

## IN THE MATTER OF

## NIPPON SHEET GLASS COMPANY, LTD., ET AL.

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

*Docket C-3298. Complaint, July 26, 1990—Decision, July 26, 1990*

This consent order requires, among other things, the float glass manufacturers to repeal the challenged portion of the Float Glass Capacity Agreement. In addition, the consent agreement prohibits respondents from entering into any agreement which has the purpose or effect of restraining competition by either limiting float glass manufacturing capacity in North America or restricting imports to North America.

*Appearances*

For the Commission: *Robert W. Doyle, Jr.* and *James C. Egan, Jr.*

For the respondents: *Robert S. Scholsberg* and *Caswell O. Hobbs, III, Morgan, Lewis & Bockius*, Washington, D.C. and *Bruce D. Sokler, Mintz, Levin, Cohn, Ferris, Glovsky & Popep*, Washington, D.C.

## 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 ("Commission"), having reason to believe that respondent Nippon Sheet Glass Company, Ltd. ("Nippon") and its subsidiary, respondent NSG Holding USA, Inc. ("NSG-USA"), corporations subject to the jurisdiction of the Commission, have pursuant to a Common Stock Purchase Agreement ("Purchase Agreement"), offered to purchase approximately 20% of the stock or voting securities of respondent Libbey-Owens-Ford Co., ("LOF"), a subsidiary of respondent Pilkington plc ("Pilkington") and said Purchase Agreement constitutes a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45; and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

## I. DEFINITIONS

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

a. "*Nippon*" means respondent Nippon Sheet Glass Company, Ltd., as well as its officers, employees, agents, divisions, subsidiaries (including but not limited to NSG-USA), successors, assigns, and the officers, employees, or agents of Nippon's divisions, subsidiaries, successors and assigns.

b. "*NSG-USA*" means respondent NSG Holding USA, Inc., a wholly owned subsidiary of Nippon, as well as its officers, employees, agents, divisions, subsidiaries, successors, assigns, and the officers, employees, or agents of NSG-USA's divisions, subsidiaries, successors and assigns.

c. "*Pilkington*" means respondent Pilkington plc, as well as its officers, employees, agents, divisions, subsidiaries (including but not limited to LOF), successors, assigns, and the officers, employees or agents of Pilkington's divisions, subsidiaries, successors and assigns.

d. "*LOF*" means respondent Libbey-Owens-Ford Co., a wholly owned subsidiary of Pilkington, as well as its officers, employees, agents, divisions, subsidiaries, successors, assigns, and the officers, employees or agents of LOF's divisions, subsidiaries, successors and assigns.

e. "*Capacity Agreement*" means the Float Glass Capacity Agreement which is Exhibit E to the Common Stock Purchase Agreement between and among Respondents, dated May 21, 1989.

f. "*Float glass*" means either clear or tinted flat glass manufactured by floating molten glass over a bed of molten material or materials.

## II. THE PARTIES

2. Respondent Nippon is a corporation organized, existing, and doing business under and by virtue of the laws of Japan with its principal offices at 5-11, Doshomacho 3-chome, Chuo-Ku, Osaka, Japan.

3. Respondent Nippon is, and at all times relevant herein has been, a corporation whose business is affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

4. Respondent NSG-USA, a wholly owned subsidiary of respondent

Nippon, is a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its principal place of business at 1209 Orange Street, Wilmington, Delaware.

5. Respondent NSG-USA is, and at all times relevant herein has been, a corporation whose business is affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

6. Respondent Pilkington is a corporation organized, existing, and doing business under and by virtue of the laws of England with its principal offices at Prescott Road, St. Helens, Merseyside, England WA10 3TT.

7. Respondent Pilkington is, and at all times relevant herein has been, a corporation whose business is affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

8. Respondent LOF, a wholly owned subsidiary of respondent Pilkington, is a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its principal place of business at 811 Madison Avenue, Toledo, Ohio.

9. Respondent LOF is, and at all times relevant herein has been, a corporation whose business is affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

### III. THE AGREEMENTS

10. Pursuant to a Common Stock Purchase Agreement with respondent Pilkington and respondent LOF dated May 21, 1989, respondent Nippon, through respondent NSG-USA, agreed to purchase approximately 20% of respondent LOF's stock or voting securities.

11. The Capacity Agreement, if enforced, would prohibit both respondent Nippon and respondent Pilkington from building or acquiring capacity for the production or fabrication of float or other flat glass except through respondent LOF for a period of five (5) years.

### IV. COMPETITION

12. Respondent Nippon is engaged in the manufacture and sale of float glass. Respondent Pilkington is engaged in the manufacture and sale of float glass. Respondents Nippon and Pilkington are engaged in the sale of float glass in North America.

## V. EFFECTS

13. The purpose and effect of the Capacity Agreement, if enforced, may be to unreasonably restrain competition in the manufacture, sale and fabrication of float glass in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

## VI. VIOLATIONS CHARGED

14. The Capacity Agreement violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and would, if enforced, constitute an unfair method of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof relating to the proposed acquisition of certain stock or voting securities of Libbey-Owens-Ford Co. ("LOF"), a subsidiary of Pilkington plc ("Pilkington") by NSG Holding USA, Inc. ("NSG-USA"), a subsidiary of Nippon Sheet Glass Company, Ltd. ("Nippon"), pursuant to a Common Stock Purchase Agreement, and respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition 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, 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 having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, not 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 Nippon is a corporation organized, existing and doing business under the laws of Japan, with its office and principal place of business located at 5-11, Doshomacho 3-chome, Chuo-Ku, Osaka, Japan.

2. Respondent NSG-USA, a wholly owned subsidiary of proposed respondent Nippon, is a corporation organized, existing and doing business under the laws of Delaware, with its office and principal place of business located at 1209 Orange Street, Wilmington, Delaware.

3. Respondent Pilkington is a corporation organized, existing and doing business under the laws of England, with its office and principal place of business located at Prescott Road, St. Helens, Merseyside, England WA10 3TT.

4. Respondent LOF, a wholly owned subsidiary of proposed respondent Pilkington, is a corporation organized, existing and doing business under the laws of Delaware, with its office and principal place of business located at 811 Madison Avenue, Toledo, Ohio.

5. 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

For the purposes of this order the following definitions shall apply:

1. "*Nippon*" means respondent Nippon Sheet Glass Company, Ltd., as well as its officers, employees, agents, divisions, subsidiaries (including but not limited to NSG-USA), successors, assigns, and the officers, employees, and agents of Nippon's divisions, subsidiaries, successors and assigns.

2. "*NSG-USA*" means respondent NSG Holding USA, Inc., as well as its officers, employees, agents, divisions, subsidiaries, successors, assigns, and the officers, employees, and agents of NSG-USA's divisions, subsidiaries, successors and assigns.

3. "*Pilkington*" means respondent Pilkington plc, as well as its officers, employees, agents, divisions, subsidiaries (including but not limited to LOF), successors, assigns, and the officers, employees and agents of Pilkington's divisions, subsidiaries, successors and assigns.

4. "*LOF*" means respondent Libbey-Owens-Ford Co., as well as its officers, employees, agents, divisions, subsidiaries, successors, assigns, and the officers, employees and agents of LOF's divisions, subsidiaries, successors and assigns.

5. "*Respondents*" means Nippon, NSG-USA, Pilkington, and LOF.

6. "*Float glass*" means either clear or tinted flat glass manufactured by floating molten glass over a bed of molten material or materials.

7. "*Capacity Agreement*" means the Float Glass Capacity Agreement which is Exhibit E to the Common Stock Purchase Agreement between and among respondents, dated May 21, 1989.

8. "*ASEAN Agreement*" means the ASEAN Float License Agreement between Nippon and Pilkington, dated August 8, 1983.

9. "*North America*" means the United States, Canada and Mexico.

#### I.

*It is ordered*, That respondent Nippon and respondent Pilkington, directly or indirectly, or through any corporate or other device, in or in connection with the offering for sale, sale or manufacture of float glass in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, shall cease and desist from entering into, cooperating in or carrying out any agreement, combination, conspiracy, understanding or planned common course of action with each other which has the purpose or effect of:

A. Prohibiting, restricting, or otherwise restraining the building, expanding, acquiring, reducing or otherwise limiting float glass manufacturing capacity in North America, *provided that*, nothing in this order shall be construed to prohibit Nippon and Pilkington in connection with the operation of respondent LOF from jointly making decisions relating to the float glass manufacturing capacity of LOF; or

B. Prohibiting, restricting, or otherwise restraining the importation of float glass to North America, *provided that*, this order shall not be construed to affect the ASEAN Agreement between Nippon and Pilkington.

## II.

*It is further ordered,* That respondents shall abrogate, delete and otherwise cease and desist from enforcing paragraph 2(3) of the Capacity Agreement.

## III.

*It is further ordered,* That respondent Pilkington shall, upon written request of respondent Nippon, license to Nippon technology sufficient to enable Nippon to manufacture and sell float glass in North America and to export such float glass to Japan. Such license shall be on terms and conditions and with the scope at least as favorable to Nippon as those contained in the ASEAN Agreement, *provided that:*

A. (1) Pilkington shall in such new license agreement be entitled to adjust the amount of license payments contained in such new license agreement from those contained in the ASEAN Agreement to account for inflation as measured by the change in the United States Consumer Price Index from August 1983 until the effective date of the new license; (2) Pilkington shall not be obligated to enter into any provision in such new license that conflicts with Article VIII ("Restriction on Manufacture of Subject Products in Mexico") of the Agreement between Pilkington and Fomento de Industria y Comercio S.A., dated March 29, 1965; and (3) Pilkington shall not be obligated in such new license to grant to Nippon geographic rights greater than those sufficient to enable Nippon to manufacture and sell float glass in North America and to export such float glass to Japan;

B. Nothing contained in this order shall be: (1) deemed to immunize or exempt from the antitrust laws or any law enforced by the Commission any licensing practice engaged in by Pilkington; (2) interpreted as prohibiting Pilkington in any respect from licensing its technology in any manner and upon any terms that it chooses, other than as specifically set forth in this order; and (3) interpreted to mean that Nippon is or is not legally obligated to obtain a license from Pilkington prior to building float glass manufacturing capacity in North America.

## IV.

*It is further ordered,* That within thirty (30) days after the date this

order becomes final, and at such other times as the Commission or its staff may require, each respondent shall submit to the Commission a verified report setting forth in detail the manner and form in which it has complied with this order.

## V.

*It is further ordered,* That for the purposes of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request by the Commission or its staff and on reasonable notice to any respondent made to their principal offices, such respondent shall permit duly authorized representatives of the Commission:

A. Reasonable access during respondent's office hours, in the presence of counsel, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of respondent relating to any matters contained in this order, for inspection and copying; and

B. An opportunity, subject to respondent's reasonable convenience, to interview, in the presence of counsel, officers or employees of respondent regarding such matters.

## VI.

*It is further ordered,* That each respondent shall notify the Commission at least thirty (30) days prior to any change in respondent which may affect compliance with the obligations arising out of this order, 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.

CONCURRING STATEMENT OF COMMISSIONERS MARY L. AZCUENAGA  
AND ANDREW J. STRENIO, JR.

Because there is reason to believe that the collateral agreement that is the subject of the consent order is anticompetitive, we have voted in favor of the order. At the same time, the settlement does not resolve other competitive concerns raised by this acquisition. We also find reason to believe that the acquisition by Nippon Sheet Glass of 20 percent of the voting securities of Libbey-Owens-Ford Co., which



currently is owned by Pilkington plc, was likely substantially to lessen competition in the float glass market. Accordingly, a Commission challenge to the acquisition—and not just to the collateral agreement—also would have been in the public interest. The public comment provides no basis for deciding that these conclusions are incorrect.

IN THE MATTER OF  
BELLINGHAM-WHATCOM COUNTY  
MULTIPLE LISTING BUREAU

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

*Docket C-3299. Complaint, Aug. 2, 1990—Decision, Aug. 2, 1990*

This consent order prohibits, among other things, a Washington state multiple listing service from refusing to publish exclusive agency or conditional listings or listings containing reserve clauses; from restricting the solicitation of homeowners with current listings for future business; and from suggesting or fixing any commission split or other fees between any listing broker and any selling broker. In addition, the order requires respondent to distribute a statement describing the provisions of the order to all its members.

*Appearances*

For the Commission: *Randall H. Brook.*

For the respondent: *Stephen C. Watson, Seattle WA.*

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 respondent Bellingham-Whatcom County Multiple Listing Bureau ("BWCMLB"), a corporation, has violated and is violating Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

PARAGRAPH 1. As used in this complaint:

(1) "*Multiple listing service*" shall mean a clearinghouse through which member real estate brokerage firms regularly exchange information on listings of real estate properties and share commissions with other members.

(2) "*Listing agreement*" shall mean any agreement between a real

estate broker and a property owner for the provision of real estate brokerage services.

(3) "*Listing broker*" shall mean any broker who lists a real estate property with a multiple listing service pursuant to a listing agreement with the property owner.

(4) "*Selling broker*" shall mean any broker, other than the listing broker, who locates the purchaser for a listed property.

(5) "*Exclusive agency listing*" shall mean any listing under which a property owner appoints a broker as exclusive agent for the sale of the property at an agreed commission, but reserves the right to sell the property personally to a direct buyer (one not procured in any way through the efforts of any broker) at an agreed reduction in the commission or with no commission owed to the agent broker.

(6) "*Exclusive right to sell listing*" shall mean any listing under which a property owner appoints a broker as exclusive agent for the sale of the property, and agrees to pay the broker an agreed commission if the property is sold, whether the purchaser is located by the broker or any other person, including the owner.

(7) "*Reserve clause listing*" shall mean any exclusive right to sell listing that includes a provision reserving the property owner's right to sell the property to one or more persons individually named in the listing agreement without owing a full commission to the broker.

(8) "*Conditional listing*" shall mean any exclusive agency or exclusive right to sell listing that makes sale of the property conditional on the purchase or sale of other property.

PAR. 2. BWCMLB is a Washington corporation with its office and principal place of business at 1801 "F" Street, Bellingham, Washington.

PAR. 3. BWCMLB is and has been at all times relevant to this complaint a corporation organized for the profit of its members within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 4. In the course and conduct of their businesses, and through the policies, acts, and practices described below, BWCMLB and its members are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. BWCMLB is, and for some time has been, providing a multiple listing service for member real estate brokerage firms. BWCMLB maintains a computerized database of residential real estate available for sale in the Bellingham, Washington area and its

surroundings (BWCMLB's "service area"). It distributes the information to its members through online terminals and frequent publication of books containing property listings.

PAR. 6. BWCMLB's member firms are owned and operated by real estate brokers who, for a commission, provide the service of bringing together buyers and sellers of residential real estate as well as other services designed to facilitate sales of these properties. Each BWCMLB member agrees to submit all of its exclusive right to sell listings for residential real estate located within BWCMLB's service area for publication to the entire membership of the multiple listing service, and to share commissions with those member firms that successfully locate purchasers for properties it has listed. Only members may participate in the multiple listing service.

PAR. 7. Membership in BWCMLB's multiple listing service provides valuable competitive advantages in the brokering of residential real estate sales in BWCMLB's service area. Membership significantly increases the opportunities for brokerage firms to enter into listing agreements with residential property owners, and significantly reduces the costs of obtaining current and comprehensive information on listings and sales.

PAR. 8. Publication of listings through BWCMLB's multiple listing service generally is considered by sellers and their brokers to be the fastest and most effective means of obtaining the broadest market exposure for residential property in BWCMLB's service area.

PAR. 9. BWCMLB is the sole multiple listing service in the Bellingham, Washington area. The vast majority of brokers that deal in residential real estate in this area are members of BWCMLB. The vast majority of broker-assisted sales of residential real estate in this area go through BWCMLB. Sales of residential real estate listings published by BWCMLB totaled about \$88 million in 1986.

PAR. 10. Except to the extent that competition has been restrained as described herein, BWCMLB members are and have been in competition among themselves in the provision of residential real estate brokerage services within BWCMLB's service area.

PAR. 11. In adopting the policies and engaging in the practices described in paragraphs twelve through sixteen below, BWCMLB has been and is acting as a combination of its members, or in conspiracy with some of its members, to restrain trade in the provision of residential real estate brokerage services within BWCMLB's service area.

PAR. 12. BWCMLB has been and is now refusing to publish any exclusive agency listing through its multiple listing service.

PAR. 13. BWCMLB has been and is now refusing to publish any reserve clause listing through its multiple listing service.

PAR. 14. BWCMLB has been and is now refusing to publish any conditional listing through its multiple listing service.

PAR. 15. BWCMLB has enacted a rule prohibiting any member other than the listing broker from soliciting the listing of any property, the listing of which is filed with the multiple listing service, until the filed listing has expired.

PAR. 16. BWCMLB has enacted a rule providing that the listing broker receive 40% and the selling broker receive 60% of the commission due on the sale of residential real estate subject to an exclusive right to sell listing in the event that the listing broker fails to specify a selling broker's share on the listing form submitted to BWCMLB.

PAR. 17. The purpose, capacity, tendency, or effect of the combination or conspiracy described in paragraphs twelve through sixteen has been, and continues to be, to restrain competition among brokers and to injure consumers by, *inter alia*:

(a) Preventing brokers from accepting certain contractual terms, such as terms that allow the property owner to pay a reduced commission or no commission if the owner sells the property other than through the broker, thereby restraining competition among brokers based on their willingness to offer or accept different contract terms that may be attractive and beneficial to consumers;

(b) Restricting brokers from competing with the listing broker and with each other to obtain renewal of listings of properties, thereby depriving owners of property of information and the advantage of price and service competition that would otherwise be offered; and

(c) Restraining competition among brokers based on their willingness to offer or accept varying commission splits, thereby depriving consumers of the advantages of competition with regard to such splits.

PAR. 18. The policies, acts, practices, and combinations or conspiracies described in paragraphs eleven through sixteen above constitute unfair methods of competition or unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The alleged conduct, or the effects thereof, are continuing and will continue or recur in the absence of the relief requested.

Commissioner Azcuenaga dissenting with respect to paragraph 16 of the complaint and paragraph I.C of the order.

#### DECISION AND ORDER

The Federal Trade Commission has initiated an investigation of certain acts and practices of Bellingham-Whatcom County Multiple Listing Bureau ("BWCMLB"). BWCMLB has been furnished with a draft of complaint which the Seattle Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge BWCMLB with violation of the Federal Trade Commission Act.

BWCMLB, its attorney, and counsel for the Commission have executed an agreement containing a consent order, an admission by BWCMLB of all the jurisdictional facts set forth in the draft of complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by BWCMLB that the law has been violated as alleged in the complaint, and waivers and other provisions as required by the Commission's Rules.

