

IN THE MATTER OF
OGILVY & MATHER INTERNATIONAL, INC.

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

Docket 9149. Consent Order, Jan. 4, 1983—Modifying Order, May 24, 1988

The Federal Trade Commission has modified a portion of a 1983 consent order (101 FTC 1) with Ogilvy & Mather International, Inc., the advertising agency for Thompson Medical Co., Inc., the makers of the topically applied analgesic "Aspercreme", by making two modifications in accordance with paragraph eight of the consent order so that the Ogilvy order matches the language in the Thompson order.

ORDER REOPENING THE PROCEEDING AND
MODIFYING CEASE AND DESIST ORDER

On February 5, 1981, the Commission issued its complaint in this proceeding alleging that Thompson Medical Co., Inc. ("Thompson"), and its advertising agency, Ogilvy & Mather International, Inc. ("Ogilvy"), had made false and deceptive representations in advertising materials for Thompson's over-the-counter topically applied analgesic "Aspercreme" in violation of Section 5 of the FTC Act, 15 U.S.C. 45 ("Section 5"). On October 4, 1982, the Commission accepted from Ogilvy an "Agreement Containing Consent Order to Cease and Desist" for public comment and on January 4, 1983, issued the negotiated consent order. The litigation against Thompson continued.

Paragraph 8 of the Ogilvy consent agreement specified that:

8. No part or provision of this Order shall become binding upon respondent until the effective date of a final order to cease and desist against Thompson Medical Company, Inc. or its successors or assigns. If a final order against Thompson Medical Company, Inc. in this proceeding contains a provision different from the provision that correspond[s] to the provision in Part I(A) of this Order or contains a definition of "competent and reliable scientific or medical evidence" that differs from Part II of this Order, then this Order shall be reopened for the sole purpose of conforming said provision or said definition in this Order with the corresponding provision or definition in the Thompson Medical Company, Inc. order. In the event that the Complaint in this matter against Thompson Medical Company, Inc. is dismissed in whole, then the Commission, upon the application of respondent, shall set aside this Order.

On November 24, 1984, the Commission issued a cease-and-desist order against Thompson. 104 FTC 648. Thompson petitioned for review of the order, which was affirmed by the Court of Appeals. 791 F.2d 189 (D.C. Cir. 1986). Thompson then petitioned for *certiorari*, and

the Commission's order became final in early 1987 after the Supreme Court denied that petition. 107 S.Ct. 1289 (1987). Consistent with paragraph 8 of the Ogilvy consent agreement, the Commission's order against Ogilvy became effective at the same time as the *Thompson* order.

On November 17, 1987, Ogilvy filed a request that the Commission reopen this proceeding and modify the 1983 consent order against Ogilvy. The request cites paragraph 8 of the "Agreement Containing Consent Order to Cease and Desist" ("consent agreement") as justification for certain modifications to Parts IA and II of the order and also asserts that changed conditions of fact and law and the public interest justify modification of other parts of the order.

The Commission's order against Ogilvy comprises seven parts. Part I prohibits respondent from misrepresenting the ingredients of any drug product, from misrepresenting that any drug product is new or involves any new principle, and from misrepresenting any test or study of any drug product or the effectiveness of any drug product. Part II of the order prohibits certain effectiveness and side effect claims for any topically applied drug product unless the claims are substantiated. Parts III, IV, V and VII of the order impose record-keeping requirements and mandate notification of the Commission concerning corporate changes and distribution of copies of the order and require submission of compliance reports. Part VI of the order states that the order does not apply to three named corporate subsidiaries of Ogilvy.

Ogilvy first seeks modifications of Parts IA and II of the order, which it believes should be granted on the basis of paragraph 8 of its consent agreement, quoted above. The modification to Part IA would replace the current language banning use of the tradename "Aspercreme" for a product that does not contain therapeutically significant quantities of aspirin with language permitting use of that tradename for such a product, provided the advertising and labeling using the tradename "clearly and prominently disclose that the product does not contain aspirin." The modified language would include explicit directions concerning the permissible disclosures for television, radio and print advertising and for labels. The requested modifications to Part IA of the order will conform a portion of the order against Ogilvy covered by paragraph 8 of Ogilvy's consent agreement to the parallel *Thompson* language, and the Commission agrees that the changes are justified.

