7] Notwithstanding my conclusion that no orders should be issued, I agree with the majority inasmuch as it decided to delete the divestiture requirements from the final orders, for the reasons set forth in the third paragraph of the preamble to each Decision and Order.

[1] The challenged conduct must be analyzed under the rule of reason. The arrangements at issue cannot be characterized as naked restraints of trade subject to summary condemnation, and thus the rule of reason applies. *See NCAA v. Board of Regents*, 468, U.S. 85, 103 (1984). The joint DOJ/FTC Health Care Enforcement Guidelines indicate that the antitrust agencies will apply a rule of reason to conduct falling outside of well defined "safety zones." Statements of Antitrust Enforcement Policy in the Health Care Area, Department of Justice and Federal Trade Commission, September 15, 1993, at 10-11, 36. The six policy statements of these Guidelines do not explicitly cover the type of conduct at issue here, *i.e.*, physician-owned ancillary joint ventures. In any case, the arrangements here most likely would fall outside of any safety zone similar to those defined in the Guidelines, because they appear to have market shares of about 60% in their respective markets.

The complaints name two limited partnerships and 28 pulmonologist partners in these ventures. The complaints allege that the respondents have "acquired and maintained market power" (paragraph 18) as a consequence of the fact that a "majority" of the pulmonologists in each of the two areas in which the two partnerships operate are partners in the ventures (paragraph 14). I am concerned that this might be read to imply that the Commission will take enforcement actions against physician-owned ancillary joint ventures simply because participating physicians constitute a majority of those practicing in the relevant market, without regard to the ventures' effects or likely effects on the market.

The complaints do not challenge, and the consent agreements do not prohibit, "self-referral" of patients to entities owned by the respondent physicians.[2] However, the Analysis of Proposed Consent Order to Aid Public Comment states that the respondents were able to "acquire and maintain market power" because "pulmonologists have the ability to influence the choice of oxygen suppliers to service patients needing oxygen at home." Because pulmonologists make referrals to providers of home oxygen services, they do have the ability to influence their patients' choice of oxygen suppliers. But this "influence" does not necessarily equate to or result in any market power.

Market power is the focus of the Commission's analysis of physician-owned ancillary joint ventures. In fact, the very violation alleged in the complaints in these matters is that the ventures "acquired and maintained market power." Market power is not necessarily created when a majority share of a relevant market is attained. Market power is defined as "the ability profitably to maintain prices above competitive levels for a significant period of time."[3] Within the context of a case under Section 5 of the FTC Act, the Commission has argued that:

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[2] The President recently signed legislation prohibiting physicians from self-referral of Medicare patients for several categories of services, including those services provided by the respondents. Omnibus Budget Reconciliation Act of 1993, Pub. L. No 103-66, ch. 2, Section 5074. Because the vast majority of home oxygen services apparently are sold to Medicare patients, it may be the case that virtually no home oxygen provider would be willing to maintain physician ownership that would cut itself off from the vast majority of market demand. If that is the case, Commission action on this matter is moot. However, I am not certain that this is true, and more importantly, this case might be viewed as precedent for Commission actions outside of the services covered by the recent legislation.

[3] U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (1992), reprinted in 4 Trade Reg. Rep. (CCH) paragraph 13104, Section 0.1 ("Sellers with market power also may lessen competition on dimensions other than price, such as product quality, service, or innovation.")

The test for market power depends on all of the relevant characteristics of a market: the strength and capacity of current competitors; the potential for entry; the historic intensity of competition; and the impact of the legal or natural environment, to name just a few.[4]

Here, the two limited partnerships each have approximately 60% market shares in the respective counties in which they operate. Assuming, *arguendo*, that the alleged product and geographic markets are relevant antitrust markets, these market shares alone do not justify an inference of market power. In addition to the respondents, the evidence indicates that there are nine competing sellers of home oxygen in Alameda County, and eight competing sellers in Contra Costa County. Some of these firms have market shares of about 10%.

If these other firms suffer from substantial competitive weaknesses that prevent them from offering the same quality of services or the same low prices as the respondents, the respondents might be able to exercise market power through their joint ventures. I have not seen evidence that any of these competitors have such competitive weaknesses.[5]

Medicare patients, who apparently comprise the vast majority of patients purchasing home oxygen services, might be less price sensitive than third-party payers such as HMOs, and thus might appear to be vulnerable to anticompetitive behavior. Medicare's restrictive reimbursement policies may severely limit suppliers, potential ability to exercise market power. But it is doubtful that these policies eliminate the possibility of an exercise of market power in these markets.