The Commission having thereafter considered the matter and having determined that it had reason to believe that BWCMLB has violated the Federal Trade Commission Act, and that a complaint should issue stating its charges in that respect, and having accepted the executed consent agreement and placed that agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission issues its complaint, makes the following jurisdictional findings, and enters the following order:

(1) Respondent BWCMLB is a Washington corporation with its office and principal place of business at 1801 "F" Street, Bellingham, Washington.

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

## ORDER

## DEFINITIONS

The following definitions shall apply to this order:

(1) "*Multiple listing service*" shall mean a clearinghouse through which member real estate brokerage firms regularly exchange information on listings of real estate properties and share commissions with other members.

(2) "*Listing agreement*" shall mean any agreement between a real estate broker and a property owner for the provision of real estate brokerage services.

(3) "*Listing broker*" shall mean any broker who lists a real estate property with a multiple listing service pursuant to a listing agreement with the property owner.

(4) "*Selling broker*" shall mean any broker, other than the listing broker, who locates the purchaser for a listed property.

(5) "*Exclusive agency listing*" shall mean any listing under which a property owner appoints a broker as exclusive agent for the sale of the property at an agreed commission, but reserves the right to sell the property personally to a direct buyer (one not procured in any way through the efforts of any broker) at an agreed reduction in the commission or with no commission owed to the agent broker.

(6) "*Reserve clause listing*" shall mean any listing that includes a provision reserving the property owner's right to sell the property to one or more persons individually named in the listing agreement without owing a full commission to the broker.

(7) "*Conditional listing*" shall mean any exclusive agency or exclusive right to sell listing that makes sale of the property conditional on the purchase or sale of other property.

(8) "*BWCMLB*" shall mean Bellingham-Whatcom County Multiple Listing Bureau and its successors, assigns, directors, officers, committees, agents, representatives, members, and employees.

## I.

*It is ordered,* That respondent BWCMLB, directly or indirectly, or through any corporation, subsidiary, division, or other device, in connection with the operation of a multiple listing service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall cease and desist from:

A. Restricting or interfering with:

1. The publication on BWCMLB's multiple listing service of any exclusive agency listing of a member; or

2. The publication on BWCMLB's multiple listing service of any reserve clause listing or conditional listing of a member.

B. Adopting or maintaining any policy, or taking any other action that has the purpose, tendency, or effect of restricting or interfering with the solicitation of a listing agreement for any property.

*Provided, however,* that nothing contained in this subpart shall prohibit BWCMLB from adopting or enforcing any reasonable and nondiscriminatory policy that prohibits any member from using information provided to it by BWCMLB that pertains to a specific listed property in the solicitation of a listing agreement for that property. Such reasonable and nondiscriminatory policy may include adoption of a rebuttable presumption that any member soliciting sellers for listings then listed with BWCMLB by another member used information provided to it by BWCMLB in the solicitation, as long as the soliciting member may fully rebut the presumption by providing a declaration under oath or other evidence that the solicitation was based upon information obtained from sources other than BWCMLB.

C. Suggesting or fixing any rate, range, or amount of any division or split of commission or other fees between any selling broker and any listing broker.

II.

*It is further ordered,* That BWCMLB shall:

A. Within thirty (30) days after this order becomes final, furnish an announcement in the form shown in Appendix A to each member of BWCMLB.

B. Within sixty (60) days after this order becomes final, amend its bylaws, rules and regulations, and all other of its materials to conform to the provisions of this order, and provide each member with a copy of the amended bylaws, rules and regulations, and other amended materials.

C. For a period of three (3) years after this order becomes final, furnish an announcement in the form shown in Appendix A to each new member of BWCMLB within thirty (30) days of the new member's admission.



## III.

*It is further ordered, That BWCMLB shall:*

A. Within ninety (90) days after this order becomes final, submit a verified written report to the Federal Trade Commission setting forth in detail the manner and form in which BWCMLB has complied and is complying with this order.

B. In addition to the report required by paragraph III(A), annually for a period of three (3) years on or before the anniversary date on which this order becomes final, and at such other times as the Federal Trade Commission or its staff may by written notice to BWCMLB require, file a verified written report with the Federal Trade Commission setting forth in detail the manner and form in which BWCMLB has complied and is complying with this order.

C. For a period of five (5) years after this order becomes final, maintain and make available to the Commission staff for inspection and copying, upon reasonable notice, all documents that relate to the manner and form in which BWCMLB has complied with this order.

D. Notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in BWCMLB, 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 BWCMLB that may affect compliance obligations arising out of this order.

Commissioner Azcuenaga dissenting with respect to paragraph 16 of the complaint and paragraph I.C of the order.

## APPENDIX A

## [BWCMLB's Regular Letterhead]

As you may be aware, the Federal Trade Commission has entered into consent decrees with several multiple listing services in order to halt certain multiple listing service practices that have been alleged to be unlawful restraints of trade. To avoid litigation, Bellingham-Whatcom County Multiple Listing Bureau ("BWCMLB") has entered into such a consent agreement. The agreement is not an admission that BWCMLB or any of its members has violated any law. For your information, BWCMLB is prohibited from the following practices:

A. Restricting or interfering with:

1. the publication on BWCMLB's multiple listing service of any exclusive agency listing of a member; or

2. the publication on BWCMLB's multiple listing service of any reserve clause listing or conditional listing of a member.

B. Adopting or maintaining any policy, or taking any other action that has the purpose, tendency, or effect of restricting or interfering with the solicitation of a listing agreement for any property.

*Provided, however,* that nothing contained in this subpart shall prohibit BWCMLB from adopting or enforcing any reasonable and nondiscriminatory policy that prohibits any member from using information provided to it by BWCMLB that pertains to a specific listed property in the solicitation of a listing agreement for that property. Such reasonable and nondiscriminatory policy may include adoption of a rebuttable presumption that any member soliciting sellers for listings then listed with BWCMLB by another member used information provided to it by BWCMLB in the solicitation, as long as the soliciting member may fully rebut the presumption by providing a declaration under oath or other evidence that the solicitation was based upon information obtained from sources other than BWCMLB.

C. Suggesting or fixing any rate, range, or amount of any division or split of commission or other fees between any selling broker and any listing broker.

SEPARATE STATEMENT OF COMMISSIONER MARY L. AZCUENAGA,  
CONCURRING IN PART AND DISSENTING IN PART

Although I have voted to accept the consent orders in *Bellingham-Whatcom County* and *Puget Sound Multiple Listing Association*, I have dissented from a paragraph in each complaint and the corresponding relief, because I have not found reason to believe that the rule concerning default commission splits is unlawful. The default split rule specifies how the commission shall be split between the listing and selling brokers but applies only if the listing broker fails to specify the split on the property listing form submitted to the multiple listing service. The rule does not affect the level of commissions (price), it does not mandate the division of commissions and it applies only in those apparently rare situations in which the listing broker fails to specify a split. I find it difficult to imagine how the rule could be anticompetitive, and, at the margin, the rule may speed the process of listing properties with the service and may reduce subsequent transaction costs.

## IN THE MATTER OF

## PUGET SOUND MULTIPLE LISTING ASSOCIATION

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

*Docket C-3300. Complaint, Aug. 2, 1990—Decision, Aug. 2, 1990*

This consent order prohibits, among other things, a Washington state multiple listing service from refusing to publish exclusive agency or listings containing reserve clauses; from restricting the solicitation of homeowners with current listings for future business; and from suggesting or fixing any commission split or other fees between any listing broker and any selling broker. In addition, the order requires respondent to distribute a statement describing the provisions of the order to all its members.

*Appearances*

For the Commission: *Randall H. Brook.*

For the respondent: *Stephen C. Watson, Seattle WA.*

## 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 respondent Puget Sound Multiple Listing Association ("PSMLA"), a corporation, has violated and is violating Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

PARAGRAPH 1. As used in this complaint:

(1) "*Multiple listing service*" shall mean a clearinghouse through which member real estate brokerage firms regularly exchange information on listings of real estate properties and share commissions with other members.

(2) "*Listing agreement*" shall mean any agreement between a real estate broker and a property owner for the provision of real estate brokerage services.

(3) "*Listing broker*" shall mean any broker who lists a real estate

property with a multiple listing service pursuant to a listing agreement with the property owner.

(4) "*Selling broker*" shall mean any broker, other than the listing broker, who locates the purchaser for a listed property.

(5) "*Exclusive agency listing*" shall mean any listing under which a property owner appoints a broker as exclusive agent for the sale of the property at an agreed commission, but reserves the right to sell the property personally to a direct buyer (one not procured in any way through the efforts of any broker) at an agreed reduction in the commission or with no commission owed to the agent broker.

(6) "*Exclusive right to sell listing*" shall mean any listing under which a property owner appoints a broker as exclusive agent for the sale of the property, and agrees to pay the broker an agreed commission if the property is sold, whether the purchaser is located by the broker or any other person, including the owner.

(7) "*Reserve clause listing*" shall mean any exclusive right to sell listing that includes a provision reserving the property owner's right to sell the property to one or more persons individually named in the listing agreement without owing a full commission to the broker.

PAR. 2. PSMLA is a Washington corporation with its office and principal place of business at 11961 124th Avenue N.E., Kirkland, Washington.

PAR. 3. PSMLA is and has been at all times relevant to this complaint a corporation organized for the profit of its members within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 4. In the course and conduct of their businesses, and through the policies, acts, and practices described below, PSMLA and its members are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. PSMLA is, and for some time has been, providing a multiple listing service for member real estate brokerage firms. PSMLA maintains a computerized database of residential real estate available for sale in the Seattle metropolitan area and its surroundings (PSMLA's "service area"). It distributes the information to its members through online terminals and frequent publication of books containing property listings.

PAR. 6. PSMLA's member firms are owned and operated by real estate brokers who, for a commission, provide the service of bringing together buyers and sellers of residential real estate as well as other

services designed to facilitate sales of these properties. Each PSMLA member agrees to submit all of its exclusive right to sell listings for residential real estate located within PSMLA's service area for publication to the entire membership of the multiple listing service, and to share commissions with those member firms that successfully locate purchasers for properties it has listed. Only members may participate in the multiple listing service.

PAR. 7. Membership in PSMLA's multiple listing service provides valuable competitive advantages in the brokering of residential real estate sales in PSMLA's service area. Membership significantly increases the opportunities for brokerage firms to enter into listing agreements with residential property owners, and significantly reduces the costs of obtaining current and comprehensive information on listings and sales.

PAR. 8. Publication of listings through PSMLA's multiple listing service generally is considered by sellers and their brokers to be the fastest and most effective means of obtaining the broadest market exposure for residential property in PSMLA's service area.

PAR. 9. PSMLA is the sole multiple listing service in the Seattle metropolitan area. The vast majority of brokers that deal in residential real estate in this area are members of PSMLA. The vast majority of broker-assisted sales of residential real estate in this area go through PSMLA. Sales of residential real estate listings published by PSMLA totaled about \$2.8 billion in 1986.

PAR. 10. Except to the extent that competition has been restrained as described herein, PSMLA members are and have been in competition among themselves in the provision of residential real estate brokerage services within PSMLA's service area.

PAR. 11. In adopting the policies and engaging in the practices described in paragraphs twelve through fifteen below, PSMLA has been and is acting as a combination of its members, or in conspiracy with some of its members, to restrain trade in the provision of residential real estate brokerage services within PSMLA's service area.

PAR. 12. PSMLA has been and is now refusing to publish any exclusive agency listing through its multiple listing service.

PAR. 13. PSMLA has been and is now refusing to publish any reserve clause listing through its multiple listing service.

PAR. 14. PSMLA has enacted a rule prohibiting any member other than the listing broker from soliciting the listing of any property, the

listing of which is filed with the multiple listing service, until the filed listing has expired.

PAR. 15. PSMLA has enacted rules providing that the listing broker and selling broker each receive 50% of the commission due on the sale of residential real estate subject to an exclusive right to sell listing in the event that the listing broker fails to specify a selling broker's share on the listing form submitted to PSMLA.

PAR. 16. The purpose, capacity, tendency, or effect of the combination or conspiracy described in paragraphs twelve through fifteen has been, and continues to be, to restrain competition among brokers and to injure consumers by, *inter alia*:

(a) Preventing brokers from accepting certain contractual terms, such as terms that allow the property owner to pay a reduced commission or no commission if the owner sells the property other than through the broker, thereby restraining competition among brokers based on their willingness to offer or accept different contract terms that may be attractive and beneficial to consumers;

(b) Preventing brokers other than the listing broker from competing to obtain renewal of listings of properties, thereby depriving owners of property of information and the advantage of price and service competition that would otherwise be offered; and

(c) Restraining competition among brokers based on their willingness to offer or accept varying commission splits, thereby depriving consumers of the advantages of competition with regard to such splits.

PAR. 17. The policies, acts, practices, and combinations or conspiracies described in paragraphs eleven through fifteen above constitute unfair methods of competition or unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The alleged conduct, or the effects thereof, are continuing and will continue or recur in the absence of the relief requested.

Commissioner Azcuenaga dissenting with respect to paragraph 15 of the complaint and paragraph I.C. of the order.

#### DECISION AND ORDER

The Federal Trade Commission has initiated an investigation of certain acts and practices of Puget Sound Multiple Listing Association ("PSMLA"). PSMLA has been furnished with a draft of complaint which the Seattle Regional Office proposed to present to the

Commission for its consideration and which, if issued by the Commission, would charge PSMLA with violation of the Federal Trade Commission Act.

PSMLA, its attorney, and counsel for the Commission have executed an agreement containing a consent order, an admission by PSMLA of all the jurisdictional facts set forth in the draft of complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by PSMLA that the law has been violated as alleged in the complaint, and waivers and other provisions as required by the Commission's Rules.

The Commission having thereafter considered the matter and having determined that it had reason to believe that PSMLA has violated the Federal Trade Commission Act, and that a complaint should issue stating its charges in that respect, and having accepted the executed consent agreement and placed that agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission issues its complaint, makes the following jurisdictional findings, and enters the following order:

(1) Respondent PSMLA is a Washington corporation with its office and principal place of business at 11961 124th Avenue N.E., Kirkland, Washington.

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

#### ORDER

#### DEFINITIONS

The following definitions shall apply to this order:

(1) "*Multiple listing service*" shall mean a clearinghouse through which member real estate brokerage firms regularly exchange information on listings of real estate properties and share commissions with other members.

(2) "*Listing agreement*" shall mean any agreement between a real estate broker and a property owner for the provision of real estate brokerage services.

(3) "*Listing broker*" shall mean any broker who lists a real estate property with a multiple listing service pursuant to a listing agreement with the property owner.

(4) "*Selling broker*" shall mean any broker, other than the listing broker, who locates the purchaser for a listed property.

(5) "*Exclusive agency listing*" shall mean any listing under which a property owner appoints a broker as exclusive agent for the sale of the property at an agreed commission, but reserves the right to sell the property personally to a direct buyer (one not procured in any way through the efforts of any broker) at an agreed reduction in the commission or with no commission owed to the agent broker.

(6) "*Reserve clause listing*" shall mean any listing that includes a provision reserving the property owner's right to sell the property to one or more persons individually named in the listing agreement without owing a full commission to the broker.

(7) "*PSMLA*" shall mean Puget Sound Multiple Listing Association and its successors, assigns, directors, officers, committees, agents, representatives, members, and employees.

#### I.

*It is ordered*, That respondent PSMLA, directly or indirectly, or through any corporation, subsidiary, division, or other device, in connection with the operation of a multiple listing service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall cease and desist from:

##### A. Restricting or interfering with:

1. The publication on PSMLA's multiple listing service of any exclusive agency listing of a member; or
2. The publication on PSMLA's multiple listing service of any reserve clause listing of a member.

B. Adopting or maintaining any policy, or taking any other action that has the purpose, tendency, or effect of restricting or interfering with the solicitation of a listing agreement for any property.

*Provided, however*, that nothing contained in this subpart shall prohibit PSMLA from adopting or enforcing any reasonable and nondiscriminatory policy that prohibits any member from using information provided to it by PSMLA that pertains to a specific listed property in the solicitation of a listing agreement for that property.



Such reasonable and nondiscriminatory policy may include adoption of a rebuttable presumption that any member soliciting sellers for listings then listed with PSMLA by another member used information provided to it by PSMLA in the solicitation, as long as the soliciting member may fully rebut the presumption by providing a declaration under oath or other evidence that the solicitation was based upon information obtained from sources other than PSMLA.

C. Suggesting or fixing any rate, range, or amount of any division or split of commission or other fees between any selling broker and any listing broker.

## II.

*It is further ordered,* That PSMLA shall:

A. Within thirty (30) days after this order becomes final, furnish an announcement in the form shown in Appendix A to each member of PSMLA.

B. Within sixty (60) days after this order becomes final, amend its bylaws, rules and regulations, and all other of its materials to conform to the provisions of this order, and provide each member with a copy of the amended bylaws, rules and regulations, and other amended materials.

C. For a period of three (3) years after this order becomes final, furnish an announcement in the form shown in Appendix A to each new member of PSMLA within thirty (30) days of the new member's admission.

## III.

*It is further ordered,* That PSMLA shall:

A. Within ninety (90) days after this order becomes final, submit a verified written report to the Federal Trade Commission setting forth in detail the manner and form in which PSMLA has complied and is complying with this order.

B. In addition to the report required by paragraph III(A), annually for a period of three (3) years on or before the anniversary date on which this order becomes final, and at such other times as the Federal Trade Commission or its staff may by written notice to PSMLA require, file a verified written report with the Federal Trade

Commission setting forth in detail the manner and form in which PSMLA has complied and is complying with this order.

C. For a period of five (5) years after this order becomes final, maintain and make available to the Commission staff for inspection and copying, upon reasonable notice, all documents that relate to the manner and form in which PSMLA has complied with this order.

D. Notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in PSMLA, 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 PSMLA that may affect compliance obligations arising out of this order.

Commissioner Azcuenaga dissenting with respect to paragraph 15 of the complaint and paragraph I.C of the order.

#### APPENDIX A

##### [PSMLA's Regular Letterhead]

As you may be aware, the Federal Trade Commission has entered into consent decrees with several multiple listing services in order to halt certain multiple listing service practices that have been alleged to be unlawful restraints of trade. To avoid litigation, Puget Sound Multiple Listing Association ("PSMLA") has entered into such a consent agreement. The agreement is not an admission that PSMLA or any of its members has violated any law. For your information, PSMLA is prohibited from the following practices:

A. Restricting or interfering with:

1. the publication on PSMLA's multiple listing service of any exclusive agency listing of a member; or
2. the publication on PSMLA's multiple listing service of any reserve clause listing of a member.