Ogilvy also requests that the Commission modify to reflect the *Thompson* decree the language in Part II of the order requiring that clinical studies conform to the requirements set forth in 21 CFR 314 and 330. Ogilvy's proposed order would require clinical studies to

conform to "acceptable designs and protocols." This change too will conform a portion of the *Ogilvy* order covered by paragraph 8 of the consent agreement to the parallel provision of the *Thompson* order, and the Commission agrees that it is justified.

Ogilvy further requests that Part VI of the order be modified. Part VI of the present order excepts from the scope of the decree "three subsidiary corporations wholly owned by respondent unless a product otherwise covered by the order is assigned or transferred from respondent to one" of them. Ogilvy seeks to except two additional subsidiaries from the scope of the order. One, Rolf Warner Rosenthal, Inc., was acquired after the order was issued and specializes in advertising of prescription drugs to health care professionals. The other, Euramerica, Inc., did not engage in advertising at the time the order was issued, but now performs some advertising activities. Ogilvy asserts that both subsidiaries are "independent" and that the "intent of Part VI is to exempt all independent Ogilvy subsidiaries." Request for Modification at 9.

Ogilvy asserts that its acquisition of Rolf Warner Rosenthal, Inc., and its conversion of Euramerica, Inc., to an advertising subsidiary constitute changed facts that under Section 5 require the Commission to reopen and modify the order. Nothing in the consent agreement and order suggests that the Commission's intent to exempt "independent" subsidiaries. Ogilvy has not suggested any other reason to construe the order this way, nor does it suggest what an "independent" subsidiary is under the terms of the order. Nothing in the consent agreement or the order compels the Commission to exempt additional subsidiaries of Ogilvy simply on a showing that they exist. The acquisition of Rolf Warner Rosenthal, Inc., and the conversion of Euramerica are not, therefore, changes of fact that require granting Ogilvy's request for modification.

Absent a showing of changed fact or law, the Commission may modify its orders if it concludes that to do so would be in the public interest. To meet its burden in this respect, Ogilvy must show that if the two additional subsidiaries are not exempted from the order, it will sustain competitive harm that is greater than or different from the harm that it reasonably might have expected at the time it agreed to the consent order. See, e.g., *Damon Corp.*, 101 FTC 689 (1983) (show cause order). Ogilvy has not carried this burden. Indeed, it has shown only that whatever harm the two new subsidiaries will sustain is the same as that currently being suffered by the company itself. According to Ogilvy, that alleged harm stems principally from the fact that the *Ogilvy* order is less stringent than certain orders in subsequent and unrelated Commission cases against competing advertising agencies.

Ogilvy submitted an affidavit from its Chairman stating that current clients have "expressed concern over the breadth of Ogilvy's order" (Phillips Aff. ¶8) and, specifically, that "the breadth of the order will chill Ogilvy's creative efforts . . . as Ogilvy seeks to avoid even the possibility of a civil penalty proceeding." Phillips Aff. ¶9. The company also has stated that the harm that would be suffered by the two new subsidiaries if the Commission refused to extend the current exemption would be the same as that being sustained by Ogilvy itself.

The Commission concludes that Ogilvy has provided no reason to treat the two subsidiaries differently from the company itself. Nor has Ogilvy shown that such harm as it has alleged is different from, or more severe than, it reasonably might have anticipated at the time the order issued. We therefore decline to grant the modification expanding the subsidiary exemption.

Ogilvy also seeks modification of several other portions of its order to conform it to the *Thompson* decree. These modifications are not covered by paragraph 8 of the consent agreement because they do not appear in the parts of the order to which that paragraph is expressly directed. Ogilvy argues that these modifications are justified based on the Commission's action in *Benton & Bowles, Inc.*, 82 FTC 1437 (1973), 102 FTC 1837 (1983). In that case, the Commission issued similar complaints against an advertiser, Sterling Drug Co., and Benton & Bowles, one of its advertising agencies. Benton & Bowles agreed to a consent order, but Sterling continued to litigate and ultimately prevailed with respect to some of the allegations. The Commission dismissed those portions of the *Sterling* complaint and then vacated the *Benton & Bowles* consent order because it had derived from the portions of the *Benton & Bowles* complaint that were the same as the portions dismissed in *Sterling*.

