

Complaint

103 F.T.C.

IN THE MATTER OF

GENERAL MOTORS CORPORATION, ET AL.

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-3132. Complaint, April 11, 1984—Decision, April 11, 1984

This consent order limits the Joint Venture between General Motors Corporation and Toyota Motor Corporation to the manufacture and sale of no more than 250,000 subcompact cars per year, for a period of twelve years, ending no later than Dec. 31, 1997. While GM, Toyota and the Joint Venture are permitted to exchange information necessary to produce the Sprinter-derived vehicles, the order prohibits the transfer or communication of any information concerning current or future prices of new automobiles or component parts produced by either automaker; sales or production forecasts or plans for any product not produced by the Joint Venture; marketing plans for any product, including products produced by the Joint Venture; and development and engineering activities relating to the product of the Joint Venture.

Appearances

For the Commission: *Edward F. Glynn, Jr.*

For the respondents: *Richard W. Pogue, Jones, Day, Reavis & Pogue*, Cleveland, Ohio and *Robert C. Weinbaum*, in-house counsel, Detroit, Mich. for respondent General Motors Corp. *Earl W. Kintner* and *Eugene Meigher, Arent, Fox, Kintner, Plotkin & Kahn*, Washington, D.C. and *Takeo Tsukada*, in-house counsel, Toyota City, Aichi Prefecture, Japan for respondent Toyota Motor Corp.

COMPLAINT

The Federal Trade Commission, having reason to believe that General Motors Corporation ("GM" or "General Motors") and Toyota Motor Corporation ("Toyota") intend to acquire shares in a Joint Venture corporation 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, as amended (15 U.S.C. 45), and it appearing that a proceeding by the Commission in respect thereof would be in the public interest, the Commission 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. DEFINITION

1. For the purpose of this Complaint, the following definition shall apply: *new automobiles* means new passenger automobiles manufactured or sold in the United States or Canada, and includes light trucks and vans.

II. GENERAL MOTORS CORPORATION

2. General Motors is a Delaware corporation with headquarters at 3044 West Grand Boulevard, Detroit, Michigan.

III. TOYOTA MOTOR CORPORATION

3. Toyota is a Japanese corporation with headquarters at 1, Toyota Cho, Toyota City, Aichi Prefecture 471, Japan.

IV. JURISDICTION

4. At all times relevant herein, each of the companies named in this complaint has been engaged in or affected commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended (15 U.S.C. 12), and Section 4 of the Federal Trade Commission Act, as amended (15 U.S.C. 44).

V. THE PROPOSED JOINT VENTURE

5. Pursuant to an agreement reflected in a Memorandum of Understanding (hereinafter "Memorandum") executed by GM and Toyota on February 17, 1983, attached to this Complaint as Exhibit 1, GM and Toyota have agreed to form a Joint Venture corporation (hereinafter "Joint Venture"). GM and Toyota will each acquire one-half of the shares in the Joint Venture and will each designate one-half of the Board of Directors of the Joint Venture. The Joint Venture will be managed principally by persons designated by Toyota. The Joint Venture will manufacture new automobiles that will be designed by Toyota in consultation with GM and will be sold to GM, and may also manufacture new automobiles that would be sold to Toyota.

VI. TRADE AND COMMERCE

6. The relevant product market is the manufacture or sale of small new automobiles, which includes automobiles commonly referred to as subcompact, compact, and intermediate sized automobiles.

7. The relevant geographic market is the United States and Canada.

8. Concentration in the relevant product and geographic markets is high.

9. Both GM and Toyota are substantial competitors in the relevant product and geographic markets.

VII. EFFECTS OF THE PROPOSED JOINT VENTURE

10. The effect of the Joint Venture may be substantially to lessen competition or tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), or may be unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), in the following ways:

(a) The output of the Joint Venture is likely to be significantly expanded beyond the single module, capable of producing not more than 250,000 new automobiles per year, an expansion that would not be reasonably necessary to accomplish any of the legitimate purposes of the Joint Venture; and

(b) The Joint Venture would provide no adequate safeguards against the use of the Joint Venture, or the relationships between GM and Toyota that are occasioned by the Joint Venture, for the transmission of competitively significant information beyond the minimum degree reasonably necessary to accomplish the legitimate purposes of the Joint Venture.

11. Each of the effects identified in Paragraph 10, singly or in combination, would significantly increase the likelihood of noncompetitive cooperation between GM and Toyota, the effect of which may be substantially to lessen competition in the relevant markets, and would not be reasonably necessary to obtain any legitimate, procompetitive benefits of the Joint Venture.

VIII. VIOLATIONS CHARGED

The parties' agreement to the proposed Joint Venture constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18).

EXHIBIT 1

TOYOTA MOTOR CORPORATION-
GENERAL MOTORS CORPORATION

MEMORANDUM OF UNDERSTANDING

FEBRUARY 17, 1983

TOYOTA MOTOR CORPORATION (Toyota) and GENERAL MOTORS CORPORATION (GM) agree to establish a joint venture (JV) for the limited purpose of manufacturing in the United States a specific automotive vehicle not heretofore produced, and related components described below. In so doing, it is the intent of both parties to provide such assistance to the JV as is considered appropriate to the enhancement of the JV's success. The JV will be limited in scope to this vehicle and this agreement is

not intended to establish a cooperative relationship between the parties in any other business.

The purpose of this Memorandum is to summarize the current understanding of Toyota and GM regarding the basic parameters of this limited manufacturing arrangement.

Product

The vehicle to be manufactured by the JV will be derived from Toyota's new front-wheel Sprinter. Body styles will include a 4-Door Sedan and (6-12 months later) a 5-Door Liftback. Toyota will retain design authority over the vehicle, in consultation as to vehicle appearance with GM, the purchaser. As modifications will probably be made to the Sprinter or Corolla over time in accordance with market demand, Toyota will effect similar changes to the JV vehicle if such changes are deemed desirable by the parties. Vehicle certification will be handled by Toyota, with assistance provided by the JV and GM as agreed upon by the parties.

Manufacturing

The JV will begin production of the GM-specific vehicle as early as possible in the 1985 Model Year with nominal capacity of approximately 200,000 units per annum at GM's former assembly facility in Fremont, California.

As part of the technical assistance stated hereinafter, Toyota will take the initiative, in consultation with GM, in designing the Fremont manufacturing layout and coordinating the related acquisition and installation of its machinery, equipment and tooling. In this regard, if GM deems it necessary for orders to be placed for construction of buildings, JV machinery, equipment and tooling prior to the establishment of the JV to facilitate a timely introduction of the initial JV vehicle in the 1985 Model Year, GM may do so in its own name directly or through Toyota, and the parties agree to share equally any capital expenditures or cancellation charges arising from such orders. The only exceptions to the above are as follows: In the event the JV is not established as a result of unfavorable U.S. governmental review of the matters set forth in this Memorandum or, following consultations between the senior management of Toyota and GM, as a result of either party notifying the other on or prior to one hundred twenty (120) days following the signing of this Memorandum of Understanding by the parties that such party is not satisfied with the prospects for developing an acceptable employee relations structure, GM shall bear 100% of the cost of such expenditures and charges.

GM's annual requirements are presently expected to exceed 200,000 units per annum. Both parties will, therefore, assist the JV in increasing its production to the maximum extent possible within the available capacity. Requirements for capacity beyond the first module will be the subject of a separate study.