It sometimes has been argued that physician ownership can create an incentive to refer for financial gain for services that are not medically necessary. But it is critical to distinguish between the potential for anticompetitive harm and the potential for inappropriate or excessive referrals resulting from physician ownership. Regardless of market share or market power, physicians sometimes may make inappropriate treatment referrals to facilities in which they have a

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[4] *General Foods Corp.* 103 FTC 204, 345 (1984).

[5] In fact, one major third-party payer in the region purchases home oxygen primarily from one of the respondents' ventures in one county, while in the other county it purchases home oxygen primarily from one of the respondents' competitors. While hardly dispositive on this issue, this suggests that this major customer considers the available services of the respondents, competitors to be of acceptable and comparable quality and price.

financial interest.[6] While real consumer injury can result from such "self-referral," this behavior is not by itself actionable under the antitrust laws. Of course, this does not mean that anticompetitive behavior could not occur in these markets. But we should be careful to distinguish anticompetitive behavior from other forms of imperfect market performance.

If patients seldom question their physicians' referrals, physicians could profit from directing patients to home oxygen providers in which they have an ownership interest. But any such "vertical control" that physicians have does not necessarily result in any horizontal market power of the ancillary ventures in which they have an interest. An ancillary venture can enable the participating physicians to coordinate some of their competitive activities. But an exercise of market power is possible only when the coordination of activities within such a venture insulates the participating physicians from outside competition sufficiently that they are able to raise prices or reduce services.

For example, in some cases, an exercise of market power may be possible if enough of the market is aggregated through the joint venture so that there is insufficient remaining market demand to sustain viable competitors. That clearly is not the case here. The evidence is at best ambiguous as to whether these ventures, which have been in operation since 1984, have had any anticompetitive effect.

Physician-owned ancillary joint ventures have a potential to accomplish significant cost savings that can be passed on to consumers in the form of lower prices and higher quality of care. Physicians frequently may be in the best position to recognize a potential demand for an ancillary medical service in their community, to back up this perception with their own capital, and to operate and monitor the venture's performance. Clearly physicians and hospitals could have more control over the quality of a service by owning a supplier of that service than by merely writing a prescription. Evidence that physician investors frequently are passive with respect to the opera-

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[6] The potential problem of inappropriate referrals made for financial gain is not limited to instances in which physicians have financial interests in facilities, equipment, or service providers that are physically or legally separate from their primary practices. The potential problem is present whenever a physician performs both diagnosis and treatment. Patients and third-party payers have limited information about whether treatments are medically necessary, and thus physicians frequently have some degree of discretion to recommend treatments that are not necessary.

tion of these companies does not dismiss the potential of these ventures to accomplish substantial efficiencies.

Of course, the respondents' large scale and market share may not be necessary to achieve the potential efficiencies of such arrangements. But even incontrovertible evidence that these firms did not gain additional efficiency by growing to their current size would be relevant only after a determination that the firms had acted anticompetitively.

The orders continue to allow self-referral, and only limit the market share of the respondent pulmonologists associated with an entity providing home oxygen. Thus, the remedy does not address any harm that might result from the mere fact of self-referral.[7] The order also would allow efficiencies from self-referral to occur, but it is far from clear that the restructuring of the two ventures required under the orders would preserve all of the efficiencies that they may have been able to accomplish. Thus it may be the case that the orders reduce efficiency, do not reduce market power, and also fail to address any real harm to consumers that might result from self-referral.

The overriding reason to cast my vote against the acceptance of these consents is the precedential effect of discouraging physicians and hospitals from forming ancillary ventures, particularly in circumstances in which it may be important to achieve a high market share in order to gain efficiencies, or even to be able to introduce a service that benefits consumers in the area. Thus, enforcement actions should be limited to conduct for which anticompetitive harm is demonstrable or highly likely to occur. Because that burden has not been met, I respectfully dissent from the Commission's actions in these matters.

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[7] As I noted above, self-referral by itself is not actionable under the antitrust laws. Thus it is appropriate that any such perceived harm is not addressed in an order resolving the allegations in these complaints.