This part of the company's request for modification would effect the following changes in the order:

Part IC: Deletion of bans on certain claims concerning efficacy based on the newness of drug or newness of mechanical principles, leaving in effect ban on claims concerning efficacy based on new scientific principles, adding the limiting description "over-the-counter" to modify "drug" and revising the existing geographic limitation to conform to the *Thompson* language: i.e., "available for purchase in the United States" rather than "nationally available for purchase;"

Parts IIC and D: Deletion of bans on certain claims concerning side effects;

Part IF: Deletion of ban on claims made without substantiation concerning the mode of action by which a drug treats a condition;

Parts IIA and B: Deletion of coverage in provision banning decep-

tive effectiveness claims of claims relating to a drug's ability to treat or relieve "any other disease or condition" in addition to "symptoms of any musculoskeletal disorder;

Parts IB and D: Deletion of redundant prohibitions concerning misrepresentations as to the presence of an ingredient and substitution of the combined provision in Part ID of the *Thompson* order; and

Part VII: Substituting the *Thompson* requirement for filing compliance reports within 60 days of service "and at such other times as the Commission may require" for the present requirement that they be filed within 60 days after the order becomes final and "annually thereafter for three years."

As in the Commission's decision vacating the *Benton & Bowles* order, the dismissal of certain allegations in the *Thompson* complaint is a change of law that requires modifying those parts of the order that relate to the complaint allegations that were dismissed. The Commission agrees, therefore, that the changes described above relating to Parts IC and IIC and D are appropriate.

The remaining modifications described above do not relate to complaint allegations that were dismissed, but rather, to allegations that resulted in less rigorous order provisions in the *Thompson* decree than those agreed to by Ogilvy. Although these modifications do not stem from dismissed complaint allegations, Ogilvy appears to argue that *Benton & Bowles* is controlling precedent. It also argues that "as a matter of fundamental fairness Ogilvy should not be punished more severely than the advertiser." Request for Modification at 20. We do not adopt either of these proffered justifications for the requested changes.

The Commission's action in *Benton & Bowles* does not compel us to conform the orders of advertising agencies and their advertisers except in the narrow circumstances in which the complaint allegations against the advertiser were replicated in the complaint against the agency, where the allegations in the advertiser's complaint were dismissed, and where the record showed no basis for imposing disparate relief on the two parties. We therefore decline to grant these modifications on the basis of that decision.

We also do not subscribe to the notion that "fundamental fairness" necessarily compels the Commission, as a general matter, to conform its orders against advertisers and their advertising agencies. Each respondent stands on its own, and the Commission may decide that it is appropriate to impose more stringent order provisions for either the advertiser or its agency. The only restriction is that the relief against any party must be reasonably related to the unlawful conduct found. *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611-13 (1946); see also

FTC v. National Lead Co., 352 U.S. 419, 428–31 (1957); *FTC v. Rubenoid Co.*, 343 U.S. 470, 473 (1952).

Paragraph 8 of Ogilvy's consent agreement specifies two portions of its consent order that were to be modified to conform to any more lenient language that subsequently might be made applicable to Thompson. The company has not shown why, at this time, the Commission should ignore the expressly limited language in paragraph 8 and modify other provisions in the order absent a demonstration that the modifications are justified on grounds of changed fact or law or the public interest. As explained elsewhere in this order, the Commission has concluded that Ogilvy has not shown that the current order is causing it any harm that is different from or more severe than it reasonably could have anticipated when it signed the consent agreement. Therefore, we have decided to deny the company's request for these changes.

Finally, Ogilvy requests modification of the preamble to Part I of the order—language not covered by paragraph 8 of the consent agreement—to limit the scope of its coverage even more narrowly than the scope of the order against Thompson. The Ogilvy order applies to all "drugs." The Thompson order applies to all "OTC drugs." Ogilvy seeks to have this language modified to cover only "OTC topically applied analgesic drugs." It argues that this request is warranted because the coverage of the orders against two of the three advertising agencies in the Commission's recent "analgesics" cases¹ and the coverage of the order against Sterling Drug, one of the advertisers, were limited to "internal analgesic drugs."²

The Commission's decision to limit the orders in the "analgesics" cases relied on by Ogilvy is not a change of fact or law that would require modification of the scope of the Ogilvy order. The order against American Home Products Corp. and its advertising agency, C.T. Clyne, which covered a more narrow range of products, was issued in September, 1981, well before the Ogilvy consent order. The mere fact that the Commission issues different orders in cases against different companies at different times does not justify conforming earlier orders to those issued later. The Commission decides each matter on its own merits and structures the relief mandated to fit the circumstances.

The Commission determines the product coverage in a particular order based on a number of considerations related to the facts of each

¹ American Home Products Corp., 98 FTC 136 (1981); Bristol-Myers Co., 102 FTC 21 (1983); Sterling Drug, Inc., 102 FTC 395 (1983).