The JV may later produce a variation of the JV vehicle for Toyota. Toyota and GM may also agree for GM to source the GM-specific vehicle from Toyota assembly plants in Japan, freeing JV capacity for Toyota's full or partial production of Toyota-specific vehicles.

Purchase of Production Materials

The JV will purchase its production materials from those sources providing the least possible cost, consistent with its standards for product quality and vendor reliability of supply. Based on this principle, Toyota and GM have agreed upon a tentative sourcing approach, under which specific components to be purchased from Toyota, GM and other outside vendors have been separately identified. Components to be manufactured by the JV, mainly major stampings, have also been identified.

Complaint

103 F.T.C.

Marketing

All GM-specific vehicles produced by the JV will be sold directly to GM or its designated marketing units for resale through GM's dealer network. If any variation of the JV vehicles should be produced by the JV for Toyota, such vehicles would be sold directly to Toyota or its designated marketing unit for resale through Toyota's dealer network. Neither Toyota nor GM will consult the other with respect to the marketing of JV products, or any other products, through their respective marketing organizations.

Vehicles sold by the JV should be priced by the JV to provide a reasonable profit for the JV, Toyota, and GM. To accomplish this, production costs must be kept as low as possible through the combined best efforts of the JV, Toyota, GM and other major suppliers. In this regard, the parties have been conducting extensive studies detailing how each can work to minimize JV expenses.

The initial JV selling price of the JV vehicle to be sold to GM during the 1985 Model Year will be determined at least 60 days prior to the start of production by negotiation between the JV and GM. This negotiation will be based on the production cost estimated 90 days prior to the expected start of production by the JV, with estimates of said cost to be guided by the feasibility study. In no event, however, will the said initial JV selling price be higher than the upper limit nor lower than the lower limit, each as defined below. The upper limit shall be determined by adjusting for feature differences the Dealer Net Price less 8% of Toyota's then current U.S. model front-wheel drive Corolla equipped comparably with the JV vehicle concerned, and the lower limit shall be determined by adjusting for feature differences the Dealer Net Price less 11% of said Corolla. The adjustment for feature differences will be made by agreement between the JV and GM.

Thereafter, although there may be exceptions, the JV vehicle selling price will be revised and determined for each model year. The new selling price for the new model year will be determined by applying to the selling price for the previous model year the Index as defined in Exhibit A. Since the calculations embodied in the Index may occasionally yield a selling price which is at significant variance with then current market conditions, the JV and GM will in such cases negotiate a more appropriate selling price.

If model changes or specification changes of the vehicle manufactured by the JV are necessary, Toyota, GM and the JV will agree upon these model changes or specification changes. Toyota will present to the JV the plan for the model changes or specification changes concerned. Then, the JV will submit to and negotiate with GM the planned model changes and specification changes together with the planned price changes. These model changes and specification changes will be made as agreed upon by the JV and GM.

The methodology to be employed in pricing optional equipment available on the JV vehicle (both initial and subsequent) will be comparable to that described in the three preceding paragraphs.

The initial prices of Toyota and GM components purchased by the JV will be determined 90 days or more prior to the start of production by negotiation between the JV and component suppliers after the determination of the specifications of the JV vehicle. Identification of the respective sources of supply and determination of the initial component prices will be guided by the feasibility study, with adjustments made for changes in specifications and appropriate economics.

Thereafter, the prices of components will be reviewed semi-annually. The new prices will be determined by negotiation between the JV and component suppliers.

If it is anticipated that continuation of the above-mentioned methods for determination of the prices of the JV vehicles to be sold by the JV and of components to be

purchased by the JV would cause those prices to be at such levels as the JV would incur the losses which could endanger the normal operation of the JV, Toyota, GM and the JV shall negotiate and take necessary measures.

As a fundamental principle, Toyota and GM shall each be free to price and free to market the respective vehicles purchased from the JV without restrictions or influence from the other.

Operating Responsibility

The JV will be jointly controlled by an equal number of Toyota and GM directors, in line with Toyota and GM ownership. Toyota will designate the JV president as the chief executive officer and chief operating officer. Toyota and GM will assign to the JV other operating officers as the JV president and JV directors may request, but the parties recognize that the question of which party shall designate the JV officers in charge of financial affairs, labor relations and certain other operations has not yet been agreed upon.

Quality Assurance

New vehicle warranty expense and administration will be the responsibility of the purchaser of the JV vehicle. The JV shall maintain product liability insurance for the benefit of the JV, the parties and other persons in such amounts as the parties may deem prudent, and the premium costs for such product liability insurance will be borne by the JV. In each product liability lawsuit involving a JV vehicle, the JV and each of the parties will communicate and cooperate with each other in all respects in investigating the facts surrounding the case and in litigating the matter. Each of the parties will refrain from taking adversarial positions against each other. To the extent possible under the JV's product liability insurance arrangements, the JV shall be the entity having the right to control such product liability lawsuits. However, the relative financial share of settlement or adverse judgment costs relating to such product liability claims or losses which are not covered by such product liability insurance shall be apportioned 60% to Toyota and 40% to GM. Matters relating to JV vehicle recall campaigns (including fines and costs of corrective actions) shall be the subject of further study and negotiation between the parties.

Technical Assistance

Toyota will grant to the JV the license to manufacture the vehicle developed by Toyota, and in exchange for this license, the JV will pay a reasonable royalty to Toyota as may be agreed upon by the parties. Toyota and GM will license the necessary industrial property rights to the JV, and in exchange for these rights, the JV will pay reasonable license fees to Toyota and/or GM as may be agreed upon by the parties. Toyota and GM will also provide technical assistance to the JV on a cost basis plus reasonable markup.

As part of the technical assistance, GM agrees to assist Toyota and the JV in completing compliance tests for safety, emissions and other areas, as agreed upon by the parties.

Purchase/Sale of Equity Interest

Toyota and GM (including, subject to the approval of the other party, their wholly or majority-owned subsidiaries) will each hold a 50% equity interest in the JV. Neither party may transfer its equity interest in the JV to a third party without the written consent of the other. The above notwithstanding, the JV will terminate not later than 12 years after start of production. The methodology for disposition of Toyota and GM equity interests prior to or upon JV termination will be incorporated in the JV docu-

Complaint

103 F.T.C.

mentation. Any surplus or deficit of the JV as at termination of the JV will be shared equally by Toyota and GM, in line with Toyota and GM ownership. Other issues relating to JV termination will be separately discussed.

Financing

Both Toyota and GM will contribute cash and/or fixed assets to the JV in exchange for equity interests. The amount to be contributed as equity will depend upon the JV's total projected capital requirements. In the event that either lenders or lessors insist that payments made by the JV be subject to appropriate guarantees, Toyota and GM agree either to provide such guarantees based on their pro rata share of the JV or to temporarily advance funds to the JV on their own account (also on a pro rata basis). To the extent permitted by creditors, Toyota and GM further agree that any security interests held by the parties in the JV assets will be shared equally.

Future Difficulties

If it is anticipated that the establishment or continuation of the JV would become difficult or infeasible due to any legal, political or labor-related reason which may arise in the United States, the parties will in good faith discuss the measures to be taken concerning the JV and endeavor to find appropriate solutions.