B. Adopting or maintaining any policy, or taking any other action that has the purpose, tendency, or effect of restricting or interfering with the solicitation of a listing agreement for any property.

*Provided, however,* that nothing contained in this subpart shall prohibit PSMLA from adopting or enforcing any reasonable and nondiscriminatory policy that prohibits any member from using information provided to it by PSMLA that pertains to a specific listed property in the solicitation of a listing agreement for that property. Such reasonable and nondiscriminatory policy may include adoption of a rebuttable presumption that any member soliciting sellers for listings then listed with PSMLA by another member used information provided to it by PSMLA in the solicitation, as long as the soliciting member may fully rebut the presumption by providing a declaration under oath or other evidence that the solicitation was based upon information obtained from sources other than PSMLA.

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Separate Statement

C. Suggesting or fixing any rate, range, or amount of any division or split of commission or other fees between any selling broker and any listing broker.

SEPARATE STATEMENT OF COMMISSIONER MARY L. AZCUENAGA,  
CONCURRING IN PART AND DISSENTING IN PART

Although I have voted to accept the consent orders in *Bellingham-Whatcom County* and *Puget Sound Multiple Listing Association*, I have dissented from a paragraph in each complaint and the corresponding relief, because I have not found reason to believe that the rule concerning default commission splits is unlawful. The default split rule specifies how the commission shall be split between the listing and selling brokers but applies only if the listing broker fails to specify the split on the property listing form submitted to the multiple listing service. The rule does not affect the level of commissions (price), it does not mandate the division of commissions and it applies only in those apparently rare situations in which the listing broker fails to specify a split. I find it difficult to imagine how the rule could be anticompetitive, and, at the margin, the rule may speed the process of listing properties with the service and may reduce subsequent transaction costs.

## IN THE MATTER OF

## INSTITUT MERIEUX S.A.

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

*Docket C-3301. Complaint, Aug. 6, 1990—Decision, Aug. 6, 1990*

This consent order requires, among other things, a Lyon, France based firm that sells rabies vaccine and inactivated polio vaccine in the United States, to lease a rabies vaccine business—acquired from Connaught BioSciences, Inc.—in Toronto, Ontario, Canada, for at least 25 years, to a Commission-approved lessee. Respondent also is required, for a period of ten years, to obtain FTC approval before acquiring any interest in a company that produces a human vaccine for a disease for which it currently manufactures a vaccine.

*Appearances*

For the Commission: *Claudia R. Higgins* and *James C. Egan, Jr.*

For the respondent: *William R. Norfolk, Sullivan & Cromwell*, New York City and *Victor Friedman, Fried, Frank, Harris, Shriver & Jacobson*, New York, N.Y.

## 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 (“Commission”), having reason to believe that the respondent, Institut Merieux S.A. (“Merieux”), a corporation subject to the jurisdiction of the Commission, has offered to purchase all of the voting securities of Connaught BioSciences, Inc. (“Connaught”) and such offer, if completed, would violate the provisions of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; that said agreement constitutes a violation of Section 5 of the FTC Act, 15 U.S.C. 45; and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

## I. DEFINITIONS

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

a. "*Merieux*" means Institut Merieux S.A., a corporation organized, existing, and doing business under and by virtue of the laws of France with its principal offices at 58 Avenue Leclerc, BP 7046, 69342 Lyon Cedex 07, France, as well as its officers, employees, agents, parents, divisions, subsidiaries, successors, assigns, and the officers, employees, or agents of Merieux's divisions, subsidiaries, successors and assigns.

b. "*Connaught*" means Connaught BioSciences Inc., a corporation organized, existing, and doing business under and by virtue of the laws of Canada with its principal offices at Suite 1500, 55 University Avenue, Toronto, Ontario, Canada, M5J 2H7, as well as its officers, employees, agents, divisions, subsidiaries, successors, assigns, and the officers, employees or agents of Connaught's divisions, subsidiaries, successors and assigns.

c. "*Inactivated polio vaccine*" means a vaccine used to prevent poliovirus disease administered by means of injection.

d. "*Rabies vaccine*" means a vaccine used to prevent or treat rabies disease.

## II. THE PARTY

2. Merieux is a corporation organized and existing under the laws of France, with its principal place of business at 58 Avenue Leclerc, BP 7046, 69342 Lyon Cedex 07, France. Merieux's wholly-owned subsidiary, Merieux Institute Inc., organized and existing under the laws of Delaware, has its principal place of business at 7855 N.W. 12th Avenue, Suite 114, Miami, Florida.

3. In fiscal year 1988, Merieux estimates its sales of rabies vaccine at approximately \$5 million in the United States. Merieux is expected to have sales of inactivated polio vaccine of approximately \$1 million in the United States in the first full year that the vaccine is sold.

4. Merieux is, and at all times relevant herein, has been engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

### III. THE PROPOSED ACQUISITION

5. On or about September 28, 1989, Merieux offered to purchase all of Connaught's voting securities. The transaction is valued at approximately \$798 million. Merieux is engaged in the manufacture and sale of rabies vaccine, as well as the development of inactivated polio vaccine. Connaught is engaged in the manufacture and sale of inactivated polio vaccine, as well as the development of rabies vaccine. After the acquisition, Merieux will be the dominant firm in the manufacture and sale of both rabies vaccine and inactivated polio vaccine.

### IV. TRADE AND COMMERCE

6. A relevant line of commerce in which to analyze the proposed acquisition of Connaught is rabies vaccine. Another relevant line of commerce in which to analyze this proposed acquisition is inactivated polio vaccine.

7. The relevant geographic market is the United States.

### V. MARKET STRUCTURE

8. The manufacture and sale of rabies vaccine and inactivated polio vaccine is a highly concentrated market in the United States. In the rabies vaccine market, Merieux is the only firm selling rabies vaccine nationwide with Connaught being one of two potential entrants. In the inactivated polio market, Connaught is the monopolist with Merieux being one of two potential entrants.

### VI. ENTRY CONDITIONS

9. Entry into the relevant markets is difficult or unlikely.

### VII. COMPETITION

10. Merieux and Connaught are potential competitors in the manufacture and sale of both rabies vaccine and inactivated polio vaccine. This acquisition would make Merieux the dominant firm in each relevant market.

### VIII. EFFECTS

11. The effect of the acquisition, if consummated, may be substantially to lessen competition in the relevant lines of commerce in the United States in violation of Section 7 of Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

## IX. VIOLATIONS CHARGED

12. The proposed acquisition of Connaught by Merieux violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and would, if consummated, violate Section 7 of the Clayton Act, 15 U.S.C. 18 and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

Commissioners Azcuenaga and Owen dissenting.

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of respondent's proposed acquisition of certain voting securities of Connaught BioSciences, Inc., and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Clayton Act and 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 Acts, 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 having duly considered the comments filed thereafter by interested persons 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 issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Institut Merieux S.A. is a corporation organized, existing and doing business under and by virtue of the laws of France, with its office and principal place of business located at 58 Avenue Leclerc, BP 7046, 69342 Lyon Cedex 07, France.

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

##### I.

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

1. "*Merieux*" means Institut Merieux S.A., a corporation organized, existing, and doing business under and by virtue of the laws of France with its principal offices at 58 Avenue Leclerc, BP 7046, 69342 Lyon Cedex 07, France, as well as its officers, employees, agents, parents, divisions, subsidiaries, successors, assigns, and the officers, employees, or agents of Merieux's divisions, subsidiaries, successors and assigns.

2. "*Commission*" means the Federal Trade Commission.

3. "*Connaught*" means Connaught BioSciences Inc., a corporation organized, existing, and doing business under and by virtue of the laws of Canada with its principal offices at Suite 1500, 55 University Avenue, Toronto, Ontario, Canada, M5J 2H7, as well as its officers, employees, agents, divisions, subsidiaries, successors, assigns, and the officers, employees or agents of Connaught's divisions, subsidiaries, successors and assigns.

4. "*Connaught's rabies vaccine business*" means Connaught's dedicated rabies vaccine production facility in Canada and all production technology and know-how related to the purified human diploid cell rabies vaccine developed and currently marketed by Connaught in Canada. As used in this order, "Connaught's rabies vaccine business" shall be construed to include all the results of research and development efforts by Connaught relating to improvements, developments and variants of the rabies vaccine product needed to obtain a product license from the Food and Drug Administration.

5. "*Investment Canada*" means the Agency of the Government of



Canada established pursuant to the *Investment Canada Act* (S.C. 1985, C. 20) of Canada.

## II.

*It is further ordered, That:*

A. Merieux shall lease on a long-term basis for a minimum of 25 years, at reasonable and customary terms, Connaught's rabies vaccine business, within three (3) months from the date this order becomes final, *provided that* the terms of the lease shall include a lump-sum payment under reasonable and customary terms for the existing inventory of Connaught rabies vaccine and shall include a commitment from the lessee to supply rabies vaccine sufficient to satisfy the Canadian demand for rabies vaccine;

B. Merieux shall, as soon as practicable, but no later than thirty (30) days after the execution of the lease agreement required by this order, deliver to the lessee Connaught's manuals, drawings, blueprints, technology, know-how, specifications and other tangible documents or documentation sufficient to operate Connaught's rabies vaccine business and Connaught's rabies vaccine facility;

C. Merieux shall, coincident with subparagraph II.B., make available to the lessee such Connaught personnel, assistance and training as the lessee might need to operate the production facility on its own and shall continue providing such personnel, assistance and training for a period of time sufficient to satisfy the management of the lessee that its personnel are well enough trained in the rabies vaccine business to produce rabies vaccine; *provided, however,* Merieux shall not be required to continue providing such personnel, assistance and training for more than one year after the execution of the lease agreement;

D. Merieux shall use its best efforts to secure from the Food and Drug Administration a product license for Connaught's rabies vaccine and shall assist in securing such license for the lessee as a part of the lease agreement; and

E. Merieux shall lease Connaught's rabies vaccine business only to a lessee that receives the prior approval of the Commission, and only in a manner, that receives the prior approval of the Commission; *provided that* if prior to the expiration of the three-month period, Merieux has proposed a lessee and the Commission has neither approved nor disapproved of such lessee, then the three-month period

shall be extended until thirty (30) days following the Commission's approval or disapproval of such lessee. However, this three-month period cannot be extended beyond an additional three months for any reason.

### III.

*It is further ordered,* That the lease agreement ordered and directed by this order shall be made in good faith and the obligation to enter into such a lease agreement shall be absolute consistent with the terms of this order.

### IV.

*It is further ordered,* That if Merieux has not leased Connaught's rabies vaccine business as provided in Paragraph II within three (3) months after the date this order becomes final, Merieux shall consent to the appointment of a trustee by the Commission who shall have the power and authority to lease Connaught's rabies vaccine business. The trustee shall use his or her best efforts to negotiate the best price and terms available consistent with this order's absolute obligation to lease Connaught's rabies vaccine business; *provided that* the terms shall include a commitment from the lessee to supply rabies vaccine sufficient to satisfy the Canadian demand for rabies vaccine.

### V.

*It is further ordered,* That the appointment of a trustee by the Commission pursuant to paragraph IV of this order shall not constitute a waiver by the Commission of its rights to seek civil penalties and other relief available to it for any violation of this order, including a violation of paragraph II. In the event that the Commission brings an action pursuant to Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, or another statute enforced by the Commission, Merieux shall consent to the appointment of a trustee in such action.

### VI.

*It is further ordered,* That if a trustee is appointed by the Commission or by a court pursuant to paragraph IV or V of this order,

Merieux shall consent to the following terms and conditions regarding the trustee's powers, authority, duties and responsibilities:

A. The Commission shall select the trustee, subject to Merieux's consent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures.

B. The trustee shall have the exclusive power and authority, subject to the prior approval of the Commission, to lease Connaught's rabies vaccines business. The trustee shall have nine (9) months from the date of appointment to accomplish the lease agreement, which shall be subject to the prior approval of the Commission. If, however, at the end of the nine-month period, the trustee has submitted a plan for leasing or believes that a lease can be executed within a reasonable time, the lease period may be extended by the Commission and, in the case of a court-appointed trustee, by the court; *provided, however*, the Commission or the court for a court-appointed trustee may only extend the lease period one additional three month period. Merieux shall cooperate fully with the trustee and shall provide all consents, perform all such acts, and execute all such documents as may be necessary to permit the execution of the lease agreement for Connaught's rabies vaccine business as the trustee may determine.

C. After its appointment, the trustee shall file monthly reports with Merieux and the Commission describing the trustee's efforts to accomplish execution of the lease agreement. If the trustee has not accomplished execution of such lease agreement within nine (9) months after its appointment, the trustee shall thereupon promptly file with the Commission a report setting forth (i) the trustee's efforts to accomplish execution of the required lease agreement, (ii) the reasons, in the trustee's judgment, why the required lease agreement has not been executed, and (iii) the trustee's recommendations. The trustee shall at the same time furnish such report to Merieux, who shall have the right to be heard and to make additional recommendations. Subject to paragraph IX, the Commission, or a court for a court appointed trustee, may, as it deems appropriate, extend the term in which to accomplish the execution of the lease agreement and the term of the trustee's appointment.

D. The trustee shall have full and complete access to the personnel, books, records and facilities of Connaught's rabies vaccine business which the trustee has the duty to lease, and Merieux shall cooperate with the trustee and shall develop such financial or other information

relevant to the assets to be leased as such trustee may reasonably request. Merieux shall take no action to interfere with or impede the trustee's accomplishment of the lease agreement. Any delays in obtaining the lease agreement caused by Merieux shall extend the time for lease under this order in an amount equal to the delay, as determined by the Commission.

E. The trustee shall serve, without bond or other security, at the cost and expense of Merieux on such reasonable and customary terms and conditions as the Commission or a court, for a court-appointed trustee, may set. The trustee shall have authority to retain, at the cost and expense of Merieux, such consultants, attorneys, business brokers, accountants, appraisers, and other representatives and assistants as are reasonably necessary to assist in the execution of the lease agreement. The trustee shall account for all monies derived from the execution of the lease agreement and all expenses incurred. After approval by the Commission of the account of the trustee, including fees for his or her services, all remaining monies shall be paid to Merieux and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee leasing Connaught's rabies vaccine business.

F. Merieux shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, or liabilities to which the trustee may become subject, arising in any manner out of, or in connection with, the trustee's duty under this order, unless the Commission determines that such losses, claims, damages, or liabilities arose out of the misfeasance, gross negligence, or the wilful or wanton acts or bad faith of the trustee.

G. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as in paragraph IV of this order.

H. Within thirty (30) days after appointment of the trustee and subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, Merieux shall, consistent with the provisions of this order, execute a trustee agreement that transfers to the trustee all rights and powers necessary to permit the trustee to lease Connaught's rabies vaccine business.

I. The trustee may ask the Commission to issue, and the Commission may issue, such additional orders or directions as may be necessary and appropriate to accomplish the execution of the lease agreement required under this order.

J. The trustee shall have no obligation or authority to operate or maintain any of the properties, assets, contracts, arrangements or enterprises required to be leased under this order.

#### VII.

*It is further ordered,* That any lease agreement entered pursuant to this order shall be in a manner which preserves the product and business leased as a viable rabies vaccine business and as a viable competitor.

#### VIII.

*It is further ordered,* That pending the lease agreement for Connaught's rabies vaccine business:

A. Merieux shall hold and operate Connaught's rabies vaccine business and shall take all reasonable measures to preserve the Connaught's rabies vaccine business as a separate viable product and business such that it can be readily leased pursuant to this order. In its conduct of Connaught's rabies vaccine business, Merieux shall promote and maintain Connaught's rabies vaccine business and shall maintain and preserve all of the intangible rights and other assets of Connaught's rabies vaccine business so that such business can be leased and operated as an effective and viable business in accordance with the requirements of this order. Without limiting any of Merieux's obligations under this order, Merieux shall observe the limitations and restrictions set forth in the remaining subparagraphs of this paragraph VIII.

B. Merieux shall refrain from taking any action which may cause any material adverse change in the business or financial condition of Connaught's rabies vaccine business.

C. Merieux shall maintain separate records as to the sales and cost of goods sold of each of the products of Connaught's rabies vaccine business and on an aggregate basis for the entire Connaught rabies vaccine business.

D. Merieux shall continue to utilize all currently used Connaught product trademarks and trade names related to Connaught's rabies vaccine business.

E. If Merieux uses its name on the products of Connaught's rabies vaccine business, and purchases advertising and other promotional

services for such products under or pursuant to Merieux's contracts and other arrangements for such services, Merieux shall preserve the separate identity of such products.

F. Merieux shall refrain from, directly or indirectly, selling, disposing of, or causing to be transferred any assets, property or business of Connaught's rabies vaccine business, except that Merieux may sell or otherwise dispose of manufactured products in the ordinary course of business, and may sell or otherwise dispose of assets, property or business to accomplish the lease required by paragraph II.

G. Merieux shall refrain from mortgaging or pledging the assets of Connaught's rabies vaccine business pursuant to any loan transaction in which the borrower is Merieux or any entity other than Connaught's rabies vaccine business, except in connection with the lease agreement described in paragraph II, unless any such mortgage or pledge does not interfere with the ability to obtain or maintain the lease agreement required by this order.

H. Merieux shall refrain from causing Connaught's rabies vaccine business to guarantee any debts or obligations pursuant to any loan transaction in which the borrower is Merieux or any entity other than Connaught's rabies vaccine business, except in connection with the lease agreement described in paragraph II, unless any such mortgage or pledge does not interfere with the ability to obtain or maintain the lease agreement required by this order.

I. Merieux shall hold in strict confidence and shall not divulge to any third party or use for its own or any third party's benefit any confidential information which Merieux has obtained or may obtain from Connaught's rabies vaccine business, except in the normal course of business, or for the purpose of accomplishing the lease agreement required by paragraph II.

J. For the purpose of assuring compliance with this order, duly authorized representatives of the Commission shall be permitted, upon written request and reasonable notice to Merieux, to interview officers, directors, and employees of Merieux and examine documents, at reasonable times and in the presence of Merieux counsel, regarding matters covered by this agreement.

K. Merieux shall remain in compliance with the lease agreement entered pursuant to paragraph II of this order, and shall not, without the prior approval of the Commission, permit any modifications, directly or indirectly, of any of the terms of such lease agreement.

## IX.

*It is further ordered,* That, in recognition of the sovereign rights of Canada and of the interests of Canada in the disposition of Connaught's rabies vaccine business, and in view of the importance of that business in supplying rabies vaccines to satisfy the health needs of Canadians, the appointment and term of a trustee, the selection of any lessee, the terms of any lease and any modifications, directly or indirectly of such lease with respect to that business pursuant to this order shall be subject to the approval of Investment Canada in accordance with Canadian law.