² Although the order against Sterling is limited to "internal analgesic drugs," the order against its advertising agency, Dancer-Fitzgerald-Sample ("Dancer"), contains the same "all OTC drug" coverage as the order in Thompson. 96 FTC 1 (1980). The Commission dismissed the Administrative Law Judge's order against a second advertising agency in *Sterling Drug*. 102 FTC at 791.

specific case such as the extent of the respondent's unlawful conduct, whether the respondent knew or should have known that its conduct was improper or unlawful and the perceived need for fencing-in relief. Here, Ogilvy consented to its order, including the present product coverage, at a time when it should have known that the product coverage in that order was broader than that contained in *American Home Products*. Some months after issuance of Ogilvy's consent order, the Commission issued its orders against Bristol-Myers, Sterling Drug and certain of their advertising agencies.

The scope of product coverage is always an important question in Commission orders that prohibit deceptive advertising. The fact that the Commission chose to impose broader orders on some and more narrow orders on others indicates that the Commission decided it was appropriate to treat the companies differently. Ogilvy has presented nothing to suggest that we should go behind that determination.

The mere fact that several of those orders, like the order against American Home Products and C.T. Clyne, included more limited product coverage than that in the *Ogilvy* and *Thompson* decrees is not a change of law or fact sufficient under Section 5 to require reopening of Ogilvy's consent and conforming it to the more favorable "analgesics" orders. This is particularly true in light of the different product coverage provisions in the "analgesics" cases themselves. As already noted, the product coverage in the order against Dancer in the *Sterling Drug* case is the same as that in *Thompson*, although the orders against Sterling Drug itself, and Ted Bates and Young & Rubicam in *Bristol-Myers*, for example, are not. See note 2, *supra*.

Ogilvy also has submitted the affidavit of its Chairman in support of this portion of the company's request for modification. That affidavit states that "[a]s a result of its much broader order, Ogilvy's ability to compete against those agencies has been threatened." Aff. at ¶7. It also states that "[a] number of Ogilvy's clients have expressed concern over the breadth of Ogilvy's order" (*Id.* at ¶8), and that its clients "are concerned that the breadth of Ogilvy's order will chill Ogilvy's creative efforts with respect to all drug products as Ogilvy seeks to avoid even the possibility of a civil penalty." *Id.* at ¶9. These statements are conclusory and self-serving. They do not demonstrate that the current order has imposed on Ogilvy significant harm that could not reasonably have been anticipated at the time the company agreed to its terms, and they offer no information relating to actual, as opposed to speculative, competitive injury. Such information would have had a bearing on the possible public interest in granting the modification.

Under the FTC Act and the Commission's rules, a Commission order need not be altered unless the respondent demonstrates a

change of law or fact requiring the modification or the Commission decides that the public interest warrants the changes sought. Ogilvy has failed to carry its burden in this respect, and the Commission, therefore, declines to grant this portion of Ogilvy's request. Similarly, we decline to grant Ogilvy's request that the product scope of Ogilvy's order be modified "at a minimum" to read "OTC drugs" as to Part I and "OTC topical analgesic drugs" as to Part II.

For the reasons above, the Commission has decided that some of the modifications proposed by Ogilvy are appropriate. Accordingly,

It is ordered, That this proceeding be, and it hereby is, reopened and that the order therein against Ogilvy & Mather International, Inc., be modified to read as follows:

ORDER

PART I

It is ordered, That respondent Ogilvy & Mather International, Inc., a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, offering for sale, sale or distribution of any over-the-counter "drug", as that term is defined in 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:

A. Employing the brand name "Aspercreme" for any such product or otherwise representing, directly or by implication, that an active ingredient of any such product is aspirin, unless such product contains aspirin in therapeutically significant quantities; *provided, however*, that the brand name "Aspercreme" may be used for such product if its advertising and labeling clearly and prominently disclose that the product does not contain aspirin.

(1) In television advertisements, an explicit and simple aspirin disclaimer statement (such as "ASPIRIN FREE") shall be superimposed on the television screen simultaneously with a vocal aspirin disclaimer statement (such as "Aspercreme does not contain aspirin") at the end of each advertisement;

(2) In radio advertisements, an explicit aspirin disclaimer statement (such as "Aspercreme does not contain aspirin") shall be made at the end of each advertisement;

(3) In print advertisements, an explicit aspirin disclaimer statement (such as "ASPERCREME DOES NOT CONTAIN ASPIRIN")

shall be displayed prominently and conspicuously in relation to each such advertisement as a whole;

(4) In labeling, an explicit aspirin disclaimer statement (such as "DOES NOT CONTAIN ASPIRIN") shall be prominently and conspicuously printed in the front package panel (or in the front of the container if no package is used).