Agreements to be Concluded

Depending upon the specific organizational form, various agreements will be concluded among Toyota and GM (including subsidiaries thereof) and the JV. These will include the following: Partnership Agreement or Shareholders Agreement and Articles of Incorporation; Vehicle Supply Agreement (JV to GM); Toyota Component Supply Agreement (Toyota to JV); GM Component Supply Agreement (GM to JV); Toyota Service Parts Agreement (Toyota to JV and/or GM); Technical Assistance and License Agreement; Realty and Other Asset Sale and/or Lease Agreements; Product Responsibility Agreement; and other documents related to the foregoing.

Since it is extremely important that the JV begin production as early as possible in the 1985 Model Year, Toyota and GM commit their best efforts to completing such documentation by May 15, 1983. In any event, both parties agree to immediately begin the detailed production process planning necessary for conversion of the Fremont plant. Except as set forth in the separate provisions for JV buildings, machinery, equipment and tooling referred to in the "Manufacturing" section above, expenses incurred by either party which directly benefit the JV will be properly recorded and, if mutually agreed, will be subsequently rebilled to the JV.

Transaction Review

The agreements reached between the parties relate only to the manufacturing JV described above and do not establish any special relationship between Toyota and GM who continue to be competitors in the United States and throughout the world. Toyota and GM further acknowledge that there are no implied obligations or restrictions other than those expressly set forth.

This Memorandum of Understanding is subject to review by the governments of Japan and the United States. Both parties commit to use their best efforts to obtain favorable reviews. Until execution of all formal documentation, satisfaction by the parties with the results of any government reviews which are undertaken, and satisfaction by the parties with the prospects for developing an acceptable employee relations structure, each party reserves the right to terminate negotiations without liability to the other and the JV shall not be established. However, except as separately set forth

in the "Manufacturing" section, the parties shall share equally the expenses and costs incurred by the parties which would, but for such termination, be rebilled to the JV.

Governing Language

This Memorandum of Understanding shall be executed in both an English and a Japanese version, but the parties agree that in the event of a conflict between the meaning of the English text and the Japanese text, the English text shall control.

Dated: February 17, 1983

TOYOTA MOTOR CORPORATION

/s/Eiji Toyoda, Chairman of the Board

GENERAL MOTORS CORPORATION

/s/Roger B. Smith, Chairman of the Board

EXHIBIT A

MARKET BASKET INDEX

The ten best selling models among the sub-compacts will be the models which constitute the basket. The models shall be revised at every model year on the basis of model volume in the U.S., using the latest R. L. Polk registration data for the previous 12 months.

For reference, the ten best selling models at present are as follows:

Chevrolet Cavalier	Mercury Lynx
Chevrolet Chevette	Nissan Sentra
Ford Escort	Subaru DL
Honda Accord	Toyota Corolla
Honda Civic	Volkswagen Rabbit

The "Index" shall be the weighted average rate of wholesale price fluctuations of these models from the prior model year to the current, weighting Corolla at 30% versus 70% for all other comparable models combined without regard of model volumes in the U.S.

For this purpose, the wholesale price shall be adjusted by eliminating the value of equipment changes and product improvements in comparison with the previous year models. To this end, the JV will evaluate and determine the value of equipment changes and product improvements, taking into account the opinions of Toyota and GM.

When competitive models are replaced by new models, or additional competitive models are brought in, neither the old model nor the new or additional model will be included in the calculation of the Index for the model year when such model changes take place. It will, however, be included in the calculation of the Index for subsequent model years.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition of shares in a Joint Venture corporation by the respondents named in the caption hereof, and the respondents 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 respondents with violation of the Clayton Act and 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 the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, 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 General Motors Corporation is a Delaware corporation with headquarters at 3044 West Grand Boulevard, Detroit, Michigan.
2. Respondent Toyota Motor Corporation is a Japanese corporation with headquarters at 1, Toyota Cho, Toyota City, Aichi Prefecture 471, Japan.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I.

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

1. *GM* means General Motors Corporation, a corporation organized, existing and doing business under the laws of Delaware, with its principal offices at 3044 West Grand Boulevard, Detroit, Michigan, as well as its officers, employees, agents, its parents, divisions, subsidiaries, successors, assigns, and the officers, employees or agents of GM's parents, divisions, subsidiaries, successors and assigns.

2. *Toyota* means Toyota Motor Corporation, a corporation organized, existing and doing business under the laws of Japan, with its principal offices at 1, Toyota Cho, Toyota City, Aichi Prefecture 471, Japan, as well as its officers, employees, agents, its parents, divisions, subsidiaries, successors, assigns, and the officers, employees or agents of Toyota's parents, divisions, subsidiaries, successors and assigns.

3. The term *New Automobiles* means new passenger automobiles manufactured or sold in or shipped to the United States or Canada, and includes light trucks and vans.

4. The term *Module* means an integrated manufacturing facility, comprising, at a minimum, body, paint and final assembly functions, capable of producing not more than approximately 250,000 New Automobiles per year.

5. The term *Joint Venture* means any corporation, partnership or other entity jointly owned, controlled, managed or directed by GM and Toyota, or by both GM and Toyota and any other entity or entities, that engages in the manufacture or sale of New Automobiles. The term *Joint Venture* includes the successors and assigns of a Joint Venture, and any entity formed subsequent to a Joint Venture, for purposes similar to the purposes of a Joint Venture.

6. Information is presumptively *public* if it is reported in a publication other than one authored by GM or Toyota.

II.

It is further ordered, That respondents shall not, without the prior approval of the Commission, form any Joint Venture except a single Joint Venture that is limited to the manufacture for or sale to GM of New Automobiles derived from the Toyota Sprinter and produced by a single Module. Nothing in this paragraph is intended to or is to be

construed to prohibit this single Joint Venture from manufacturing or selling additional products to Toyota.

III.

It is further ordered, That respondents shall not form any Joint Venture that is not limited in duration to a maximum of twelve years after the start of production or that continues in operation beyond the earlier of twelve years after the start of production or December 31, 1997; *provided, however,* that nothing in this paragraph prohibits respondents from continuing any entity beyond twelve years for the limited purposes of winding up the affairs of the Joint Venture (which shall not include manufacturing New Automobiles), disposing of its assets, and providing for continuing warranty or product or service responsibilities for Joint Venture products.

IV.

It is further ordered, That respondents shall not exchange or discuss between themselves, or with any Joint Venture, non-public information in connection with New Automobiles relating to current or future:

1. Prices of GM or Toyota New Automobiles or component parts of New Automobiles, except pursuant to a supplier-customer relationship entered into in the ordinary course of business;
2. Costs of GM or Toyota products, except as provided in Paragraph V of this order;
3. Sales or production forecasts or plans for any product other than the product of the Joint Venture; or
4. Marketing plans for any product.

V.

It is further ordered, That respondents shall not, except as may be necessary to accomplish, and solely in connection with, the legitimate purposes or functioning of any Joint Venture, exchange or discuss between themselves, or with any Joint Venture, non-public information in connection with New Automobiles relating to current or future:

1. Model changes, design changes, product designs, or development or engineering activities relating to the product of the Joint Venture;
2. Sales or production forecasts or plans as they relate to the product of the Joint Venture; or
3. Costs of GM or Toyota products supplied to the Joint Venture.

VI.