## X.

*It is further ordered,* That, for a period of ten years from the date this order becomes final, Merieux shall not, directly or indirectly, acquire any stock, share capital, assets or equity interest in any concern, corporate or noncorporate, engaged in the manufacture or sale in or to the United States of any human vaccine which may be used to prevent, cure, or treat any disease for which Merieux currently manufactures a vaccine without the prior approval of the Commission, if such concern:

A. Is incorporated in one of the United States or organized under the laws of one of the United States or has its principal offices within the United States; or

B. Manufactures human vaccines in the United States; or

C. Had annual net sales of human vaccines of five million dollars or more in or into the United States in the most recently completed calendar year prior to the date of the requested approval;

*provided that* this paragraph shall not apply to investments by Merieux in research joint ventures or to Merieux's funding of independent research and that Merieux shall file with the Commission under the Commission's rules of confidentiality copies of all agreements that pertain to such research joint ventures or independent research arrangements within thirty (30) days of such agreement or arrangement.

## XI.

*It is further ordered:*

A. Merieux shall, within sixty (60) days from the date this order becomes final and every sixty days thereafter until the lease agreement required by this order is accomplished, submit in writing to the Commission a verified written report setting forth in detail the manner and form in which Merieux intends to comply, is complying, and has complied with the terms of this order and such additional information relating thereto as may from time to time reasonably be required by the Commission. All such compliance reports shall include, among other things that may be required from time to time, a full description of all contacts or negotiations with anyone relating to the lease of Connaught's rabies vaccine business, including the name and address of all parties contacted, copies of all written communications to and from such parties, and all internal memoranda, reports and recommendations concerning the lease pursuant to the provisions of this order.

B. On the anniversary of the date of this order becomes final, and on every anniversary thereafter for the following nine (9) years, and at such other times as the Commission or its staff may request, Merieux shall submit a verified written report setting forth in detail the manner and form in which Merieux intends to comply, is complying, and has complied with the terms of this order.

## XII.

*It is further ordered,* That for a period of ten (10) years from the date this order becomes final, Merieux shall notify the Commission at least thirty days prior to any change in Merieux which may affect compliance with the obligations arising out of this order, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other similar change in the corporation.

Commissioners Azcuenaga and Owen dissenting.

## STATEMENT OF COMMISSIONER DEBORAH K. OWEN

The purpose of this statement is to elaborate on, and express some concerns about, certain elements of the consent agreement accepted



by the Commission in this matter. In particular, this agreement constrains an acquisition that involves two foreign entities, who, between them, maintain minimal relevant assets in the United States; yet the effects of the agreement may bear substantially more upon our neighbor to the north, Canada. The Commission's order also includes a remedy—a vaccine production facilities lease—of questionable efficacy; and, a prior approval provision that covers a product market beyond that alleged in the complaint on which the order is based.

But, first, I wish to forestall any possible misunderstanding as to the meaning of my negative vote in this matter.

I share Chairman Steiger's publicly stated desire to enhance the Commission's scrutiny of, and vigilance with respect to mergers "at the margin"; in particular those involving high concentration and high barriers to entry.<sup>1</sup> This policy is one in which I wholeheartedly concur, and I commend the Chairman for her leadership in this area, and my colleagues and the staff for their strong support of that direction. I also emphasize that this so-called "margin", in appropriate cases, may certainly include anticompetitive conduct that occurs wholly outside the boundaries of the United States, but affects a U.S. market.

The instant case was a difficult one; legitimate disagreements were reasonably expressed. My dissent from accepting the proffered, as well as the modified, consent agreements is based on the combined weight of essentially three concerns:

1. Whether, as a matter of prosecutorial discretion, in the interests of comity and other factors, the Commission should have taken any enforcement action<sup>2</sup> in this matter;

2. Whether this consent agreement is fair and effective; and

3. Whether the Commission has sufficiently articulated the premises of its action.

Raising the issue of prosecutorial discretion, and the subset of comity, presupposes that the Commission has subject matter jurisdiction over the transaction and can exercise personal jurisdiction over the parties. Judge Hand's 1945 opinion in the *Alcoa* case<sup>3</sup> launched a struggle for the courts, law enforcement authorities, and commentators to come up with criteria with which to determine whether jurisdiction may be appropriately exercised over foreign transactions

<sup>1</sup> See, e.g., Remarks of Chairman Janet D. Steiger before the 23rd New England Antitrust Conference (November 3, 1989) at 4-5.

<sup>2</sup> For this purpose, I treat a decision to accept a consent agreement as the functional equivalent of a decision to take enforcement action.

<sup>3</sup> *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

that have anticompetitive effects in a given U.S. market.<sup>4</sup> Several cases are frequently cited for the proposition that the Commission may take enforcement action against foreign transactions, including ordering divestiture of foreign assets. Because the cases brought to my attention involved parties with substantial relevant productive presence in the United States, it is not clear to me that they are as helpful as we might otherwise desire in conducting our analysis here. Even if we leave aside the questions of whether the courts are appropriately “in the business” of making comity determinations,<sup>5</sup> and whether the comity consideration should be part of the jurisdictional analysis *per se*, we must recognize that, because of the complexity of these considerations, and the differences among the courts in formulating and applying them, predicting the outcome in a litigated jurisdictional case is certainly chancy.

Even if jurisdiction over a transaction appears clear-cut, there may be good reasons to exercise prosecutorial discretion not to take an enforcement action, based upon considerations of comity, or other practical considerations. As those who object to a judicial determination of deference based on comity point out, the enforcement agencies, both the FTC and Justice, are parties to several international agreements calling for cooperation with other nations in antitrust enforcement.<sup>6</sup> Both agencies work closely with the State Department and representatives of the other governments in order to assure, first, that there is adequate notice of U.S. interest in a foreign transaction and, second, that cooperation is obtained in satisfying those interests. Accordingly, this Commission is well poised to take comity considerations into account in the exercise of its prosecutorial discretion.

The Canadian Government has noted<sup>7</sup> that the Commission’s action in this matter “does not reflect the approach to a wholly foreign merger which is described in [the U.S. Department of Justice

<sup>4</sup> For instance, the Ninth Circuit, in *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976) adopted a three-step test with criteria to determine, first, whether a jurisdictionally-cognizable violation of the antitrust laws has occurred; second, whether that violation has some effect—actual or intended—on the foreign commerce of the U.S.; and, finally, whether as a matter of international comity, U.S. jurisdiction should be exercised. By contrast, a divided panel of the District of Columbia Circuit, in *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984), disagreed with the Ninth Circuit over whether U.S. and foreign interests in a foreign transaction can, or should, be balanced in order to decide whether the exercise of jurisdiction by U.S. courts is appropriate.

<sup>5</sup> See e.g., 1988 Fordham Corp. L. Inst. 5-1 (B. Hawk ed. 1989) (discussion involving the Honorable Charles F. Rule, Edward F. Glynn, Joel Davidow, Jeffrey Kessler, and Janusz A. Ordover).

<sup>6</sup> *Id.* at 5-3-5-5; 5-13-5-14.

<sup>7</sup> In the Matter of Institut Merieux, File No. 891 0098, Comments of the Government of Canada, March 30, 1990 and Aide-Memoire, May 16, 1990.

*Antitrust Enforcement Guidelines for International Operations*<sup>8</sup>,” presumably, Illustrative Case 4. In that case, the Department indicated that, on the basis of comity, in the exercise of its prosecutorial discretion, and in light of the difficulty of obtaining effective relief, it would ordinarily decline to prosecute a merger between “leading” companies in a global product market, which are “foreign and all of their assets involved in producing and distributing [the product] are located outside the United States”, even though the shipments of those companies into the United States account for 60% of this market.

One might try to distinguish the facts in this matter from the Justice Department’s hypothetical case based on its caveat that “the Department might reach a different conclusion . . . if either [party] had production facilities or substantial distribution assets used to produce or distribute [the product] located in the United States”. But, it is my understanding that neither party maintains relevant production facilities or relevant substantial distribution assets in the United States. Other distinguishing factors not mentioned in the Justice Department Guidelines could also quite legitimately be considered in cases of this nature, such as whether one of the foreign parents dictates prices in the United States market involved.

The Canadian comments highlight the public’s understandable confusion about the basis for the Commission’s action in this case, and whether the United States Government’s antitrust agencies are consonant in their approach to extraterritorial cases. Neither the complaint, the order, nor the notice to “Aid” Public Comment indicates to the parties, or to the public at large, that we have taken any account of the Guidelines in reaching our decision. It is unclear whether we fundamentally disagree with the Justice Department on Illustrative Case 4 in its delineation of the appropriate exercise of prosecutorial discretion; it is unclear whether we agree with its premises, but feel that the assets caveat applies; and, it is unclear whether we believe additional factors should be considered. All of the foregoing will remain mysteries to interested parties outside of the Commission who legitimately have a need to know in terms of their business planning and efforts to comply with the law. We are also keeping these matters a secret from other countries who have

<sup>8</sup> Reprinted in 4 Trade Reg. Rep. (CCH) ¶13,109 (November 10, 1988). The Canadian Government in its comments, *supra* note 9, nonetheless did not “wish to endorse either generally or specifically the policies articulated in the [Guidelines].”

justifiable interests in the predictability and fairness of Commission actions that affect their citizens.

This case underscores the need for the Commission to better articulate its standards, based on sound experience in individual cases. Speeches by extant Commissioners and staff certainly make an important contribution to this goal, but they cannot take the place of clear and judicious, collective articulation of specific policies. Among the vehicles that the Commission might consider are more comprehensive statements accompanying consent agreements, and refined guidelines, either alone or with the Department of Justice. Until such time as the Commission acts to embrace or repudiate the Guidelines, in whole or in part, they are out there for all the world to see and govern their conduct by—apparently at their peril.<sup>9</sup>

In this matter, the comments of the Government of Canada strongly suggest (at least to this reader) that its concerns about the acquisition of Connaught by Institut Merieux transcended the mere issue of whether the Commission had strictly fulfilled its notification obligations under the Memorandum of Understanding that exists between the two Governments.<sup>10</sup> It is unclear whether the more speculative future concerns that the Commission harbors over pending product developments by Institut Merieux and Connaught, which may ultimately be licensed for use here by the U.S. Food and Drug Administration (FDA), outweigh the Canadians' present concerns over the effects of this transaction, and the Commission's various remedies, in their backyard. Furthermore, the Commission's original proposed consent order would have reserved to the Commission alone decisions over selection of a lessee for the vaccine production facility located in Canada, the terms of the lease, and the selection of a trustee in the event that Merieux was unable to find a lessee within a certain period of time; these reservations of authority could conflict with Canadian authority over the same transaction and assets which are located in its territory.<sup>11</sup> I trust that the Commission did not intend to charge off

<sup>9</sup> Because of our clearance procedures with the Justice Department, prospective merging parties who file Hart-Scott-Rodino notifications do not know when they are in the process of constructing a transaction which antitrust agency will judge their conduct, and under what standards.

<sup>10</sup> Memorandum of Understanding Between the Government of the United States of America and the Government of Canada as to Notification, Consultation and Cooperation With Respect to the Application of National Antitrust Laws, March 9, 1984, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,503. The Commission's initial failure to comply with the precise letter of that Memorandum is, of course, unfortunate; but, adequate corrective action was promptly taken. I commend Bureau Director Arquit's plans to institute additional preventative measures to militate against any recurrence of this regrettable incident.

<sup>11</sup> While the final order has been modified to subject these decisions to the prior approval of Canadian authorities, the initial Commission proposal had an adverse effect on our relations with our neighbor and highlights the issue of how wise any action was here.

under the battle cry of "54'40" or fight!", but I wouldn't blame the Canadians if they initially viewed it that way. Curiously, the ultimate result is so solicitous of the Canadians' interests that it places this agency of the United States Government in the position of blessing priority to Canadian purchasers of vaccine, rather than Americans, in the event of a shortage.

At a time when representatives of competition authorities around the world are calling for more international cooperation in antitrust enforcement<sup>12</sup>, I fear that our initial decision to proceed in this questionable case has sent an unnecessarily harsh message, with questionable benefits to American consumers in return.

As to the fairness and efficacy of the consent order taken in this case, I am troubled by two elements: the leasing provisions and the prior approval provision. First, as to the order's leasing provisions, the relief they promise is not guaranteed, for a variety of reasons, and considerable resources may be expended (our own and Merieux's), only to face disappointment. It is my understanding that, apart from some expressions of interest, a potential lessee has not yet been clearly identified. This is unsettling, based on what I understand to be the Commission's preference in past cases for more certainty along these lines. Finally, the FDA has expressed some concern about the feasibility of accomplishing the Commission's directive under the FDA's standards governing facilities. Finally, there is no "crown jewel" fallback position, in the event that the lease provisions cannot be effectuated.

The responses to these concerns seem to be two: first, that there is a precedent in the drug industry, including at Connaught's facilities, for lease agreements; and second, that we have nothing to lose by accepting the agreement, *i.e.*, that we cannot be worse off than we would have been if we let the proposed acquisition take place unencumbered.

With respect to the first assertion, there appears to be inadequate evidentiary support to conclude that the suggested precedent is sufficiently analogous to warrant our reliance. With respect to the second, there are several disadvantages to entering into a consent which faces several practical barriers to its realization. We may be worse off if we have accepted a consent requiring a lease that does not materialize, or materializes with an ineffectual competitor. Further-

<sup>12</sup> See Remarks of Sir Leon Brittan, Vice President of the Commission of the European Communities, "Jurisdictional Issues in E.E.C. Competition Law", Cambridge, England, 8 February 1990, as well as the remarks of several participants at the 5th International Cartel Conference in Berlin, June 17-19, 1990.

more, we should not ignore the costs of monitoring this arrangement, including the compliance reports that we will be seeing every 60 days during at least part of its tenure (and the monthly trustee's reports, if that feature of the order comes into play).

I also find some ambiguity as to how this consent would operate subsequent to possible FDA approval of the Connaught rabies vaccine. If the approval comes during Merieux's or the trustee's search for a lessee, would the "ongoing business" requirement mandate an aggressive marketing campaign on Merieux's part for a product that it may not possess in the future? Moreover, will the FDA re-qualification process unduly postpone the introduction of, or interrupt the presence of, this vaccine in the market?

My other concern as to the substance of this order is the prior approval provision, which affords this Commission, for a time certain, special powers vis-à-vis the future overlapping acquisitions of Merieux in the entire vaccine business; its scope is troubling. While the complaint accompanying the order charges anticompetitive effects in only two specific vaccine markets, rabies and IPV, the prior approval provision runs to acquisitions involving a horizontal overlap in vaccines for any human disease. While, obviously, Merieux has accepted this expansion of the product market, I question whether the Commission would necessarily adopt such a scope in a litigated case, and whether we should do so here simply because we can.<sup>13</sup>

A prior approval provision affords the Commission, for a time certain, special extrajudicial powers vis-à-vis the future acquisitions of the party subject to it, and may place that party at a distinct disadvantage relative to competitors who need only comply with Hart-Scott-Rodino Act restrictions. Although I am aware that prior approval provisions in consent orders have been expanded into geographic markets not covered by the accompanying complaint<sup>14</sup>, my inquiries have not yielded examples of comparable extension of product markets, nor any compelling rationale therefor.

<sup>13</sup> I realize that in the ever-developing "global economy," companies like Institut Merieux may seek to accommodate regulatory authorities in order to make their way into new markets. However, I have recently expressed serious concerns about the irrelevance of parties accepting consent agreements to the merits of the case. See CPC International, Inc., No. 892 3176, and discussion of *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 246 n.14 therein.

<sup>14</sup> An example among consent orders is *Canada Cement Lafarge* (C-3100), under which the Commission granted prior approval of an acquisition. In that case, the scope of the prior approval provision extended beyond the complaint's geographic market to encompass acquisitions of facilities within 300 miles of Lafarge's facilities. As to the geographic scope of prior approval provisions in litigated orders, see *American Medical International, Inc.*, 104 FTC 1, 221-237 (1984); *Hospital Corporation of America*, 106 FTC 361, 513-19 (1985).

The prior approval provision here would make the Commission's work easier in the event of a future merger with anticompetitive potential in other vaccine markets. But, this is not the test of a wise exercise of our power. Some special circumstance that supports the imposition of a broadened product market should be present that would lead us reasonably to believe that the regular Hart-Scott-Rodino process provided by the Congress would not protect our law enforcement interests in a future case involving these parties outside of the product market identified in the instant complaint.<sup>15</sup>

In summary, this is a matter which raises serious questions as to the judicious exercise of our prosecutorial discretion, and potential, grave complications stemming from the remedies provided. Although each of the problems discussed in this statement might not, in and of itself, have prompted me to dissent in this matter, their combination compels me to do so.

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<sup>15</sup> In the alternative, the *AMI* and *HCA* cases suggest the possibility of a prior *notification* provision of broadened scope.

Interlocutory Order

113 F.T.C.

IN THE MATTER OF

FAY'S DRUG COMPANY, INC.

*Docket 9227. Interlocutory Order, August 17, 1990*

ORDER AMENDING COMPLAINT TO REFLECT  
CHANGED NAME OF RESPONDENT FAY'S DRUG COMPANY, INC.

Pursuant to Section 3.15 of the Rules, the Joint Motion to Amend Complaint (August 17, 1990) is granted, and henceforth with respect to Fay's, the caption of the case should read Fay's Incorporated.



IN THE MATTER OF  
GOODYEAR TIRE & RUBBER COMPANY, ET AL.

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

*Docket 6486. Consent Order, Mar. 9, 1961—Set Aside Order, Aug. 21, 1990*

The Federal Trade Commission has set aside a 1961 consent order with Goodyear Tire & Rubber Co., (58 FTC 309), which prohibited the company from entering into sales commission agreements with any oil marketing company for the marketing of tires, batteries, and accessories. The Commission concluded that changes of law warranted reopening the proceeding, and that because there is little prospect that the activities prohibited by the 1961 order could now diminish competition, there was no need to maintain the order, and it should be set aside.

ORDER REOPENING AND SETTING ASIDE FINAL ORDER  
ISSUED ON MARCH 9, 1961

On April 23, 1990, the Goodyear Tire & Rubber Company (“Goodyear”) filed a request to reopen and set aside the Final Order that was entered in this proceeding on March 9, 1961. Goodyear’s request was on the public record for thirty days. No comments were received. The request was filed pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b) and Section 2.51 of the Federal Trade Commission Procedures and Rules of Practice, 16 CFR 2.51.