It is further ordered, That each respondent shall, and respondents shall cause any Joint Venture to:

1. Maintain complete files and records of all correspondence and other communications, whether in the United States or elsewhere, between and among GM, Toyota and the Joint Venture concerning information described in Paragraph V;

2. Maintain logs of all meetings and nonwritten communications, whether in the United States or elsewhere, between and among GM, Toyota, and the Joint Venture concerning information described in Paragraph V, including in such logs the names and corporate positions of all participants, the dates and locations of the meetings or other communications and a summary or description of such information;

3. For a period of six years, retain and make available to the Federal Trade Commission on request the complete files, records and logs required by subparagraphs 1 and 2; and

4. Annually, on the anniversary date of this Order, furnish a copy of this Order to each management employee of the Joint Venture and each management employee of GM and Toyota with responsibilities for the Joint Venture, and furnish to the Federal Trade Commission a signed statement provided by each such employee affirming that he or she has read a copy of this Order, understands it, and intends to comply fully with its provisions.

VII.

It is further ordered, That each respondent shall, within sixty days from the date of issuance of this Order, and annually thereafter, submit in writing to the Commission a report setting forth in detail the manner and form in which it 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.

VIII.

It is further ordered, That each respondent shall notify the Commission at least thirty days prior to any change in itself or in any Joint Venture that affects 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 corporations or Joint Venture.

IX.

It is further ordered, That the prohibitions of this Order shall terminate five years after the termination of manufacturing or sales of New Automobiles by all Joint Ventures.

Commissioners Pertschuk and Bailey voted in the negative.

STATEMENT OF CHAIRMAN JAMES C. MILLER III

On December 22, 1983, the Federal Trade Commission provisionally accepted for public comment a consent agreement concerning the proposed joint venture between General Motors Corporation and Toyota Motor Corporation ("the venture"). Under that consent agreement, which was accepted after one of the most thorough and intensive antitrust reviews in Commission history, GM and Toyota may only undertake the joint venture subject to safeguards limiting the venture's scope and preventing the exchange of competitively sensitive information not required to achieve the legitimate objectives of the venture.

Over one hundred comments were received concerning the proposed consent agreement. None of these comments raised any significant new facts or substantive arguments beyond those already considered by the Commission. Because I believe the consent agreement, as modified today by the Commission, permits the venture's procompetitive benefits while minimizing anticompetitive concerns, I have voted to give final acceptance to it.

In analyzing the joint venture, it is important to separate reality from rhetoric. The Fremont venture is a limited production joint venture, not a merger of GM and Toyota. The extent of continuing competition between the companies dwarfs the limited area of cooperation represented by the venture. The FTC's approval of the joint venture, subject to the safeguards of the consent order, does not, as some have charged, ignore the antitrust laws, nor does it turn them upside down. Rather, it represents a careful application of antitrust principles to the specific facts at hand. The goal of the Commission's antitrust review has been to protect competition, and hence consumers. We've also been very sensitive to the substantial gains to competition and consumers projected by the venture under the safeguards incorporated in the consent agreement.

In evaluating the proposed consent agreement, the Commission weighed a number of possible competitive concerns. These included

the effect of the joint venture pricing formula, the possibility of tacit or explicit collusion resulting from the venture, and the venture's effect on Toyota's incentives to enter into production in the United States. Nothing in the comments received alters my preliminary assessment that with the safeguards incorporated in the consent these possibilities do not represent significant antitrust dangers. Let me explain.

Without the restraints incorporated in the consent agreement, the Fremont venture does raise two potentially troubling issues: the venture's effect on GM's incentives to continue alternative production of small cars, and the possibility of anticompetitive information exchanges that are unnecessary to achieve the legitimate purposes of the joint venture. To address these concerns, the Commission has incorporated certain safeguards in the consent agreement. The joint venture's production at the Fremont plant has been restricted to ensure that GM would retain incentives to fill the remainder of its small car needs from other sources. Expansion of the venture would be permitted only if approved in advance by the Commission.

To ensure that the joint venture were not used to facilitate the exchange of competitively sensitive information unnecessary to its operation, the exchange of certain information was prohibited, and record-keeping and reporting requirements concerning exchanges of other information were imposed to ensure continued, close monitoring of the venture's future operations.

As a result of the public comments received and our further analysis, the Commission has determined to broaden slightly both the scope of prohibited information exchanges and the record-keeping requirements by adding product development and engineering activities to the other categories of restricted information. Although this modification may result in some additional burden to the venture and its parent firms, the additional relief appears warranted to ensure that the Fremont venture is in fact confined to its efficiency-enhancing effects. The combined effect of the consent agreement provisions will permit the Commission to monitor the venture's conduct and to detect possible antitrust problems in sufficient time to prevent any (potential) anticompetitive effects.

Against these concerns, it is important to weigh the three major procompetitive benefits that are likely to result from the joint venture. First, the Fremont venture will increase the total number of small cars available in America, thus allowing consumers a greater choice at lower prices, despite present restrictions on Japanese imports. Second, the joint venture car will cost less to produce than GM were forced to rely immediately on some other production source. Finally, the joint venture offers a valuable opportunity for GM

complete its learning of more efficient Japanese manufacturing and management techniques. Moreover, to the extent the Fremont venture demonstrates the Japanese system can be successfully adapted to the United States, the venture should lead to the development of a more efficient and competitive U.S. industry. Evidence obtained during the Commission's investigation persuasively establishes that a successful experiment at Fremont could serve as a predicate for other domestic auto makers and their unionized employees to work out similar flexibility in work rules and practices.

As indicated by the staff memoranda and consultants' reports that were placed on the public record, the Commission's review of the Fremont venture has been thorough and painstaking. The attorneys and economists who investigated the joint venture should be commended both for the quality of their analysis and the professionalism that they have shown in carrying out their duties despite intense public interest in this matter and grossly distorted criticism from some quarters. The public comments received concerning provisional acceptance of the consent agreement contain no new information or analyses to alter the Commission's preliminary determination that, with the safeguards incorporated in the modified consent agreement, the Fremont venture offers substantial benefits to competition and U.S. consumers without incurring significant anticompetitive risks. To ensure these benefits are realized by American industry and American consumers, I have voted to give final acceptance to the consent agreement as modified.

DISSENTING STATEMENT OF COMMISSIONER PERTSCHUK

The Commission's final acceptance of this consent agreement is a gift from the American public to GM and Toyota's shareholders and Toyota's workers. Based on highly speculative "learning efficiencies," which—if they exist to any degree—are obtainable in less anticompetitive ways, the Commission has approved an arrangement whereby GM and Toyota will cooperate in setting price levels as well as sharing information about the most sensitive commercial subjects, aside from setting a new antitrust standard—one which allows virtually any automobile production joint venture imaginable—the most likely result is upward pressure on GM and Toyota automobile prices, with other manufacturers' prices following along.

I agree with the majority on one point: the comments received did not raise questions about any of the fundamental factual assumptions which led three Commissioners to hail the joint venture as a boon to productivity and two Commissioners to protest it as likely to reduce competition. In my view, the conclusion that GM can accomplish any

legitimate objectives of the joint venture through less harmful ways is as sound as ever. The question—why Toyota rather than a smaller Japanese partner—remains unanswered. The Bureau of Economics provides speculative estimates of the marginal gain from GM's joining hands with Toyota, as opposed to Isuzu or others, but these estimates deserve the healthiest of skepticism. They are based on the highly unrealistic assumption that Toyota's lower cost structure can be transferred intact to U.S. assembly.

A key to the frailty of the assumption that a Toyota partnership is unique is illustrated by Ford and Chrysler's argument that, if Toyota's technology were really so special, the acquisition of this essential knowledge by the leading American firm might be anticompetitive in itself. Staff's answer is that: "There are other very practical ways for [Ford and Chrysler] to learn Japanese methods . . . for example, a joint venture with Mitsubishi." (BC staff memo at 15) In other words, our staff would like to have it both ways: Toyota's technology is so unique that GM should be allowed to choose it as a partner in spite of competitive risks, but it is *not* so special that Ford and Chrysler can't learn essentially the same technology in other ways.

The key role of the import quotas is also reconfirmed in staff's latest analysis. The voluntary restraint agreement prevents other Japanese manufacturers from offsetting price increases which stem from any price coordination between GM and Toyota and helps protect the American oligopoly from more vigorous price competition. This buffer against competition is a major reason Toyota dealers are able to charge a premium of \$2,000 to \$4,000 above list price. Further, staff predicts that import restraints are unlikely to disappear quickly: "As long as the Japanese cost advantage remains substantial, Japanese automobile exports seem likely to be limited in some fashion, *i.e.* an extended VRA, a legislated import quota, or domestic content requirements." (BC staff memo at 11).

But, aside from the fact that the VRA increases the anticompetitive potential of the joint venture, what is its relevance to antitrust analysis? The staff continues to justify the joint venture, in part, because it *evades* the VRA: ". . . the joint venture *does* increase the mix of small cars available to the American public by circumventing existing, and probable future, import limitations." (BC staff memo at 1) I cannot accept this line of reasoning, which amounts to elevating the evasion of national policy to an antitrust defense.

The staff's analysis contains other speculative assertions to support the notion that there were no reasonable alternatives to GM's joining hands with Toyota. For example, staff argues that a joint venture with Isuzu would not produce the same "labor demonstration effect" as a GM-Toyota venture because, since GM owns a substantial share

of Isuzu, the "UAW would likely perceive Isuzu as GM's 'alter ego' under the labor laws, and be unwilling to grant significant concessions." (BC staff memo at 17) The staff does not provide evidence for this theorizing about the fundamentally different reactions of the UAW to a GM-Toyota rather than GM-Isuzu joint venture, and I suspect the argument is principally speculation.

The Modification

The prospective futility of the consent agreement is highlighted by the modification to the order. All the Commissioners, I believe, agree that the risks to competition from the joint venture stem primarily from information exchanges, involving price, output decisions, product innovation, marketing plans, etc. In recognition of the fact that sensitive information is *inherent* in the venture, the consent agreement does not—and logically cannot if the venture is allowed to proceed—prevent this type of information exchange. Consequently, the agreement requires GM and Toyota to keep records of communications about model changes, design changes, product designs, sales or production forecasts or plans, and costs of GM or Toyota products supplied to the joint venture. (See paragraph V and VI of the order)

The modification approved by the Commission adds "development or engineering activities" to this list of types of communications for which records must be kept. The fact is, however, we could ask GM and Toyota to keep records on *all* communications about *any* subject and the result would be file cabinets of documentation of information exchange that is likely to reduce competition between the two companies but which will not be prohibited under the order because they are part and parcel of the joint venture. Moreover, the record of information exchanges is certain to reflect a carefully condensed version of information transfers, one that will not necessarily indicate fully the subject and scope of the exchange. Further, we can assume some information exchanges will be informal and casual and, despite good faith of the companies' compliance officers, never be memorialized in the required records. I do not question the sincerity of the Commission in making this modification, but it should provide little comfort to the public.

Early Termination

A troubling aspect of the Commission's procedure in this case is the timing of "early termination," that is, the Commission's decision to terminate the waiting period provided in the Hart-Scott-Rodino Act so that GM and Toyota could consummate their transaction even though the waiting period had not expired. Except for a cryptic reference in the *Federal Register* of March 2, 1984 [49 FR 7870] which even

reporters following this matter closely missed, the decision to grant early termination was never announced by the Commission or the companies. Despite the arguments of the Chairman and the Bureau Director, I believe the Commission's affirmatively allowing GM and Toyota to consummate the venture weeks before final acceptance of the agreement, and in fact before the end of the comment period, effectively foreclosed our ability to obtain a preliminary injunction if the Commission had decided to reject the agreement. Even though that issue is now moot, since the agreement has become final, the issue of when the Commission grants early termination will arise again and deserves close examination by staff within the Commission and by outside observers.

Conclusion

In summary, the basic issues are the same. Everyone recognizes significant antitrust risks. Otherwise there would be no need for the consent agreement. However, the majority of the Commission insists that the benefits of GM learning Toyota's production techniques—and the marginal benefit of learning from Toyota rather than another partner—outweighs these risks. I continue to believe that the Commission has underestimated the likelihood of price coordination and risks to competition and, further, that any learning through joint production can be accomplished in less harmful ways. The principal incentives driving this joint venture are 1) the ability of GM to obtain, at lower cost than building on its own, a popular and high quality car, built principally in Japan, to carry the GM nameplate; and 2) the ability of Toyota to achieve profits from sales of components and cars in the U.S. despite the voluntary restraint agreement. These are perfectly understandable objectives, but the antitrust laws exist to redirect business behavior when what is good for individual companies is not good for everyone else.

DISSENTING STATEMENT OF COMMISSIONER PATRICIA P. BAILEY

The Commission received a great number of public comments on this matter, but I agree that they produced no significant new information or analysis. That being so, I see no reason to modify my original conclusion that this combination of two powerful and direct competitors cannot be sanctioned under the antitrust laws. The management "efficiencies" which supposedly justify it are not the sort of cost savings which merit the discretionary consideration of antitrust enforcers, and the value ascribed to them is more a product of free guesswork than verifiable calculation. The consent order does not prevent information exchanges on numerous competitively sen-

FEDERAL TRADE COMMISSION DECISIONS

Dissenting Statement

103 F.T.C.

subjects, and it embodies a formula for establishing the wholesale price for the joint venture car which is very likely to reduce retail price competition between GM and Toyota.

Thus, the concerns which led me to dissent from the initial acceptance of the consent agreement in this matter remain valid, and I attach here a copy of the statement I issued at that time.

DISSENTING STATEMENT OF COMMISSIONER PATRICIA P. BAILEY
DECEMBER 22, 1983

The Commission majority has today voted to accept a consent agreement with the General Motors and Toyota Motor Corporation which does not cure the antitrust infirmities of their proposed joint venture. I have, therefore, dissented from that decision.

I am acutely aware of the arguments favoring this joint venture. Certainly any knowledgeable observer would agree that American car companies, facing stiff foreign competition in the United States market, need to improve production techniques in order to strengthen their competitive positions into the future. The decision for this Commission, however, is whether a joint venture such as that proposed by these companies is sanctioned by the nation's antitrust laws. I do not believe by any stretch of the imagination that it is. Whether it *should* be is not for me to say. That argument should be posed in another forum.

In any event, to claim that the consent agreement accepted today, which allows a partial combination of the first and third largest car companies in the world, solves any perceived antitrust problems with the venture, is simply, in my view, not the case. Indeed, both companies have acknowledged publicly that the consent merely restates the essential conditions of their original agreement.¹

The reasons for my decision in this matter are summarized below.