The order Goodyear seeks to have set aside, Docket No. 6486, was based on a finding by the Commission that an agreement between the Atlantic Refining Company (“Atlantic”) and the Goodyear Tire and Rubber Company (“Goodyear”) constituted an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act. Under the agreement, Atlantic received commissions on the sale of Goodyear products to designated Atlantic franchisees. The order prohibited Atlantic from continuing the sales commission agreement and related business practices with Goodyear or other Atlantic suppliers. The order also prohibited Goodyear from maintaining such agreements with Atlantic or any other marketing oil company.

Docket No. 6486 was fully litigated. The Commission’s decision and order were affirmed and enforced by the Seventh Circuit Court of Appeals on April 24, 1964, and affirmed by the United States

Supreme Court on June 1, 1965. Goodyear asserts that, since the adjudication of the Commission's order, there have been changes of law that warrant reopening the order and setting it aside.

The Atlantic Richfield Company ("Arco") was formed as a result of the merger of Atlantic with other oil companies. Arco became the successor to Atlantic and was thereby bound by the terms of the order in Docket No. 6486. On February 3, 1989, Arco filed a request to reopen and set aside that order. On June 2, 1989, the Commission granted that request as to Arco. Order Reopening and Setting Aside Final Order Issued on March 9, 1961 ("Order Setting Aside").

The Commission has considered Goodyear's request and has concluded that Goodyear has made a showing that warrants setting aside the entire order in Docket No. 6486. Significant changes of law since the entry of the order in this matter warrant setting aside the order.

#### BACKGROUND

The Commission issued the complaint that initiated the adjudication of this matter on January 11, 1956. The initial decision of the hearing examiner was issued on October 23, 1959. The Commission's opinion, issued on March 9, 1961, held that the sales commission agreement concerning tires, batteries, and other automotive accessories ("TBA") between Atlantic and Goodyear and another between Atlantic and the Firestone Tire and Rubber Company ("Firestone") constituted unfair methods of competition and violated Section 5 of the Federal Trade Commission Act. 58 FTC 309. The Court of Appeals and the United States Supreme Court upheld the Commission's decision and order. 331 F.2d 394 (7th Cir. 1964), 381 U.S. 357 (1965).

#### The Decision

The factual basis for the finding that the sales commission agreement violated the Federal Trade Commission Act was explicitly set out in the Commission's decision. Prior to 1951, Atlantic had acquired TBA products and resold them to its petroleum franchisees. In 1951, it switched to a system under which Atlantic selected manufacturers of TBA to supply its franchisees. Atlantic entered into "best efforts" contracts with Goodyear and Firestone. Under these contracts Atlantic agreed that it would exert its best efforts to promote Goodyear products to all of its franchisees within a designated geographic area and Firestone products within another

area. In return those companies agreed to limit TBA sales to Atlantic franchisees within the designated areas and to pay Atlantic a commission on all their sales to the franchisees. Under the sales commission plan, designated Goodyear and Firestone wholesalers were allocated geographical regions. In each region, one wholesaler was to be the sole source of TBA to each Atlantic franchisee.

The Commission's decision stated this arrangement was unlawful because it "presents a classic example of the use of economic power in one market (here, gasoline distribution) to destroy competition in another market (TBA distribution)." 58 FTC at 367. The Commission found that Atlantic had "sufficient economic power" to reduce competition that would have existed from suppliers of other TBA products. *Id.* at 364.

Atlantic was found to have successfully implemented its sales commission program through the use of threats and coercion. *Id.* at 347. The record contains lengthy references both to complaints by franchisees that they would have purchased other TBA products absent pressure from Atlantic and to instructions by Atlantic that its pressure must be implemented in a covert manner. *Id.* at 328, 355, 357.

The decision stated that Atlantic threatened, explicitly and implicitly, to cancel franchises of gas stations that did not buy the TBA products that Atlantic recommended. *Id.* at 343-47. The gas station franchise agreements were subject to annual review and could be cancelled by Atlantic on a number of subjective grounds. *Id.* at 356.

The Commission found: "Goodyear thus appeared confident that the presence of an Atlantic salesman together with the Goodyear representative would render unnecessary any higgling or haggling over price before an initial order for TBA from Atlantic dealers." *Id.* at 355. The record before the Commission also contained evidence that, "Goodyear has sales commission contracts with a number of other marketing oil companies, and these agreements are in all material respects identical with the Goodyear-Atlantic contract. . . . The evidence of record in this case shows that oil companies other than Atlantic have employed coercive tactics in requiring their dealers to purchase Goodyear TBA." *Id.* at 352.

The Hearing Examiner found that sales of TBA were vital to service station owners. TBA provided both the products for the full services expected by customers and additional revenues that made the stations profitable. 58 FTC at 313.

The Commission's decision concerning the Atlantic sales commission plan was one of three such plans that the Commission found unlawful. In the other two actions, involving Shell Oil and Texaco, the Commission decisions were also upheld on review. See, *Firestone Tire & Rubber Co.*, 58 FTC 383 *aff'd sub nom. Shell Oil Co. v. FTC*, 360 F.2d 470 (5th Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967), and *B.F. Goodrich Tire & Rubber Co.*, 69 FTC 22 (1966), *rev'd sub nom. Texaco, Inc. v. FTC*, 383 F.2d 942 (D.C. Cir. 1967) *rev'd sub nom. FTC v. Texaco, Inc.*, 393 U.S. 223 (1968). The Commission also had evidence before it concerning the use of sales commission plans for marketing TBA products to the franchises of seven other oil companies. 58 FTC at 359.

Atlantic and Goodyear denied that their sales commission agreement harmed competition and asserted it was "a legitimate and competitive method of distributing TBA which benefits suppliers of TBA products, oil companies, dealers and distributors of petroleum products and the consuming public." 58 FTC at 324. The Supreme Court, however, rejected the parties' claim that the Commission erred when it refused "to consider evidence of economic justification for the program." 381 U.S. 357 at 371. It also rejected the contention "that the Commission should have made a far more extensive economic analysis of the competitive effect of the sales-commission plan, examining the entire market in tires, batteries and accessories." *Ibid.* It rejected the necessity of these inquiries on the ground that "the effect of this plan is similar to that of a tie-in." *Ibid.*

In these cases, it appears the Commission was concerned about the cumulative effect of foreclosure of competition in TBA products as a result of all the agreements. While Atlantic's share of the retail gasoline market in the area served by its franchisees was 6.8%, the Commission noted that gas stations as a group accounted for 37% of the sales of tires and tubes, 44% of the sales of batteries and 20% of the sales of automotive accessories. *Id.* at 325-6. In the *Shell* case, between 1948 and 1958, the market share of gas stations for TBA products had increased from 31 to 45 percent of all sales. 58 FTC 371 (1961). The Commission alleged that gas stations were likely to become even more important in the sale of TBA. 58 FTC at 326.

#### The Order

The Commission entered an order that forbade Atlantic from promoting or coordinating the sale of TBA products from any TBA

vendor other than itself to Atlantic franchisees. It also forbade Goodyear from:

1. Entering into or continuing agreements with Atlantic or other marketing oil companies in connection with sales of Goodyear TBA products by distributors of any such oil company.
2. Paying or offering to pay anything of value to any marketing oil company for promoting the sale of any Goodyear TBA products by distributors of any such oil company.
3. Participating in monitoring the sales of TBA products to distributors of any marketing oil company for such oil company.

STANDARD FOR REOPENING A FINAL ORDER OF THE COMMISSION

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require.<sup>1</sup> A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of the order inequitable or harmful to competition. *Louisiana Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986) at 4. *See*, S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *see Phillips Petroleum Co.*, Docket No. C-1088, 78 F.T.C. 1573, 1575 (1971) (modification not required for changes reasonably foreseeable at time of consent negotiations); *Pay Less Drugstores Northwest, Inc.*, Docket No. C-3039, Letter to H.B. Hummelt (Jan. 22, 1982) (changed conditions must be unforeseeable, create severe competitive hardship and eliminate dangers order sought to remedy) (unpublished); *see also United States v. Swift & Co.*, 286 U.S. 106, 119 (1932) ("clear showing" of changes that have

<sup>1</sup> Section 5(b) provides, in part:

[T]he Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part.

The 1980 amendment to Section 5(b) did not change the standard for order reopening and modification, but "codifie[d] existing Commission procedures by requiring the Commission to reopen an order if the specified showing is made," S. Rep. No. 96-500, 96th Cong., 2d Sess. 9-10 (1979), and added the requirement that the Commission act on petitions to reopen within 120 days of filing.

eliminated reasons for order or such that the order causes unanticipated hardship).

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in requests to reopen to show how the public interest warrants the requested modification. 16 CFR 2.51. In such a case, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. *Damon Corp.*, Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 24, 1983), at 2 (hereafter "Damon Letter") (unpublished). For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order." *Damon Corp.*, Docket No. C-2916, 101 FTC 689, 692 (1983). Once such a showing of need is made, the Commission will balance the reasons favoring the modification requested against any reasons not to make the modification. Damon Letter at 2; see, e.g., *Chevron Corp.*, Docket No. C-3147, 3 Trade Reg. Rep. (CCH) 22,239 (March 13, 1985) (public interest warrants modification where potential harm to respondent's ability to compete outweighs any further need for order). The Commission will also consider whether the particular modification sought is appropriate to remedy the identified harm. Damon Letter at 4.

The language of Section 5(b) plainly anticipates that the burden is on the requester to make "a satisfactory showing" of changed conditions to obtain reopening of the order. See also *Gautreaux v. Pierce*, 535 F. Supp. 423, 426 (N.D. Ill. 1982) (requester must show "exceptional circumstances, new, changed or unforeseen at the time the decree was entered"). The legislative history also makes clear that the requester has the burden of showing, by means other than conclusory statements, why an order should be modified.<sup>2</sup> If the Commission determines that the requester has made the necessary showing, the Commission must reopen the order to determine whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order,

<sup>2</sup> The legislative history of amended Section 5(b), S. Rep. No. 96-500, 96th Cong., 2d Sess. 9-10 (1979), states:

Unmeritorious, time-consuming and dilatory requests are not to be condoned. A mere facial demonstration of changed facts or circumstances is not sufficient . . . . The Commission, to reemphasize, may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order.

however, if the requester fails to meet its burden of making the satisfactory showing of changed conditions required by the statute. The requester's burden is not a light one in view of the public interest in repose and the finality of Commission orders. See *Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality); *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 296 (1974) ("sound basis for . . . [not reopening] except in the most extraordinary circumstances"); *RSR Corp. v. FTC*, 656 F.2d 718, 721-22 (D.C. Cir. 1981) (applying *Bowman Transportation* standard to FTC order).

Goodyear asserts that there have been changes of law that require the Commission to reopen and set aside the order.

#### CHANGES OF LAW WARRANT REOPENING THE ORDER

Goodyear urges that, since the order was entered, court and Commission decisions have significantly changed the antitrust law that applies to tying and other non-price vertical restraints. Specifically it cites two lines of cases that would require the Commission to consider issues that the Commission did not address when it found the Goodyear-Atlantic sales commission plan was an unfair method of competition. The issues are:

A requirement, pursuant to *United States Steel Corp. v. Fortner*, 429 U.S. 610 (1977), that "economic power" concerning the tying product be demonstrated in terms of market power, and

A requirement, pursuant to *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), to consider efficiencies resulting from the vertical restraints that might enhance interbrand competition.

Request at 34 *et seq.*

These arguments track the Commission's decision in setting aside this order as to Arco. The Commission concluded these changes of law were relevant to its original decision:

"[f]or purposes of reopening the order, the important point is that the Commission made no inquiry concerning the market power of Atlantic and that today such an inquiry would be mandatory. . . . *Fortner* and subsequent cases established criteria that changed the law of tying in ways that are central to the determination of this case. Accordingly, there has been a change of law that warrants reopening this order."

Order Setting Aside at pp. 6-7. It further concluded that;

If the Commission's finding was not that the sales commission plan was an unlawful tie, the plan was, nevertheless, held to be a *per se* unlawful vertical restraint of some other type. Since the Supreme Court's decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), it has been clear that non-price vertical restraints generally are to be evaluated under a rule of reason standard. That standard requires consideration of whether interbrand competition may be enhanced by efficiencies resulting from vertical restraints. But as the Supreme Court noted in affirming the order in this case, the Commission refused to consider "evidence of economic justification" or to analyze "the competitive effect of the sales commission plan, examining the entire market in tires, batteries and accessories." 381 U.S. 357 at 371 (1965). Thus, to the extent the Commission's decision rests on an analysis of vertical restraints, it appears that this change of law also requires reopening the order.

*Id.* at 7.

The same conclusion applies to Goodyear. There have been no subsequent developments in the antitrust law that would warrant a different outcome, therefore the order is reopened as to Goodyear also.

#### THE ORDER WILL BE SET ASIDE

Having concluded that changes of law warrant reopening the order, the question remains whether modification of the order is appropriate. An order is not set aside automatically on the grounds that the law has changed, even if, as here, the Commission refused to consider issues that later become mandatory. Having satisfied itself on a record of adequate proof under then prevailing standards, the Commission does not have to reprove its case to maintain a final order. The order remains in force unless the requester can show either that there is no basis in current law on which such a case could be brought and no need for the order or that the current effect of the order is detrimental to competition. *See, Louisiana Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986).

In the context of this request, Goodyear has made no showing of harm to competition resulting from the restraints the order imposes on it. It must, therefore, persuade the Commission that there is no need for the order. Goodyear urges that the Commission's decision setting aside the order as to Arco made the findings necessary when it determined that "gas stations as a group, and Arco in particular, probably have too small a market share to produce substantial competitive effects on TBA distribution." Order Setting Aside at pp. 7-8. The Commission's decision noted that the market share of gas



stations had declined from 37 percent in 1961 to sales of "8 percent of replacement tires in 1987." Order Setting Aside at n. 3.

Goodyear's request may appear to deserve a closer look at possible competitive effects, because it has a much larger share of the TBA market than Arco, or all gas stations, and Goodyear could augment that share through agreements with marketing oil companies. Goodyear concedes that it produces a substantial share of replacement tires in the American market, including tires sold by gas stations. (Goodyear's share of the battery and accessories market is negligible. Request at n. 10)

However, even if Goodyear were to capture all tire sales to gas stations that would not satisfy the standard for unlawful tying set out in *Fortner, supra*. An unlawful tie requires the existence of a tying product that has market power and use of that market power to tie the sale of the tied product. *See also, Jefferson Parish Hospital District No. 2 v. Hyde*, 446 U.S. 2 (1984). In this order, the gas station franchise is the tying product, not tires.

In any case, gas station franchises do not appear at this time to have the potential to create market power in the sale of tires. Their once substantial share has been lost to mass marketers and specialty automotive stores. *See Arco Request*, Tables 1 and 2. As a result, if Goodyear were to engage in the activities currently prohibited by the order, it appears that there is little prospect that such activities could diminish competition. There is, therefore, no need to maintain the order.

Accordingly, *it is ordered*, that this matter be reopened and that the Commission's order in Docket No. 6486 issued on March 9, 1961, be set aside as to Goodyear as of the date of this order.

Modifying Order

113 F.T.C.

IN THE MATTER OF

THE KROGER CO.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 9040. Consent Order, Nov. 11, 1977—Modifying Order, Aug. 21, 1990*

This order reopens the proceeding and modifies the 1977 consent order (90 FTC 459) which, with certain limitations, required respondent to keep advertised sale items on hand and to sell them at no more than the advertised price. Respondent's petition was based on the 1989 amendment to the Commission's Retail Food Store Advertising & Marketing Practices Rule (the "Unavailability Rule"). The Commission concluded that its action in amending the Unavailability Rule constituted a changed condition of law and fact, requiring that the proceeding be reopened and the order modified.

ORDER REOPENING THE PROCEEDING AND  
MODIFYING CEASE AND DESIST ORDER

On April 23, 1990, The Kroger Co., a corporation, filed a request to reopen the proceeding and modify the consent order entered against it by the Commission on November 11, 1977, in Docket No. 9040 (90 FTC 459).

The request to reopen the proceeding and modify the consent order was placed on the public record on April 23, 1990, and a press release regarding the request was issued on May 10, 1990. The public comment period ended on June 11, 1990, and no comments were filed. On July 31, 1990, petitioner withdrew its request that part III.A.(1) of the consent order be deleted. The deadline to rule on petitioner's request was August 21, 1990.

Petitioner is one of the nation's largest food retailers. The order prohibits it from failing to have advertised items readily available for sale, from failing to mark each item with a price no higher than the advertised price, and from failing to sell each item at a price no higher than the advertised price. Petitioner may, however, avoid liability for its failure to comply with these proscriptions if it discloses in its sale advertisements specific exceptions, limitations or restrictions with respect to store, item and price. Petitioner must also maintain a continuing surveillance program which entails surveys of its stores to ascertain the rates of unavailability, over price marking and over-

charging. Defenses and presumptions applicable to those defenses are based on tolerance levels of unavailability, over price marking and overcharging.

The order also requires petitioner to post in each of its stores a copy of its advertisement and a statement that all items advertised are required to be available for sale at or below the advertised price, except as specifically noted in the advertisement. The statement must also advise consumers that a raincheck may be obtained if an item is unavailable. Additionally, petitioner's advertisements for sale items must disclose that each item is required to be available, except as specifically noted in the advertisement. Petitioner is further required by the order to deliver a copy of the order to specified supervisory employees.

#### PETITIONER'S REQUEST

Petitioner requests that the Commission reopen and modify the order so that it is not inconsistent with the Commission's Retail Food Store Advertising and Marketing Practices Rule ("the Rule"), as amended on August 28, 1989. Petitioner states that changes in law, fact and public interest considerations warrant the requested relief.

Petitioner states that the Commission's action in amending the Rule constitutes a change of law and fact requiring that the order be reopened and modified so that it is not inconsistent with the amended Rule. Both the order and the original Rule required the petitioner to have advertised items readily available, at or below the advertised prices, and both permitted similar defenses. The amendments permit new defenses to unavailability that were not permitted under the original Rule or the order.

Petitioner relates that it filed a request to reopen the proceeding and vacate the order on July 1, 1988, which was based on similar alleged changes and public interest considerations as in the instant request. It states that the Commission denied its request on August 18, 1989, because the amendments to the Rule did not constitute changes in law or fact requiring that the order be vacated. The Commission did indicate, however, that changes in the Rule "may require that the order be modified so that it is not inconsistent with the amended Rule." Petitioner quotes from the Commission's letter advising it of its denial of the request:

"It may be in the public interest, however, to reopen and modify the order to

enable petitioner, and ultimately the consumer, to benefit from the Rule's amendments."