Effect of precedent

There should be no mistake about the effect of the Commission's decision today. The principles of legality for this joint venture cannot be limited to one hermetically sealed experiment in Freemont, California. This joint venture is between the largest U.S. car producer and the largest Japanese car producer—both price-leaders for their makes of cars; thus, any similarly-structured joint venture between any other members of the industry must be sanctioned. How could we deny to other companies what we have authorized for the industry giants? In effect, this is rule-making for the industry. It is predictable that several features of this joint venture will result in a reduction of competitive vigor between GM and Toyota. Concern about that should deepen when the strong likelihood that these features will be copied in "me-too" joint ventures between the remaining domestic car companies and foreign partners is considered. This venture, then, must be seen as a prototype for the industry that may well produce effects which are quantitatively more significant than those caused by it alone. The industry is clearly undergoing a concentration trend; the question is whether the Federal Trade Commission should accelerate that process by an action which will inevitably touch off a reactive pattern of strategic pairing between car manufacturers. That is especially a troubling concern since the purpose behind these coopera-

¹g., *New York Times*, December 21, 1983, p. D1 "If it gives them [the FTC] some comfort and seals the deal, it's OK." (quoting General Motors Chairman Roger Smith); *Washington Post*, December 21, 1983, p. D1 "In terms of the order . . . are likely to include no more than a written agreement to abide by three of the venture that have already been publicly announced." (According to Toyota's U.S. Counsel.)

tive ventures would not be the creation of a new competitor, but rather a decrease in the overall number of market participants, leading to increased likelihood of tacit, if not actual, collusion.²

Nature of the transaction

Some joint ventures can be highly pro-competitive, although this is not likely to be one of them. Particularly prized are ventures where the combination of the parent firms' resources achieves what neither can manage alone: an increase in pure research, a technological breakthrough, product innovation, or entry into a new market.³ This joint venture has none of those output-enhancing features. Manifestly, neither GM nor Toyota is a new entrant into the automobile market. The car to be produced by this joint venture likewise is nothing new: it is a derivative of Toyota's Corolla. The design differences between the two models are "modest" and beneath the sheet metal the cars will be "essentially identical." (BC staff memo, I, 10)

On its face the GM/Toyota arrangement falls into the most suspect category of joint ventures:

Of all joint ventures, the horizontal is inherently the most anticompetitive, because it involves the formation of a joint venture in the markets in which the parents operate. Under such circumstances, antitrust compliance and enforcement problems are acute: if the arrangement is allowed to operate at all, the parents, through their representatives in the joint venture, will necessarily agree on prices and output in the very market in which they themselves operate. Brodley, *supra*, 95 Harv. L. Rev. at 1522.

Or, as another commentator puts it:

When one or both parent firms actively compete in the same product and geographic market as the joint venture, the inevitable coordination of competitive activities between parent and partly-owned subsidiary and the resultant stifling of aggressive behavior of the joint venture should be treated under typical cartel rules. Pitofsky, *supra*, 82 Harv. L. Rev. at 1035-1036.

Initial concerns about the joint venture's anticompetitive potential are only intensified when it is analyzed in its market context. Our economic and legal staffs have calculated the Herfindahl indices for various probable markets. They range from a low of 1262 (dollar sales, subcompact cars) to a high of 2413 (unit sales, all cars). (BC staff memo VI, 9; BE memo, Appendix H). This means that a plausible market is at best moderately concentrated, and at worst highly concentrated—but in any event structured in a way which mandates a very hard look at any combination of competitors. Entry barriers to this market are obviously quite high, consisting of economies of scale in production and distribution and, for foreign car manufacturers, import limitation (BC staff memo VI, 22, 26). Within this oligopolistic market, GM holds the longstanding leading market share (44% as compared with the 16.7% of its closest rival, Ford) and is the price leader among domestic auto producers. (BC staff memo, VI 10, 12)⁴ Toyota holds the same price leader position among Japanese importers. (BE staff memo, V

² Professor Pitofsky has observed that a market setting with numerous joint ventures raises particular antitrust concerns. Pitofsky, *Joint Ventures Under the Antitrust Laws: Some Reflections on the Significance of Penn-C* 82 Harv. L. Rev., 1007, 1033 (1969).

³ U.S. Department of Justice Antitrust Guide Concerning Research Joint Ventures, 466 CCH Trade Reg. Rep. 35 (December 1, 1980); Brodley, *Joint Ventures and Antitrust Policy*, 95 Harv. L. Rev., 1523 (1982); Pitofsky *cit.*

⁴ General Motors is clearly the price leader among domestic auto producers, both because it announces prices first and because its prices virtually dictate Ford and Chrysler decisions. (BC staff memo, VI, 12)

15). Toyota is the fourth largest car manufacturer in the U.S. and the third largest in the world. (BC staff memo, III, 1).⁵

In short, this is a market which is prone to effective collusion, and a collaboration between two major competitors resembles a partial merger more than a true joint venture. In these circumstances the degree of anticompetitive risk and the genuine need for the venture must be stringently examined. *See, e.g., U.S. v. Penn-Olin*, 378 U.S. 158, 170-72 (1964); *Brunswick Corp.*, 94 F.T.C. 1174, 1265-66 (1979), *aff'd and modified on other grounds sub. nom., Yamaha Motor Co. v. FTC*, 657 F.2d 971 (8th Cir. 1981), *cert. denied*, 102 S.Ct. 1768 (1982).

Anticompetitive Risks

The two principal aspects of the joint venture which I fear will lead to blunted competition between the two companies are the transfer price formula and the ongoing exchange of a broad range of product planning, engineering design, and marketing information.

The price which the joint venture will charge GM for the car is calculated by a formula which consists of a weighted average of wholesale prices of competitive small cars. Toyota's Corolla is given special weight in the formula. Simply between GM and Toyota this formula reduces price competition, because any price cuts Toyota gives its dealers must be passed on to GM, with a corresponding reduction in Toyota's joint venture profits. Consequently, Toyota's incentives are to raise the Corolla price, knowing that such a price rise is incorporated into the cost of the joint venture car to GM; and knowing, moreover, that both it and GM are the industry price leaders, so that competitors are likely to match the higher prices. The competitors' price hikes in turn are reflected in the transfer price formula—and so the formula assures an ascending spiral of lockstep pricing,⁶ although without explicit cooperation or collusion.⁷

It is important to note that infirm price competition between the Corolla and the joint venture car can infect the prices on other car models. Car manufacturers who offer a full line of cars maintain price differentials between various carlines and models. (BC staff memo, VIII, 12). GM will undoubtedly follow this practice and seek to keep a consistent dollar gap between the joint venture car and the next biggest model, and between each model further up the line. Thus a rise in the price of the joint venture car will force reactive price rises all the way up the GM line and, because of GM's price-leader position, the same ripple effect can be expected in competitive car lines. Consumers will still be offered a choice of prices, but the overall level of price competition will be artificially elevated.

The Bureau of Competition Director has dismissed the price rises flowing from the transfer formula as too small to worry about. However, the problem is not so much how much prices rise, but the fact that there has been a major change in car manufacturers' incentives to engage in price competition. Because there will be several new disincentives to price competition at work in the market, cartel stability will be encouraged. Alternatives to this competitor-based pricing formula apparently were never explored by the parties. (BC staff memo, VIII, 7). The consent does not cover the matter at all. In particular, there has been no consideration of an alternative, suggested by Professor Salop, of a price escalator provision that is triggered by a cost index which

⁵ the subcompact portion of the U.S. market which is most directly affected by this joint venture, Ford, Toyota and GM are ranked respectively first, second and third, with the following market shares: 19.10%, 16.06%, 14.41%. (BC staff memo, VI, 96).

⁶ the phrase "lockstep" pricing was first used by one of Toyota's counsel when describing to his client a probable effect of the transfer price formula. (GM 25945, quoted in Koch memo, 30)

⁷ for a more vigorous analysis of this phenomenon, see the comments of John Kwoka (Professor of Economics, Georgetown University; Consultant to the F.T.C.) and Steven C. Salop (Professor of Economics, Georgetown University Law Center; Consultant to the Chrysler Corporation).

is not under Toyota's control yet is highly correlated with Toyota's costs. Such indexed contracts have been used for the purchase of major car components⁸ and are apparently common to various industries. I fail to see why the Commission was not provided with a comparative analysis of all practical pricing formulae.

Finally, I should point out that the transfer price formula is a bit of a red herring, since the agreement between GM and Toyota allows them to negotiate directly an appropriate selling price whenever the transfer formula yields a selling price which is at significant variance with then current market conditions. The consent agreement would not prevent operation of this proviso.

Unfortunately, even if a well-drafted consent could cure the transfer price infirmities of this joint venture, I would still object to it. That is because I see the overriding problem as incurable. This joint venture, by its very nature, necessitates coordination of GM and Toyota product marketing and research efforts. The joint venture will produce a car for GM which is manufactured according to Toyota production techniques. The most significant components of the car, representing well over half the value of all its parts and material, will be produced by Toyota. How could the joint venture not act as a clearinghouse for exchanges between customer (GM) and supplier (Toyota) as to what the end product should and could be? The twelve-year life of the joint venture covers two complete model cycles, and certainly there are a host of changes in car features from year to year. Improvements in the vehicle's designs and technology will be known to the parent companies well in advance of public announcements or even industry gossip. Moreover many features on small cars are common to large portions of the entire fleet; therefore knowledge that either parent can produce, say, extended corrosion protection or a significantly lighter engine, gives a window onto overall marketing strategies, not "just" plans for compact and subcompact cars.

It has been argued that GM and Toyota are such fierce competitors that they will jealously guard all their secrets. This argument ignores the fact that, even if a major technological breakthrough or some other "hush hush" project were carefully isolated, merely in the legitimate daily operations of the joint venture GM and Toyota can glean enough additional hard data to vastly improve educated guesses about each other's competitive activities. There does not have to be a complete swap of technical plans for competition to be dulled. For example, in the course of negotiations, Toyota has *already* supplied GM with certain detailed product information which otherwise would certainly not be exchanged between these competitors. (BC staff memo, VIII 17-18; Kwoka, 37-38) It may be too late for GM to match certain technological improvements, but it certainly can adjust its marketing efforts to defuse any Toyota impact. This would leave it free to focus its competitive energies on car companies other than Toyota—a strategic luxury not available to Ford, Honda, Chrysler *et al.*

As a final example of why I have trouble accepting this rosy picture of uncompromising competitors who will never be tempted to do each other favors, consider that Toyota *has already offered, and GM has acted upon*, suggestions on retail price differentials for the joint venture car relative to the Corolla. (BC staff memo, VIII, 18-19; Kwoka, 38-39).

I cannot improve upon the BC staff's summary of these instances of the most competitively sensitive information exchange:

The point here is that the joint venture facilitates discussions about price that GM conceded were forbidden and this is the only example we happen to know about; should the joint venture proceed, others may well occur due to the introduction of new models and/or changes in the product itself. . . . Concern over the occasion and

⁸ For example, Chrysler has furnished us with examples of two such contracts which it has with Mitsubishi and Volkswagen, both for the supply of automotive engines.

necessity for such information exchanges arises again when a new joint venture model needs to be negotiated after several years. (BC staff memo, VIII, 19).

The consent agreement does not cure this problem. It specifically allows the parties to exchange information "necessary to accomplish . . . the legitimate purposes of functioning of the Joint Venture." This is a highly significant loophole. What is "necessary" or "legitimate" is determined in the first instance by GM and Toyota. Their threshold sensitivity on these points is demonstrated by the fact that GM's counsel has represented that the information exchanges I just described were not used for any purpose other than determining suitable product options for the joint venture. (BC staff memo, VIII, 17-18).

Alleged Procompetitive Benefits

We are assured that the joint venture will produce "efficiencies" which will offset any anticompetitive effects such as I have described above. In the FTC merger guidelines we defined an efficiency as a cost saving that could not be obtained unilaterally by either company, but instead required a pooling of resources. The efficiencies alleged in this matter do not meet even that general description.

Staff of the Bureau of Economics conclude that the joint venture will increase industry output and is therefore procompetitive. Such a conclusion, I note, requires a rejection of GM's own estimates to the contrary. Nonetheless, I am not convinced that staff has proved this social efficiency, as distinct from private benefits to GM and Toyota. There is no doubt that GM could use a new small car in order to maintain or increase market share in the compact/subcompact market, as well as to safeguard its large car sales by accrual of CAFE credits.⁹ However, it is highly doubtful that the GM/Toyota venture arrangement represents additional output that would not come into being without the joint venture. The best evidence on this point is GM's own predictions that the sales of the joint venture car will come largely at the expense of other GM and Toyota vehicles. The joint venture car is expected to divert sales especially from GM's Chevette and mid-size "J" car. (BE staff memo, VIII, 3-4; Kwoka memo, 51) Our economics staff finds "somewhat puzzling" that GM assumes *no* net increase in industry sales as a result of the joint venture, and deals with the puzzle by summarily rejecting GM's estimates and producing its own competitive supply and demand models. (BE staff memo, VIII, 5-14). I am troubled by this willingness to set aside a damaging admission, as well as by several of the assumptions underlying the BE calculations.¹⁰ Also, regardless of what minimal¹¹ output effects the joint venture may have, those same effects could be achieved in large part through alternatives. As Professor Kwoka demonstrates, absent the joint venture GM would very likely satisfy its small car needs by a variety of options, including domestic assembly of the 'R' car now being produced by GM's Japanese affiliate Isuzu, and improving and retaining the Chevette. (Kwoka memo, 47-55A; Muris memo, 31). Similarly, though with less certainty, we can predict that Toyota would have to pursue U.S. manufacturing options, absent the joint venture. (Toyota's two largest Japanese rivals, Honda and Nissan, have already taken that step.) Naturally these options are more expensive and presumably not

⁹ The Corporate Average Fuel Economy ("CAFE") statute, part of the Energy Policy and Conservation Act of 1975, sets annually escalating efficiency standards for the average of each domestic car manufacturer's fleet. The law provides stiff fines for failure to meet the standard. CAFE essentially conditions the sale of a larger car on the sale of a small car. Firms need to lower their fleet average and so continue selling the more profitable large cars.

¹⁰ See critique in Koch memo, pp. 38-39; alternate calculations by Professor Kwoka at 31-35, 44-55.