Under the amended Rule, petitioner says, rainchecks, items of comparable value, other compensation of equivalent value and general disclaimers of limited availability of advertised items will provide an "absolute defense" to its competitors, while petitioner will be subject to higher costs. When it consented to the order, petitioner states, it could not have foreseen that its competitors "would be relieved of any realistic concern about potential penalties and would consequently be spared from the excessive costs of ensuring compliance."

Pointing out the inconsistencies between the order and the amended Rule, petitioner states that, if the order is not modified, it will be left in the position of violating the order by complying with the amended Rule or violating the amended Rule by complying with the order. As an illustration, petitioner says that parts I and III of the order would not permit it to follow the amended Rule's standards regarding advertising items in limited supply. Conversely, it says that it would violate the amended Rule if it refused to offer substitutes for out-of-stock items even though such refusal would be in compliance with the order if it was within the tolerance levels permitted by the order.

Petitioner is also asking that specified provisions of the order that were never part of the Rule be stricken from the order. It argues that the advertising disclosure and store notices relating to availability, which are required by the order, are inconsistent with the amended Rule since they do not reflect the defenses to unavailability provided by the amendments.

Petitioner states that the provisions of the order requiring a surveillance program, entailing surveys of its stores to determine levels of unavailability, will not be needed if the order is modified so that it is not inconsistent with the amended Rule. Under the amended Rule, petitioner maintains, compliance may be achieved through advertising disclosures of limited availability, or by offering rainchecks, comparable items or other compensation for unavailable items.

Petitioner argues that surveillance and surveys of pricing impose heavy burdens that are inconsistent with the "fundamental functions" of the amended Rule to eliminate costs. Because of the widespread use of scanners, petitioner says, it "would necessitate examination, correlation and recordation of every 'identification code' and associated 'display' prices for many, if not most advertised items." "In

addition”, petitioner continues, “audits would be needed to calculate and document the ‘ultimate price’ in transactions involving total dollar purchase, couponing or other promotional items.”

Arguing that it is in the public interest to reopen and modify the order as requested, petitioner notes that it estimated in its prior request that the order be vacated that compliance with the original Rule and the order costs it approximately \$7 million per year and that, if it were required to comply only with the amended Rule, these costs could be reduced by \$3 to \$4 million. If it is compelled to endure these “costly compliance measures while other food retailers are free of them”, petitioner states, “its competitive effectiveness will be impaired.” The consequences, it says, will be detrimental to consumers served by its 11,400 supermarkets throughout the United States.

#### THE COMMISSION’S DECISION

Under Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), the Commission must reopen an order to consider whether it should be altered, modified or set aside if a respondent files a request that makes a satisfactory showing that changed conditions of law or fact require the order to be altered, modified or set aside in whole or in part. This provision also permits the Commission to reopen an order for the purpose of altering, modifying or setting aside some or all of its terms whenever it believes that such an action would be required in the public interest. Rule 2.51(b) of the Commission’s Rules of Practice implements this provision of law and states that to be satisfactory, a request may not be “merely conclusory” but must “set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modifications.”

The Commission has concluded that its action in amending the Retail Food Store Advertising and Marketing Practices Rule constitutes a changed condition of law and fact, requiring that the order be reopened and modified. When petitioner entered into the consent order, the original Rule was in effect and it and its competitors were subject to civil penalty liability for failing to have advertised specials available at or below the advertised prices. Similar defenses were provided for petitioner under the order and for its competitors under the Rule. With the amendments to the Rule, which it could not have foreseen when it entered into the consent order, petitioner is no longer in the same position as its competitors because it may not avail itself

of the same defenses that they may invoke. In addition, the amendments to the Rule have brought the terms of the order into conflict with that Rule.

On August 28, 1989, the Commission amended the Rule in order to reduce costs on the retail food store industry that are passed along to consumers. The Commission concluded that the amended Rule would not significantly reduce consumer protection because instances of unavailability would be mitigated by the amended Rule's requirement that consumers be offered rainchecks or comparable substitute items. The Commission believes that it is in the public interest that petitioner, and ultimately its customers, should be entitled to the cost savings that the amended Rule will provide.

A separate prohibition in the original Rule against failing to have advertised specials available at or below the advertised prices was omitted from the amended Rule. However, over pricing continues to be prohibited by the amended Rule since it is implicit in the requirement that products offered for sale at a stated price be available. This will be true even if the pricing provisions of the order are eliminated to coincide with the amended Rule. The order also has pricing proscriptions. The order also requires petitioner to maintain a program of surveillance, including surveys of its individual stores, with tolerance levels for over price marking and overcharging. The Commission believes that such costly procedures are inconsistent with the amended Rule's stated purpose of reducing compliance costs.

The Commission is persuaded by the petitioner's argument that the order's costly compliance procedures to protect against unacceptable levels of unavailability will not be needed when the order is modified so that it is not inconsistent with the amended Rule. The amendments will enable petitioner to comply with the order by disclosing limited availability in its advertising or by offering "rainchecks", comparable items or other compensation in unexpected instances of unavailability. Petitioner has shown that provisions of the order requiring disclosures in advertisements and the posting of statements in petitioner's stores concerning unavailability and pricing are inconsistent with the amended Rule and should be stricken from the order.

#### CONCLUSION

Petitioner has demonstrated that changed conditions of law and fact, and public interest considerations require that the proceeding be reopened and the order modified as requested.

*It is therefore ordered*, That the proceeding is hereby reopened and the Decision and Order issued on November 11, 1977, is hereby modified to read as follows:

#### ORDER

#### DEFINITIONS

For purposes of this order, "*respondent*" means The Kroger Co., a corporation, its successors or assigns, its officers, agents, representatives and employees.

For purposes of this order, "*retail food store*" shall mean all of respondent's food stores, but shall not include convenience stores (stores less than 4,000 square feet in total area) and drug stores.

#### I. PROHIBITED ACTIVITIES

*It is ordered*, That respondent, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of food or grocery products or other merchandise, hereafter sometimes referred to as items, offered or sold in its retail food stores, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from, directly or indirectly:

Offering any such products for sale at a stated price, by means of an advertisement disseminated in an area served by any stores which are covered by the advertisement, if these stores do not have the advertised products in stock and readily available to customers during the effective period of the advertisement, unless the advertisement clearly and adequately discloses that supplies of the advertised products are limited or the advertised products are available only at some outlets;

*Provided, however*, that no violation of this modified order shall be found if respondent

(a) Ordered the advertised products in adequate time for delivery in quantities sufficient to meet reasonably anticipated demand;

(b) Offers a "raincheck" for the advertised product;

(c) Offers at the advertised price or at a comparable price reduction a similar product that is at least comparable in value to the advertised product; or

(d) Offers other compensation at least equal to the advertised value.

## II. ADDITIONAL OBLIGATIONS OF RESPONDENT

*It is further ordered:*

A. That throughout each advertised sale period in each of its retail food stores covered by an advertisement, respondent shall post a copy of the advertisement conspicuously (1) at or near each doorway affording entrance to the public, and (2) at or near the place where customers pay for merchandise.

B. Respondent shall forthwith deliver a copy of this order to each of its operating divisions and to each of its present and future officers and other personnel in its organization down to the level of and including assistant store managers who, directly or indirectly, have any supervisory responsibilities relating to (a) availability or price marking of advertised items in respondent's retail food stores, and (b) check stand operations, or who are engaged in any aspect of preparation, creation, or placing of advertising, and respondent shall secure a signed statement acknowledging receipt of said order from each such person.

C. Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the respondent which may affect compliance obligations arising out of this order.

D. At such times as the Commission may require, respondent shall file a report in writing setting forth in detail the manner and form in which it has complied with this order.



IN THE MATTER OF  
THE VONS COMPANIES, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3302. Complaint, Aug. 27, 1990—Decision, Aug. 27, 1990*

This consent order prohibits, among other things, a Mich. based corporation that operates grocery stores in Calif. and Nev. from misrepresenting the extent to which any food contains pesticides and from making any representation concerning the presence or health effects of any pesticide applied to or present in any food, unless respondent possesses and relies upon competent and reliable scientific evidence substantiating such representation.

*Appearances*

For the Commission: *Steven A. Shaffer* and *Jeffrey A. Klurfeld*.

For the respondent: *Robert P. Bermingham*, El Monte, CA.

COMPLAINT

The Federal Trade Commission, having reason to believe that the Vons Companies, Inc. has 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 Vons Companies, Inc. ("Vons") is a corporation organized, existing, and doing business pursuant to the laws of the State of Michigan. Its principal office or place of business is at 10510 Lower Azusa Road, El Monte, California.

PAR. 2. Respondent has advertised, promoted, offered for sale, sold, and distributed to the public various products, including fruits, vegetables and other produce ("Vons produce") which constitute "food" as defined in Section 15 of the Federal Trade Commission Act. Respondent's offering for sale, promotion, sale and distribution of Vons produce constitutes the maintenance of a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. In the course and conduct of its business, respondent has

disseminated and caused the dissemination of advertisements and promotional materials for Vons produce by various means in or affecting commerce. Such advertisements and promotional materials were for the purpose of inducing, and were likely to induce, directly or indirectly, the purchase by the public of Vons produce.

PAR. 4. Typical of respondent's advertising for Vons produce, but not necessarily all-inclusive thereof, is a two-page brochure attached hereto as Exhibit A. The aforesaid brochure contains the statement "PESTICIDE FREE PRODUCE."

PAR. 5. Through the use of the statement referred to in paragraph four and others in advertisements and promotional materials not specifically set forth herein, respondent has represented, directly or by implication, that all produce sold by Vons is free of pesticides.

PAR. 6. In truth and in fact, not all produce sold by Vons is free of pesticides. Therefore, respondent's representation as set forth in paragraph five was and is false and misleading.

PAR. 7. The aforesaid acts or practices of respondent were and are to the prejudice and injury of the public and constituted and now constitute unfair and deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act and false advertisements in violation of Section 12 of the Federal Trade Commission Act.

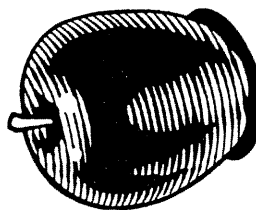
THE VONS COMPANIES, INC.

Complaint

EXHIBIT A

779

# AT VONS WE'VE GOT PESTICIDES UNDER CONTROL.



# VONS.

### Helpful Hints For The Consumer.

Since most pesticides are topical (sprayed on the outer surfaces of the produce) you can do several things at home to make sure that your produce is safe to eat.

For example:

Always wash your produce with water. This will help remove pesticide residue. In addition, that may will take off any "road dirt" that may have accumulated during the harvesting and transporting process.

On leafy produce, peel the outside layers off. Vons actually does this before the produce arrives in our stores.

In conclusion, we at Vons want you to know that we share your concern about the pesticide issue. And that Vons is doing everything we can to bring you the safest, highest quality produce available.

### For More Information:

- National Pesticide Telecommunications Network (800) 858-PEST
- Pesticide Enforcement Branch of California Department of Food & Agriculture, 1220 N Street, Sacramento, CA 95814 (916) 445-5343

Exhibit A - 1

Complaint

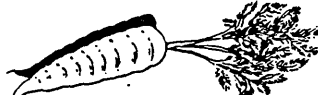
113 F.T.C.

Exhibit A - 2

**Pesticides Are Essential To Our Abundant Food Supply.** Pesticides are responsible for the abundance of fruits and vegetables available in your neighborhood market. They help control insects, diseases and weeds and enable growers to store and transport produce over long distances. As a result, Americans have the lowest food costs in the world.

**Vons Mandatory Pesticide Testing.** Vons is obsessed with providing our customers with the highest quality produce available. That's why our policy on pesticide residue testing is maintained by the California Department of Food and Agriculture (CDFA). The (CDFA) has the most extensive pesticide monitoring program in the U.S. They randomly test Vons produce at all three produce warehouses regularly, and results are then telecommunicated to Vons within 6 to 8 hours. In this way, produce which does not meet CDFA regulations is held for pickup by the authorities or destroyed before reaching a Vons store.

Naturally, all imported produce must meet the same strict standards enforced by the CDFA. Foreign producers are well aware of our more stringent regulations, and consequently, test results show there is very little



difference between the pesticide levels on imported and domestic produce.

**Vons Goes Beyond U.S. Food & Drug Administration Standards to Assure Safe Produce.** Vons works year-round with an independent lab, testing selected produce that consumer groups have expressed concern about. For example, this past summer every shipment of grapes was randomly sampled for over 60 different pesticides. In addition, Vons also tests for Aler, a plant growth regulator used on apples. Throughout the 1988 apple crop year, Vons prohibited any apples treated with Aler from entering our stores; a policy that will be continued in 1989.



This private testing is just one way Vons is addressing the concerns of the consumer over the safety of their produce.

**Because Of Concern Over Pesticides, Vons Produce Growers Are Changing The Way They Farm.** Vons continually meets with growers to convey consumer concerns over the use of pesticides in produce. As a result, they've begun doing their own pesticide testing to make sure levels are well within the federal



standards. They're also utilizing newer pesticides, which can be applied in smaller amounts because of their increased effectiveness. In addition, California growers generally use fewer pesticides because of a stricter registration process, and the fact that this region of the United States is less humid than other agricultural parts of the country. Furthermore, many Vons growers are using an Integrated Pest Management (IPM) system. These growers are continually looking for alternative methods for fighting bugs, such as a machine which "vacuums" bugs away. An adaptation of this vacuum machine is now being used on large lettuce and strawberry farms in Salinas.

**The 1987 Food Safety Report** The CDFA's 1987 pesticide residue monitoring program indicated that no residues were detected in 85% of the samples tested, and residues well below the allowable levels were found in another 13% of the samples. It's important to note that these tests were taken during the preharvest and processing periods when pesticide levels would be at their highest. Consequently, by the time produce actually arrives in the stores, any pesticides previously detected have been reduced or completely dissipated.



PESTICIDE FREE PRODUCE

## 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, their 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, 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 The Vons Companies, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Michigan, with its principal place of business located at 10510 Lower Azusa Road, El Monte, California

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

## I.

*It is ordered,* That respondent Vons Companies, Inc., a corporation, its successors and assigns, and its officers, and respondent's repre-

sentatives, agents and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of any food, as "food" is defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, directly or by implication, the extent to which the food contains pesticides or any particular pesticide, as "pesticide" is defined in Title 7, Section 136(u) of the United States Code.

## II.

*It is further ordered,* That respondent Vons Companies, Inc., a corporation, its successors and assigns, and its officers, and respondent's representatives, agents and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of any food, as "food" is defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making, directly or by implication, any representation concerning the presence or health effects of any pesticide applied to or present in the food, as "pesticide" is defined in Title 7, Section 136(u) of the United States Code, unless at the time of making the representation respondent possesses and relies upon competent and reliable scientific evidence substantiating such representation. To the extent that such evidence consists of tests, experiments, analyses, research, studies or other evidence based on the expertise of professionals, such evidence shall be "competent and reliable" only if those tests, experiments, analyses, research, studies, or other evidence are conducted and evaluated in an objective manner by persons qualified to do so, using only procedures that are generally accepted in the profession as yielding accurate and reliable results.

## III.

*It is further ordered,* That respondent, in connection with the advertising, promotion, offering for sale, sale or distribution of any product covered by this order, shall, for three years from the date of last dissemination of any representation covered by this order,

maintain and upon written request make available to the Federal Trade Commission for inspection and copying:

1. All materials relied upon in making any representation covered by this order;
2. All test reports, studies, surveys or demonstrations in its possession that materially contradict, qualify, or call into question the basis upon which respondent relied at the time of the initial dissemination and each continuing or successive dissemination of any representation covered by this order.

#### IV.

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

#### V.

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

IN THE MATTER OF  
CENTRAL SOYA COMPANY, INC.

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

*Docket C-3303. Complaint, Aug. 27, 1990—Decision, Aug. 27, 1990*

This consent order requires, among other things, a soy protein concentrate ("SPC") company based in Fort Wayne, Ind., to obtain FTC approval, for 10 years, before acquiring any interest in any SPC assets of any company engaged in manufacturing SPC within the United States.

*Appearances*

For the Commission: *Katharine B. Alphin.*

For the respondent: *Frederick Thompson, Fort Wayne, IN. and Linda R. Blumkin, Fried, Frank, Harris, Shriver & Jacobson, New York, N.Y.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Central Soya Company, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated Section 7 of the Clayton Act, and Section 5 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, hereby issues its complaint stating its charges as follows:

DEFINITIONS

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

a. "*Central*" means Central Soya Company, Inc., its parent, its subsidiaries, divisions, and any groups and affiliates under its control,



and their respective directors, officers, employees, agents and representatives, and their successors and assigns.

b. "*Staley*" means A. E. Staley Manufacturing Company, its subsidiaries and divisions, and their respective directors, officers, employees, agents and representatives, and their successors and assigns.

c. "*SPC*" means soy protein concentrate, a product manufactured by removing from dehulled soybeans most of the oil and water-soluble non-protein components, leaving a product that is approximately 70% protein.

2. Central is a wholly-owned subsidiary of SMRK Equity Holdings, Inc., a Delaware corporation, which is controlled by Beghin-Say S.A., a French corporation. Central is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana with its principal place of business being located at 1400 Fort Wayne Bank Building, Fort Wayne, Indiana.

3. Central is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

#### THE ACQUISITION

4. On February 10, 1986, Central purchased part of the assets that Staley used to produce SPC ("*Staley SPC assets*"). These assets included manufacturing equipment, patents, trademarks, technology, know-how, customer lists, and a small plant located in Muskogee, Oklahoma.

#### TRADE AND COMMERCE

##### Relevant Line of Commerce

5. A relevant line of commerce in which to analyze Central's acquisition of the Staley assets is no broader than the manufacture and sale of all SPC.

##### Relevant Section of the Country

6. The relevant section of the country is the entire United States.

#### MARKET STRUCTURE

7. The production, distribution and sale of SPC is extremely

concentrated, whether measured by the Herfindahl-Hirschmann Indices or two-firm and four-firm concentration ratios.

#### ENTRY CONDITIONS

8. Entry into the production, distribution and sale of SPC in the United States is difficult and further entry is unlikely.

#### COMPETITION

9. Central and Staley were actual competitors in the production, distribution and sale of SPC in the United States.

#### EFFECTS

10. The effect of the acquisition of the Staley SPC assets has been substantially to lessen competition in the relevant line of commerce in the relevant section of the country in the following ways, among others:

- a. By eliminating actual competition between Central and Staley;
- b. By increasing Central's ability to unilaterally exercise market power; and
- c. By increasing the likelihood of, or facilitating, actual or tacit collusion.

11. Any or all of the above effects increase the likelihood that firms have increased prices and restricted output or will increase prices and restrict output both in the near future and in the long term.

12. Central's acquisition of the Staley SPC assets violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and Section 7 of the Clayton Act, 15 U.S.C. 18.

#### DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent Central Soya Company, Inc., and the respondent having been furnished thereafter with a copy of a draft of complaint which the Atlanta Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45; 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 Section 5 of the Federal Trade Commission Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

PARAGRAPH 1. Central Soya Company, Inc., is an Indiana corporation, with its executive offices located at 1400 Fort Wayne Bank Building, Fort Wayne, Indiana.

PAR. 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

##### I.

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

A. "*Central*" means Central Soya Company, Inc., its parent, its subsidiaries, divisions, and any groups and affiliates under its control, and their respective directors, officers, employees, agents and representatives, and their successors and assigns.

B. "*Commission*" means the Federal Trade Commission.

C. "*Person*" means any natural person or any corporate entity, partnership, association, joint venture, governmental entity, trust, or any other organization or entity.

D. "*SPC*" means soy protein concentrate, a product manufactured by removing from dehulled soybeans most of the oil and water-soluble non-protein components, leaving a product that is approximately 70% protein.

E. "*SPC assets*" means assets used in the production of SPC exclusive of raw materials.

## II.

*It is ordered,* That, for a period of ten (10) years from the date this order becomes final, Central shall cease and desist from acquiring, directly or indirectly, without the prior approval of the Commission, any stock or share capital of, or any interest in, or any of the SPC assets of any person engaged in the manufacture of SPC within the United States. *Provided, however,* that this paragraph shall not be deemed to prohibit: (1) upon at least 30 days advanced notice to the Commission, the taking by Central from any person, of a non-exclusive license that contains no restrictions with respect to limiting entrants into the market for SPC; (2) purchases of SPC in the ordinary course of business that do not exceed five million (5,000,000) pounds total a year and that do not result in the elimination of a competitor; and (3) upon at least 30 days advanced notice to the Commission, the purchase of used equipment with a fair market value of less than fifty thousand dollars (\$50,000).

## III.

*It is further ordered,* That, one year from the date this order becomes final and annually for nine (9) years thereafter, Central shall file with the Commission a verified, written report setting forth in detail the manner and form in which it is complying or has complied with this order, including but not limited to, a statement identifying each SPC purchase made, the person from whom each SPC purchase was made, and the date, quantity and price of each SPC purchase.

## IV.

*It is further ordered,* That, for the purpose of determining or securing compliance with this order, upon written request and with reasonable notice to Central made to its executive offices, Central shall permit any duly authorized representative or representatives of the Commission:

A. Access, during office hours, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and

documents in the possession or under the control of Central relating to any matters contained in this order; and

B. Upon five (5) days' written notice to Central, and without restraint or interference from them, to interview officers or employees of Central regarding such matters.

V.

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

VI.

*It is further ordered,* That Central shall require, as a condition precedent to the closing of the sale or other disposition of all or a substantial part of its SPC assets, that the acquiring party file with the Commission, prior to the closing of such sale or other disposition, a written agreement to be bound by the provisions of the order.

## IN THE MATTER OF

## JEEP EAGLE CORPORATION

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

*Docket C-3304. Complaint, Sept. 4, 1990—Decision, Sept. 4, 1990*

This consent order requires, among other things, the Highland park, Mi. successor to American Motors Corp. to conduct a computer search of its warranty claims files to implement a redress program to benefit original owners of new 1983, 1984 and 1985 model year Renault Alliance and Encore automobiles that experienced four or more documented repair visits to correct specific automatic transmission fluid or engine oil leaks or related problems.

*Appearances*

For the Commission: *Adrienne Williams* and *Lydia B. Parnes*.

For the respondent: *Christopher Smith, Arent, Fox, Kintner, Plotkin & Kahn*, Washington, D.C.

## COMPLAINT

The Federal Trade Commission, having reason to believe that American Motors Corporation (hereinafter "AMC"), which has been succeeded by Jeep Eagle Corporation (hereinafter "Jeep Eagle"), has violated the provisions of the Federal Trade Commission Act, ("FTC Act"), 15 U.S.C. 41 *et seq.*, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH. 1. (a) Jeep Eagle is a Maryland corporation with its principal office and place of business located at 12000 Chrysler Drive, Highland Park, Michigan. Jeep Eagle is the successor corporation to American Motors Corporation.

(b) American Motors Corporation manufactured, distributed, offered for sale and sold through authorized dealers automobiles, including automobiles bearing the designations Renault Alliance ("Alliance") and Renault Encore ("Encore").

(c) American Motors Sales Corporation ("AMSC") was a subsidiary of American Motors Corporation.

## RESPONDENT'S COURSE OF TRADE

PAR. 2. AMC has engaged in the manufacture, distribution, offering for sale and sale of automobiles located in various states of the United States.

PAR. 3. At all times relevant to this complaint, AMC has maintained a substantial course of business, including the acts and practices set forth herein, in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

PAR. 4. AMC distributed, and through automobile dealers, offered for sale and sold to the public 1983, 1984, and 1985 model year Alliance automobiles and 1984 and 1985 model year Encore automobiles.

PAR. 5. AMC, through AMSC, issued warranties to each purchaser of new 1983, 1984, and 1985 model year Alliances and new 1984 and 1985 model year Encores. These warranties consisted of a 12 month/12,000 mile full warranty and a 24 month/24,000 mile limited warranty.

PAR. 6. AMC sold to the public some 1983, 1984, and 1985 model year Alliances and 1984 and 1985 model year Encores that developed problems requiring repairs, including automatic transmission fluid and engine oil leaks and related problems.

PAR. 7. The warranties issued by AMSC on new 1983, 1984, and 1985 model year Alliances and new 1984 and 1985 model year Encores are valid contracts between AMSC and purchasers of those vehicles.

PAR. 8. The full and limited warranties for new 1983, 1984, and 1985 model year Alliances and new 1984 and 1985 model year Encores contained the following statements respectively:

If the vehicle becomes defective under normal use and service, any authorized Renault Dealer in the United States or Canada will, without charge and at the Dealer's place of business within a reasonable time after delivery of the vehicle to the Dealer, repair or, at AMSC's option, replace with a new or Factory reconditioned part, any part found defective. (Full Warranty).

If a component covered by this warranty becomes defective under normal use and service, any authorized Renault Dealer in the United States or Canada will, at the Dealer's place of business within a reasonable time after delivery of the vehicle to the Dealer, repair or, at AMSC's option, replace the component with a new or Factory reconditioned component. (Limited Warranty).

PAR. 9. In the course of attempting to perform obligations under the

warranties issued by AMSC, Renault authorized dealers on a significant number of occasions failed to repair successfully automatic transmission fluid or engine oil leaks and related problems within a reasonable time after delivery of the vehicle to the dealers for repair.

PAR. 10. The acts alleged in paragraph nine constitute breaches of AMSC's contracts with purchasers of Alliances and Encores.

PAR. 11. AMSC's breaches of contract have caused substantial injury to consumers that is not outweighed by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. Therefore, these breaches of contract are unfair acts or practices in violation of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

Commissioner Calvani recused, Commissioner Azcuenaga dissenting, and Commissioner Owen not participating.

#### DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of American Motors Corporation, which has been succeeded by Jeep Eagle Corporation, named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection 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 attorneys, 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 the 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 filed thereafter by interested persons 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 issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Jeep Eagle Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located at 12000 Chrysler Drive, in the City of Highland Park, State of Michigan.

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

#### DEFINITIONS

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

1. "*Original Owner*"—"Original Owner" shall mean any consumer who purchased a new 1983, 1984, or 1985 model year Alliance automobile or a new 1984 or 1985 model year Encore automobile for his or her personal, family or household use.

2. "*Eligible Claimant*"—"Eligible Claimant" shall mean any original owner who files a properly completed claim form with respondent on or before the return dates established in Parts I.C., I.D., and I.E. of this order with respect to a vehicle that underwent more than three repair visits.

3. "*Repair Visit*"—"Repair visit" shall mean a single trip to an authorized dealership for a warranty repair. Each individual repair visit shall be identified by referring to the computerized list prepared by the respondent pursuant to Subpart I.A. of this Part. Each entry in a Warranty Claim History contained in the list that references a Technical Information Code identifying an automatic transmission fluid leak or engine oil leak shall be compared to the other entries in the same Warranty Claim History referencing any such Technical Information Codes. An individual entry shall qualify as a single visit if the Julian date, dealer code, zone code, repair order date, or mileage of the record are different from the other records in the vehicle's warranty claim file, except that if the dealer code, zone code, repair order date, and mileage are the same but the Julian date is greater

than 30 days from the otherwise identical claim record, then the claim is assumed to be a resubmission of a previously denied claim and not counted as a separate repair visit.

I.

*It is ordered,* That respondent, its successors and assigns, shall cease and desist from failing to take the following actions:

(A) Conduct a computer search of its warranty claims files to identify and prepare a list of the vehicles whose original owners are eligible to file a claim, using the following criteria:

- (1) 1983, 1984, and 1985 model year Alliance and Encore vehicles;
- (2) Warranty claims paid through February 29, 1988;
- (3) Repairs within the first 24 months or 24,000 miles of warranty coverage; and
- (4) More than three repair visits for an automatic transmission fluid or engine oil leak or any combination of the two as reflected by the indication of the Technical Information Codes that identify automatic transmission fluid leaks or engine oil leaks.

The list of Technical Information Codes, dated February 9, 1989, placed on the public record in Docket No. 842-3103, shall constitute all of the Technical Information Codes that identify automatic transmission fluid leaks or engine leaks, as required by Definition 3 and Part I.A.4. The list of the vehicles whose original owners are eligible to file a claim, dated February 9, 1989, prepared by the respondent and placed on the public record in Docket No. 842-3103, shall constitute the list required by this Part.

(B) Within forty-five (45) days of the date of service on respondent of this order:

(1) Using the list prepared pursuant to Subpart A, compile from its own records a mailing list that includes the name and last-known address of each original owner of a new 1983, 1984, or 1985 model year Alliance or a new 1984 or 1985 model year Encore that underwent more than three repair visits.

(2) Calculate a payment for each eligible original owner identified pursuant to Subparts A and B(1) of this Part in the amount of \$40.00 for each repair visit in excess of three.

(C) Within sixty (60) days of the date of service on respondent of this order, send by first class mail to the last known address of each

original owner identified by respondent from its records pursuant to Subparts A and B(1) of this Part, a notice package consisting of: (i) a copy of the letter attached to this order as Attachment A with the return date and amount of payment filled in; (ii) a copy of a claim form attached to this order as Attachment B with the amount of payment filled in; (iii) a self-addressed, first class, postage-paid return envelope; and (iv) an envelope containing the materials described in subsections (i)-(iii) marked "Address Correction Requested," "Forwarding Postage Guaranteed by Sender," and "Payment Offer." For purposes of this Subpart, the return date shall be the date one hundred fifty (150) days after the date of service of this order. Compliance with the return date shall be determined by the postmark of the envelope in which the claimant returns the claim form.

(D) For a period of two hundred ten (210) days following the date of service on respondent of this order, provide to original owners not identified by respondent pursuant to Subparts A and B(1) of this Part who present to respondent records of repair visits evidencing their eligibility for payment under the criteria contained in Subpart A of this Part, a notice package consisting of: (i) a copy of the letter attached to this order as Attachment C with the return date and amount of payment filled in; (ii) a copy of a claim form attached to this order as Attachment D with the amount of payment filled in; (iii) a self-addressed, first class, postage-paid return envelope; and (iv) an envelope containing the materials described in subsections (i)-(iii) marked "Address Correction Requested," "Return Postage Guaranteed by Sender," and "Payment Offer." For purposes of this Subpart, the return date shall be the date two hundred seventy (270) days after the date of service of this order. Compliance with the return date shall be determined by the postmark on the envelope in which the claimant returns the claim form.

(E) For a period of two hundred ten (210) days following the date of service on respondent of this order, provide to each original owner identified by respondent from its own records pursuant to Subparts A and B(1) of this Part, who has not returned the claim form pursuant to Subpart C of this Part and who writes respondent concerning this order, a notice package consisting of: (i) a copy of the letter attached to this order as Attachment A with the return date and amount of payment filled in; (ii) a copy of a claim form attached to the order as Attachment B with the amount of payment filled in; (iii) a self-addressed, first class, postage-paid return envelope containing the

materials described in subsections (i)-(iii) marked "Address Correction Requested," "Forwarding Postage Guaranteed by Sender," and "Payment Offer." For purposes of this Subpart, the return date shall be the date two hundred seventy (270) days after the date of service of this order. Compliance with the return date shall be determined by the postmark on the envelope in which the claimant returns the claim form.

(F) Within three hundred (300) days of the date of service on respondent of this order, send to each eligible claimant by first-class mail a payment in the amount determined as provided in Subpart B.2 of this Part.

(G) Respondent's obligations under this Part shall terminate upon expenditure of the sum of money equal to the total amount needed to award payments calculated pursuant to Subparts A and B of this Part, or within one (1) year from the date of service on respondent of this order, whichever occurs earlier.

## II.

*It is further ordered,* That respondent, its successors and assigns, shall, on or before one (1) year after the date of service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form of its compliance with this order.

## III.

*It is further ordered,* That respondent, its successors and assigns, shall maintain records demonstrating the manner and form of respondent's compliance with Part I of this order. These records shall be retained and made available to the Commission for inspection and copying upon reasonable notice until such time as the order terminates pursuant to Part IV of this order.

## IV.

*It is further ordered,* That this order shall terminate six (6) years after the date of service of this order on respondent.

Commissioner Calvani recused, Commissioner Azcuenaga dissenting, and Commissioner Owen not participating.

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Decision and Order

## ATTACHMENT A

[corporate letterhead]

[date]

Dear \_\_\_\_\_ :

Our records show that you are the original owner of an 1983-1985 Alliance or 1984-1985 Encore. Pursuant to an agreement with the Federal Trade Commission, Jeep Eagle as the successor corporation to American Motors Corporation is offering payments to certain original owners of particular vehicles that underwent more than three visits to repair certain automatic transmission fluid and engine oil leaks. Our records indicate that you are eligible for a payment of \$ \_\_\_\_\_ under this program provided that you follow the steps discussed below. Please read this letter and follow the steps listed below in order to apply for payment.

## HOW TO APPLY

In order to apply for a payment, you must do the following:

1. Fill out the enclosed claim form completely.
2. Return the completed claim form to us in the enclosed envelope. You must mail the claim form back to us by [return date] to make sure you are considered for this program.
3. The claim form contains a release, which you must sign in order to receive a payment. By signing the release, you will give up your right to sue Jeep Eagle for any warranty claims you may have relating to the engine, transmission, or transaxle of your vehicle.
4. Please write us at the address below if you change your address in the next several months so we can contact you again.

If you have any questions about this program, please contact:

Mr. T. W. Alley		Division of Enforcement
National Coordinator		Bureau of Consumer Protection
3rd Party Arbitration	or	Federal Trade Commission
Chrysler Motors Corporation		Washington, D.C. 20580
CIMS 423-23-06		
26001 Lawrence Avenue		
Centerline, Michigan 48015		

Remember: You must mail the completed claim form to us by [return date]. Also, please remember to let us know if you change your address.

Sincerely yours,

JEEP EAGLE CORPORATION

Enclosure

ATTACHMENT B

CLAIM FORM

Name: \_\_\_\_\_  
 Address: \_\_\_\_\_  
 Telephone: ( \_\_\_ ) \_\_\_\_\_ (home)  
 ( \_\_\_ ) \_\_\_\_\_ (business)

1. Model Year: \_\_\_\_\_
2. Model Description: Alliance Encore (Circle one)

I bought the vehicle described above as new for my personal use or the use of my family or household. During the period that I owned this vehicle, it underwent more than three visits to repair certain automatic transmission fluid and engine oil leaks.

I hereby accept Jeep Eagle's payment, as contained in its letter of \_\_\_\_\_, in the amount of \$ \_\_\_\_\_.

In consideration of this payment, I hereby release and discharge Jeep Eagle, its successors and assigns, and its directors, officers, agents, representatives, and employees, and its divisions and other subsidiaries, from any and all warranty claims relating to the engine, transmission, or transaxle of the vehicle described above.

\_\_\_\_\_  
 Date

\_\_\_\_\_  
 Owner's Signature

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Decision and Order

## ATTACHMENT C

[corporate letterhead]

[date]

Dear \_\_\_\_\_ :

Thank you for writing us regarding your 1983-1985 Alliance or 1984-1985 Encore. Pursuant to an agreement with the Federal Trade Commission, Jeep Eagle as the successor corporation to American Motors Corporation is offering payments to certain original owners of particular vehicles that underwent more than three visits to repair certain automatic transmission fluid and engine oil leaks. The records you submitted indicate that you may be eligible for a payment of \$ \_\_\_\_\_ under this program. Please read this letter and follow the steps listed below in order to apply for payment.

## HOW TO APPLY

In order to apply for a payment, you must do the following:

1. Fill out the enclosed claim form completely. This will be used to determine your eligibility for a payment.
2. Return the completed claim form to us in the enclosed envelope. You must mail the claim form back to us by [return date] to make sure you are considered for this program.
3. Once we receive your completed claim form, we will determine if you are eligible for a payment. If you are eligible we will send you a check. Please write us at the address below if you change your address in the next several months so we can contact you again.
4. The claim form contains a release form, which you must sign in order to receive a payment. By signing the release, you will give up your right to sue Jeep Eagle for any warranty claims you may have relating to the engine, transmission, or transaxle of your vehicle.

If you have any questions about this program, please contact:

Mr. T. W. Alley		Division of Enforcement
National Coordinator		Bureau of Consumer Protection
3rd Party Arbitration	or	Federal Trade Commission
Chrysler Motors Corporation		Washington, D.C. 20580
CIMS 423-23-06		
26001 Lawrence Avenue		
Centerline, Michigan 48015		

Remember: You must mail the completed claim form to us by [return date]. Also, please remember to let us know if you change your address.

Sincerely yours,

JEEP EAGLE CORPORATION

Enclosure

ATTACHMENT D

CLAIM FORM

Name: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Telephone: ( — ) \_\_\_\_\_ (home)  
( — ) \_\_\_\_\_ (business)

1. Date of Purchase: — / — / —  
(mo) (day) (year)

2. Model Year: \_\_\_\_\_

3. Model Description: Alliance    Encore    (Circle one)

4. Vehicle Identification Number:

\_\_\_\_\_

(This seventeen-digit number appears on an embossed plate on the upper left-hand side of the instrument panel.)