¹¹ Ironically, BE's favorite justification for the joint venture has been hamstrung by the only provision of the consent which changes the original obligations of the parties. The formerly open-ended production commitment has been capped at 200,000 cars.

as attractive to the companies, but from an overall industry viewpoint they are preferable to simply letting GM acquire 200,000 units of Toyota's production capacity for twelve years.

The second major¹² justification for the joint venture translates even less easily into an "efficiency" benefit. That is the claim that GM needs to have "hands-on" experience with Japanese management techniques in order to produce a cheaper car. No one denies that the Japanese have a significant cost advantage (approximately \$2000) in the production of cars. However, it is not possible to isolate and quantify many of the sources of that advantage, other than differences between labor wages in the automotive industries of the U.S. and Japan, which account for 40% of the cost advantage. (Kwoka memo, 11). GM concedes that Japanese advantage does not derive from superior products or manufacturing hardware. I must ask therefore, regardless of what value we assign to management skills, whether the fact that they differ justifies this sort of close cooperation between rivals. For example, if Ford had a 30% cost advantage over GM, attributable solely to some Ford management mystique, would the antitrust laws permit GM to learn Ford's special production techniques by jointly producing a Lincoln/Cadillac-type car? I think not.

Conclusion

In summary, then, if this joint venture between the world's first and third largest automobile companies does not violate the antitrust laws, what does the Commission think will? This is surely the question that potential joint venture partners will be asking themselves. In this decision, the Commission has swept another set of generally recognized antitrust law principles into the dustbin, using again the incorporeal economic rhetoric that now dominates Commission decision-making. In this case, the decision results in the blessing of a business proposal that is both breathtaking in its audacity and mind-numbing in its implications for future joint ventures between leading U.S. firms and major foreign competitors that seek to lend a friendly helping hand.

Perhaps in uneasy recognition of the controversy this antitrust generosity would otherwise ignite, the majority has thrown Br'er Rabbit into the briar patch by penciling in a last minute consent order that the proposed joint venture partners have themselves said merely restates the main features of the private agreement already existing between them. This will fool no one who has even a passing familiarity with the real issues in this antitrust decision.

STATEMENT OF COMMISSIONER GEORGE W. DOUGLAS

The Federal Trade Commission has always viewed with utmost seriousness its commitment to consider the public's comments prior to issuing consent orders. The Commission's concern is particularly relevant in matters such as this, where many believe that the Commission's decision will have ramifications that transcend by far the immediate interests of the directly affected parties.

Although the Commission received in excess of a hundred individual comments following the announcement of its preliminary decision, it is significant that none of the comments raised any new facts or concerns that had not already been discussed and analyzed at length

¹² GM has characterized the learning experience as the primary goal of the joint venture; BC staff is skeptical as to its value. (BC staff memo, II, 31-40, 48-52).

by both the Commission and its staff. Given the diversity of public opinion and the heterogeneity of interests in this matter, the fact that no new issues have been raised by the public comments is testimony, I believe, to the thoroughness and objectivity of our staff's analyses.

Prior to coming to its decision, the Commission reviewed and analyzed an extensive collection of documentary evidence, outside submissions, and exhaustive staff analyses. Because of the unique circumstances surrounding this case, edited versions of that material has been made available to the public. In its review of this material the Commission was confronted—perhaps to a degree never previously encountered—with a host of intriguing and thorny concerns touching upon such issues as international trade policy, labor relations, and local employment conditions, among others—many of which went far beyond the customary bounds of traditional antitrust concerns.

Wisely, I believe, the Commission eschewed entanglement in these side issues and focused on the factual evidence relating to the joint venture's potential effects on competition. With this as a reference standard, the Commission, following its review of the evidence, was unwilling to approve the joint venture unless General Motors and Toyota agreed to institute several important anticompetitive safeguards limiting information exchanges and the number of automobiles that would be made available to General Motors. It is significant that only after these safeguards were agreed to by the two partners would the Commission give its tentative approval to the joint venture.

The Commission's action today promises substantial benefits for American consumers, for American labor, and for the American manufacturing sector in general.

The American car-buying public stands to benefit because the joint venture serves to increase both the total number of small cars available to the public and domestic small car manufacturing capacity. This increase in domestic productive capacity and productive efficiency will enhance competition in the sale of small cars and strengthen the competitive posture of American automobile manufacturers.

While the majority of the Commission remains convinced that the procompetitive effects of this joint venture overwhelm any of the possible anticompetitive concerns that have been raised in this matter, I should caution against the drawing of any undue inferences from today's decision. Each case that comes before the Commission is analyzed and decided upon based on its own merits, and it should go without saying that the circumstances in this case are sufficiently unique as to augur against making any inferences as to how the Commission might view other production joint ventures.

STATEMENT OF COMMISSIONER TERRY CALVANI

On December 22, 1983, I voted in favor of provisionally accepting a consent agreement to permit General Motors Corporation and Toyota Motor Corporation to engage in a limited manufacturing joint venture in Fremont, California. At that time, I indicated that I looked forward to receiving and reviewing public comments on the joint venture under the Hart-Scott-Rodino Act procedures and Commission rules. The Commission has received over one hundred comments on the provisionally accepted consent order. After carefully reviewing those comments, several things are apparent. First, the Staff has done an exhaustive job analyzing the competitive aspects of the joint venture. The major concerns raised in the comments had already been identified by the Staff in their investigation, and the resulting consent order addressed virtually all of these concerns. Second, to the extent anyone feared the proposed consent will not prevent collusion between General Motors and Toyota, the modification adopted today should allay those fears. Limiting information exchanges between the two companies in product development and engineering to communications necessary for producing the joint venture vehicle closes the only potential channel for collusion not covered by the proposed consent. Moreover, the record keeping requirements associated with this change provide an effective method for monitoring compliance.

Although the joint venture presents some potential antitrust problems, the modified consent order addresses the major antitrust concerns that arise from the joint venture. The modified consent prevents collusion between the companies in long term strategic planning as well as in the short term, without unduly interfering with the substantial procompetitive benefits that I believe will result from the joint venture.

IN THE MATTER OF
RENTACOLOR, INC., ET AL.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket 9163. Complaint, Nov. 1, 1982—Final Order, April 16, 1984

This order requires two Newington, Conn. firms engaged in the public leasing of color television sets and other video equipment, among other things, to cease representing in advertising the amount of any payment, the number of payments required, or that no downpayment or other payment is required at the consummation of a lease, without also including the disclosures required by the Consumer Leasing Act and Sections 213.4 and 213.5 of Regulation M. The order additionally bars the companies from failing to properly include statutorily-required disclosures in contracts and other leasing instruments; and dismisses the complaint against the individual respondent.

Appearances

For the Commission: *Ronald G. Issac* and *Justin Dingfelder*.

For the respondents: *Basil J. Mezines* and *Michael G. Charapp, Stein, Mitchell & Mezines*, Washington, D.C. and *Brandon J. Hickey, Murtha, Cullina, Richter and Pinney*, Hartford, Conn.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Truth in Lending Act and the implementing regulations promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Rentacolor, Inc., a corporation, Rentacolor U.S.A., Inc., a corporation, and Brian N. Cawley, individually and as an officer of said corporations, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts and the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Rentacolor, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 3549 Atlantic Avenue, Long Beach, California.

Respondent Rentacolor U.S.A., Inc. is a corporation organized, ex-