I bought the vehicle described above as new for my personal use or the use of my family or household. During the period that I owned this vehicle, it underwent more than three visits to repair certain automatic transmission fluid and engine oil leaks.

I hereby accept Jeep Eagle's payment, as contained in its letter of \_\_\_\_\_, in the amount of \$ \_\_\_\_\_.

In consideration of this payment, I hereby release and discharge Jeep Eagle, its successors and assigns, and its directors, officers, agents, representatives, and employees, and its divisions and other subsidiaries, from any and all warranty claims relating to the engine, transmission, or transaxle of the vehicle described above.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Owner's Signature



## SEPARATE STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

Having failed to find reason to believe that AMC-Renault or Jeep-Eagle Corporation, its successor, has violated the law as alleged in the complaint, I dissent from the Commission's decision to accept this consent agreement. Although I have substantial sympathy for the plight of consumers affected by the conduct alleged, the Commission can impose a remedy only when it has reason to believe that a violation of law has occurred. Here that burden has not been met.

IN THE MATTER OF  
AMERSHAM INTERNATIONAL PLC

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

*Docket C-3305. Complaint, Sept. 14, 1990—Decision, Sept. 14, 1990*

This consent order prohibits, among other things, a Buckinghamshire, England company from consummating the acquisition of Medi-Physics, Inc. by respondent until after the closing of the sale of Medi-Physics' SPECTamine business to IMP, Incorporated or any other Commission-approved acquirer. In addition, for a period of ten years, respondent is prohibited from acquiring, without prior Commission approval, any stock, share capital, or equity interest in, or any assets relating to SPECT brain imaging.

*Appearances*

For the Commission: *Phillip L. Broyles, Susan Pettee, and Steven Newborn.*

For the respondent: *D. Stuart Meiklejohn, Sullivan & Cromwell, New York, N.Y.*

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent, Amersham International plc ("Amersham"), a corporation subject to the jurisdiction of the Federal Trade Commission, proposes to acquire Medi-Physics, Inc., from Hoffman-La Roche, Inc., a corporation subject to the jurisdiction of the Federal Trade Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. PARTIES

A. *Amersham International plc.*

1. Respondent Amersham is a corporation organized and existing

under the laws of England, with its offices and principal place of business at Amersham Place, Little Chalfont, Buckinghamshire, England HP7 9NA. Amersham does business in the United States through its wholly owned subsidiary, Amersham Corporation, an Illinois corporation with its offices and principal place of business at 2636 South Clearbrook Drive, Arlington Heights, Illinois.

2. Amersham is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

*B. Medi-Physics, Inc.*

3. Medi-Physics, Inc. is a corporation organized and existing under the laws of the State of New Jersey, with its headquarters at 140 East Ridgewood Avenue, Paramus, New Jersey.

4. Medi-Physics is, and at all times relevant herein has been engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

*C. Hoffman-La Roche, Inc.*

5. Hoffman-La Roche, Inc. is a New Jersey corporation, with its headquarters at 340 Kingsland Street, Nutley, New Jersey. Hoffman-La Roche is the owner of all of the voting securities of Medi-Physics.

6. Hoffman-La Roche is, and at all times relevant herein has been engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

II. THE ACQUISITION

7. On or about April 25, 1990, Amersham and Hoffman-La Roche entered into an agreement whereby Amersham will acquire all of the voting securities of Medi-Physics from Hoffman-La Roche for a price of approximately \$45 million. The parties plan to consummate the transaction on May 11, 1990, or as soon thereafter as possible.

III. THE RELEVANT MARKET

8. For purposes of this complaint, the relevant line of commerce in

which to analyze Amersham's acquisition of Medi-Physics is the business of formulating, manufacturing, marketing and selling radiopharmaceutical brain perfusion imaging agents for use with Single Positron Emission Tomography ("SPECT") equipment.

9. For purposes of this complaint, the relevant section of the country is the United States.

10. The relevant market is highly concentrated, whether measured by Herfindahl-Hirschmann Indices ("HHI") or two-firm and four-firm concentration ratios.

11. Entry into the relevant market set out in paragraphs 8 and 9 herein is very difficult.

12. Amersham and Medi-Physics are actual competitors in the relevant market.

#### IV. EFFECTS OF THE ACQUISITION

13. The effect of the acquisition may be substantially to lessen competition and to tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the FTC Act, 15 U.S.C. 45, in the following ways, among others:

a. Actual competition between Amersham and Medi-Physics will be eliminated;

b. Amersham will acquire a monopoly in the business of formulating, manufacturing, marketing and selling brain perfusion imaging agents for use with SPECT equipment in the United States; and

c. The resulting Amersham monopoly in the business of formulating, manufacturing, marketing and selling brain perfusion imaging agents for use with SPECT equipment would increase the likelihood of collusion if another firm should enter the market.

#### V. VIOLATIONS CHARGED

14. The acquisition agreement described in paragraph 7 would constitute a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

15. The acquisition described in paragraph 7, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

#### 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 the complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by 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 Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Amersham International plc ("Amersham") is a corporation organized and existing under the laws of England, with its offices and principal place of business at Amersham Place, Little Chalfont, Buckinghamshire, England HP7 9NA. Amersham does business in the United States through its wholly owned subsidiary, Amersham Corporation, an Illinois corporation with its offices and principal place of business at 2636 South Clearbrook Drive, Arlington Heights, 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

## I.

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

A. “*Acquisition*” means Amersham’s acquisition of any or all of the stock or assets of Medi-Physics.

B. “*Amersham*” means Amersham International plc, a corporation organized, existing, and doing business under and by virtue of the laws of England, its directors, officers, employees, agents and representatives, its domestic and foreign parents, predecessors, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures, and the directors, officers, employees, agents and representatives of its domestic and foreign parents, predecessors, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures. The words “subsidiary”, “affiliate” and “joint venture” refer to any firm in which there is partial (10 percent or more) or total ownership or control between corporations.

C. “*Assignment Agreement*” means the series of agreements between Medi-Physics (to which Amersham will become successor after Amersham acquires Medi-Physics) or Hoffman-La Roche, Inc. and IMP, Incorporated, consisting of the following documents: (1) an executed Assignment Agreement between IMP, Incorporated and Medi-Physics, Inc.; (2) a Security Agreement between IMP, Incorporated and Hoffman-La Roche, Inc.; (3) a Manufacturing Agreement between IMP, Incorporated and Medi-Physics, Inc.; (4) a Promissory Note, from IMP, Incorporated to Hoffman-La Roche, Inc.; (5) a Bill of Sale, showing Medi-Physics’ sale of the SPECTamine product to IMP, Incorporated; (6) a Trademark Assignment, from Medi-Physics, Inc. to IMP, Incorporated; and (7) an Assignment of U.S. Patent No. 4,360,511 from Medi-Physics, Inc. to IMP, Incorporated.

D. “*Brain perfusion imaging product for use with SPECT equipment*” (also referred to as “*Spect brain imaging agent*”) means a substance injected into the bloodstream, capable of crossing the blood-brain barrier, tagged with a short-lived radioactive isotope (Iodine 123 or Technetium 99) that enables blood perfusion of the brain to be imaged by using a computerized scintillation camera that produces tomographic images.

E. “*Commission*” means the Federal Trade Commission.

F. "*Hoffman-La Roche*" means Hoffman-La Roche, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of New Jersey, with its principal offices at 340 Kingsland Street, Nutley, New Jersey, as well as its directors, officers, employees, agents and representatives, its domestic and foreign predecessors, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures, and the directors, officers, employees, agents and representatives of its domestic and foreign predecessors, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures. The words "subsidiary", "affiliate" and "joint venture" refer to any firm in which there is partial (10 percent or more) or total ownership or control between corporations.

G. "*IMP, Incorporated*" means IMP, Incorporated, a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its headquarters at 8044 El Rio, Houston, Texas.

H. "*Medi-Physics*" means Medi-Physics, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its principal offices located at 140 East Ridgewood Avenue, Paramus, New Jersey, as it was constituted prior to the Acquisition, as well as its directors, officers, employees, agents and representatives, its domestic and foreign predecessors, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures, and the directors, officers, employees, agents and representatives of its domestic and foreign predecessors, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures. The words "subsidiary", "affiliate" and "joint venture" refer to any firm in which there is partial (10 percent or more) or total ownership or control between corporations.

I. "*Medi-Physics' SPECTamine business*" means and includes Medi-Physics' approved New Drug Applications ("NDA") for its Iofetamine HCl I-123 injection brain perfusion imaging product for use with Single Positron Emission Tomography ("SPECT") equipment, brand named SPECTamine ("SPECTamine"); U.S. Patent Number 4,360,511, expiration date 11/23/01, entitled "AMINES USEFUL AS BRAIN IMAGING AGENTS;" U.S. Trademark No. 1,438,930; the U.S. SPECTamine customer lists; business records insofar as they relate to SPECTamine; all United States production technology and know-how related to SPECTamine as developed and currently produced and marketed by Medi-Physics in the United

States; and all the results of research and development efforts by Medi-Physics relating to improvements, developments and variants of the SPECTamine product.

## II.

*It is further ordered,* That Amersham shall not consummate the acquisition until after the closing of the sale of the Medi-Physics' SPECTamine business to:

A. IMP, Incorporated, pursuant to the Assignment Agreement;  
or

B. Any other acquirer approved in advance by the Commission and in a manner approved in advance by the Commission.

## III.

*It is further ordered,* That until the date at which all of its obligations under the Assignment Agreement cease, Amersham, as successor in interest to Medi-Physics, shall not, without prior approval of the Commission, make or agree to any modification with respect to any terms (other than those concerning technical or mechanical aspects of either party's performance) contained in the Assignment Agreement or any other instruments approved by the Commission to execute the divestiture of Medi-Physics' SPECTamine business to an Acquirer.

## IV.

*It is further ordered,* That Amersham shall provide to the Federal Trade Commission, as promptly as possible and in any event no later than thirty (30) days after their receipt or transmittal, copies of all communications between Amersham and Medi-Physics, Hoffman-La Roche, IMP, Incorporated, or any other Acquirer of the Medi-Physics' SPECTamine business, regarding changes in or alleged breaches of the Assignment Agreement or any other instruments approved by the Commission to execute the divestiture of Medi-Physics' SPECTamine business to any acquirer.

## V.

*It is further ordered,* That for a period of ten (10) years from the



date this order becomes final, Amersham shall cease and desist from acquiring, without the prior approval of the Commission, directly or indirectly, through any subsidiary, corporate or other device, any stock, share capital, or equity interest in, or any assets relating to SPECT brain imaging agents of, any concern, corporate or noncorporate, engaged in the manufacture or sale, in or to the United States, of any SPECT brain imaging agent; *provided, however*, that nothing in this order shall require Amersham to obtain Commission approval of any action taken by Amersham in the ordinary course of Amersham's own business, whether in the manufacture or sale of products it currently manufactures or sells, or in the development of new products.

#### VI.

*It is further ordered*, That on the first anniversary of the date that this order becomes final, and on every anniversary date thereafter for the following nine (9) years, and at such other times as the Commission or its staff may request, Amersham shall submit a verified written report setting forth in detail the manner and form in which Amersham intends to comply, is complying, and has complied with the terms of this order and the Assignment Agreement.

#### VII.

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

#### VIII.

*It is further ordered*, That Amersham shall notify the Commission within thirty (30) days of the date of FDA approval of the SPECTamine manufacturing facility of the acquirer of Medi-Physics' SPECTamine business.

IN THE MATTER OF  
SEEKONK FREEZER MEATS, INC., ET AL.

*Docket 8880. Interlocutory Order, September 21, 1990*

ORDER

*It is ordered,* That this show cause proceeding is dismissed.  
Commissioner Strenio dissenting.

OPINION OF THE COMMISSION

*Per Curiam:*

The Commission has reopened this matter to consider modifying our earlier decision and order, which found that respondents had violated the Truth-In-Lending Act and Regulation Z. Staff now urges that we find that respondents' conduct constitutes an unfair act or practice under Section 5 of the FTC Act. The issue presented is nearly identical to that posed by *Reliable Mortgage Corporation, et al.*, D. 8956, where, in an accompanying decision, the Commission finds the record insufficient to support the proposed modification. For similar reasons, we reject the arguments proffered here and dismiss this show cause proceeding.

I. Procedural History

On March 15, 1973, the Commission issued an order against Seekonk Freezer Meats, Inc. and its chief executive officer Lawrence Fontes ("Seekonk" or "respondents") for violations of Section 5 of the FTC Act, 15 U.S.C. 45, the Truth-In-Lending Act ("TILA"), 15 U.S.C. 1601 *et seq.* and Regulation Z, 12 CFR 226, which implements TILA. *Seekonk Freezer Meats, Inc., et al.*, 82 FTC 1025 (1973) ("*Seekonk*"). The Commission found that respondents advertised certain credit terms without disclosing others in violation of Regulation Z's triggering term provision,<sup>1</sup> TILA and the FTC Act. *Seekonk*, 82 FTC at 1052.<sup>2</sup> The Commission's order, among other things,

<sup>1</sup> Regulation Z's triggering term provision currently appears at 12 CFR 226.24(c) (1981) (previously 12 CFR 226.10(d)(2)).

<sup>2</sup> Through advertising such as "only \$4.72 per week for 26 weeks" and "only \$3.30 per week for 52 weeks", respondents represented the amount of an installment payment, the number of installments and the period of repayment without also disclosing: (1) cash price; (2) amount of down payment required; (3) amount of finance charge expressed as an annual percentage rate; and (4) deferred payment price. *Seekonk*, 82 FTC at 1052.

prohibited respondents from stating any of Regulation Z's identified credit terms without stating all required terms. *Seekonk*, 82 FTC at 1059. Predicating its findings on TILA, Regulation Z and the FTC Act generally, the Commission did not determine that the violations constituted unfair or deceptive practices under Section 5 of the Federal Trade Commission Act.

On January 31, 1989, the Commission issued an order to show cause to respondents in this matter<sup>3</sup> as to why the *Seekonk* proceeding should not be reopened and the order modified to clarify that the TILA violation constitutes an unfair and deceptive act or practice in violation of Section 5. *Seekonk*, D. 8880 (January 31, 1989) (Show Cause Order). Respondents failed to answer the show cause order.

Consequently, on September 25, 1989, the Commission issued an order reopening this proceeding and ordering the staff to file a brief addressing the proposed modification. *Seekonk*, D. 8880 (September 25, 1989) (Order Reopening Proceeding to Consider Modification of Decision and Directing Submission of Briefs). The Commission invited interested parties to submit amicus curiae briefs on the proposed revisions to the *Seekonk* decision.<sup>4</sup> The staff filed their brief on January 2, 1990. No amici briefs were received.

## II. Discussion

The issue presented is whether the credit advertising violation in *Seekonk*—advertising certain credit terms without disclosing other required terms—constitutes an unfair practice under Section 5 of the FTC Act.<sup>5</sup> Staff advances two primary arguments in support of the proposed modification. First, staff claims that by enacting TILA, Congress determined that this practice is unfair. Second, staff argues that the TILA violation independently meets the unfairness criteria. These arguments are nearly identical to those presented in *Reliable*, where, in an accompanying opinion, we decline to adopt the proposed modification. *Reliable Mortgage Corporation et al.*, D.8956 (FTC Sept. 21, 1990), slip op. at 3-7. Although *Seekonk* involves a different credit advertising violation than *Reliable*, the same conclusions apply. First, we reject the argument that Congress' general concern with

<sup>3</sup> On the same date, the Commission issued a similar show cause order against respondents in *Reliable Mortgage Corporation, et al.*, 85 FTC 21 (1975) ("*Reliable*"). *Reliable*, D.8956 (January 31, 1989) (Show Cause Order). Our opinion denying the proposed modification accompanies this decision.

<sup>4</sup> 54 Fed. Reg. 47,826 (November 17, 1989).

<sup>5</sup> The reopening order also invited proof on whether the violation was deceptive under Section 5. Staff declined to brief this issue.

unfair and misleading credit advertising practices amounts to a determination that a violation of TILA constitutes an unfair or deceptive act or practice under Section 5. Neither the statutory language nor the legislative history supports such an approach. *Reliable*, D.8956, slip op. at 3-5.

Second, we find the record insufficient to establish that a violation of Regulation Z's triggering term provision independently meets the unfairness criteria. A finding of unfairness requires evidence of substantial unavoidable consumer injury. *Orkin Exterminating Co., Inc.*, 108 FTC 263, 360 (1986), *aff'd*, 849 F.2d 1354 (11th Cir. 1988), *cert. denied*, 109 S.Ct. 865 (1989).<sup>6</sup> Staff claims that Seekonk's failure to disclose crucial credit terms obscured the true cost of credit and may have resulted in erroneous credit choices and unavoidable search costs. Br. at 15-16. But no evidence is cited in support.<sup>7</sup>

In short, absent a record with supporting evidence, we cannot find that *Seekonk's* failure to disclose was unfair. This is not to say that the practice might be deemed unfair in another case on a litigated record. We are simply reluctant to make new law in the context of a nonadversarial proceeding where the evidence is lacking.<sup>8</sup>

### III. Conclusion

For the reasons set forth above, and in our accompanying opinion in *Reliable*, we find the record insufficient to support the proposed modification. Accordingly, we dismiss this show cause proceeding.

#### SEPARATE STATEMENT OF CHAIRMAN JANET D. STEIGER

I concur in the decision to dismiss this show cause proceeding, but reach that decision for different reasons than those stated by the Opinion of the Commission. My separate statement made in *Reliable Mortgage Corporation*, Doc. No. 8956, applies here as well.

<sup>6</sup> The Commission considers: (1) how substantial the injury is; (2) whether the practice produces offsetting benefits that outweigh the injury; and (3) whether the consumers could have reasonably avoided it. *Orkin*, 108 FTC at 362; *International Harvester Co.*, 104 FTC 949, 1061 (1984).

<sup>7</sup> At most, the record shows that Seekonk failed to disclose annual percentage rates as high as 21% and down payments from \$117.50 to \$42.50. Br. at 13-14. We have no way of ascertaining whether this omitted information in fact imposed substantial consumer injury.

<sup>8</sup> In certain circumstances, "half-truths" may be deceptive under Section 5 of the FTC Act. See *International Harvester*, 104 FTC at 1057-58. Here, however, the record contains no evidence or findings to support a conclusion that Seekonk's partial disclosure constituted deception under Section 5.

## CONCURRING OPINION OF COMMISSIONER DEBORAH K. OWEN

I agree with the result and the underlying analysis of the Majority Opinion in this matter. The observations made in my Concurring Opinion in *Reliable Mortgage Corporation*, Doc. No. 8956, apply here as well.