B. Representing, directly or by implication, that any such drug involves a new scientific principle, when such drug or one involving such principle has been available for purchase as an over-the-counter drug in the United States for more than one year.

PART II

It is further ordered, That respondent Ogilvy & Mather International Inc., its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any "drug," as that term is defined in the Federal Trade Commission Act, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do cease and desist from:

A. Employing any trade name for any such drug which represents, directly or by implication, that such drug contains an active ingredient which it in fact does not.

B. Representing, directly or by implication, that any such drug has an ingredient when in fact it does not have that ingredient.

C. Misrepresenting the contents, validity, results, conclusions or interpretations of any test or study.

D. Representing, directly or by implication, the mode of action by which any such drug treats, mitigates, or cures any symptom, disease, or condition unless respondent possesses and relies upon a reasonable basis substantiating the representation.

PART III

It is further ordered, That respondent Ogilvy & Mather International, Inc., its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any topically applied drug, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, cease and desist from:

A. Representing, directly or by implication, that any such topically applied drug is effective for the treatment or relief of the symptoms

of any musculoskeletal disorder (such as arthritis, tendonitis, bursitis, or rheumatic disorders), or any other disease or condition;

B. Representing, directly or by implication, that any such topically applied drug is as fast or faster, or is as effective or more effective, than aspirin in the treatment or relief of the symptoms of any musculoskeletal disorder (such as arthritis, tendonitis, bursitis, or rheumatic disorder), or any other disease or condition;

unless at the time of the dissemination of any such representation respondent possesses and relies upon a reasonable basis consisting of competent and reliable scientific or medical evidence substantiating that representation. For the purposes of this order, competent and reliable scientific or medical evidence shall include at least two well-controlled, double blinded clinical studies which conform to acceptable designs and protocols and are conducted by different persons, independently of each other. Such persons shall be qualified by training and experience to conduct such studies. *Provided, however,* with respect to any representation covered by this Part, if the Food & Drug Administration promulgates any final standard which establishes conditions under which such product is safe and effective, then in lieu of the above, respondent may possess and rely upon scientific evidence which fully conforms to such final standards as a reasonable basis for said representation. *Provided, further,* however, where the evidence relied upon by respondent was not directly or indirectly conducted or controlled by respondent, it shall be an affirmative defense to an alleged violation of this Part for respondent to prove that it reasonably relied on the expert judgment of its client or of an independent third party in concluding that a reasonable basis exists which meets the requirements of this Part. Such expert judgment shall be in writing signed by a person qualified by education or experience to render the opinion. The written opinion shall describe the contents of the evidence upon which the opinion is based and shall set forth the qualifications of the person to render the opinion.

PART IV

It is further ordered, That respondent Ogilvy & Mather International Inc., its successors and assigns, and its officers, representatives, agents and employees, for a period of three years after respondent last disseminates the advertisements for products covered by this order, shall retain all test results, data, and other documents or information on which it relied for its representations or any documentation which contradicts, qualifies or calls into serious question any claim included in such advertisements which were in its possession during either

their creation or dissemination. Such records may be inspected by the staff of the Commission upon reasonable notice.

PART V

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to the effective date of 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 the order.

PART VI

It is further ordered, That respondent shall distribute a copy of this order to each of its operating divisions, and to each of its officers who are engaged in the preparation and placement of advertisements for products covered by this order.

PART VII

It is further ordered, That the provisions of this order shall not apply to Scali, McCabe, Sloves, Inc.; Cole & Weber, Inc.; and Rogers, Weiss/Cole & Weber Advertising, three subsidiary corporations wholly owned by respondent, unless a product otherwise covered by this order is assigned or transferred from respondent to one of those corporations. However, respondent shall distribute a copy of this order to the officers of the aforementioned corporations.

PART VIII

It is further ordered, That the respondent shall, within sixty (60) days after this order becomes final and annually thereafter for three (3) years, file with the Commission a report, in writing, signed by a responsible officer for respondent, setting forth in detail the manner and form in which it has complied with this order.

STATEMENT OF CHAIRMAN DANIEL OLIVER
CONCURRING IN PART AND DISSENTING IN PART

I concur in the Commission's decision to modify the Ogilvy order in accordance with paragraph 8 of the consent agreement. I also concur in the decision to delete the portions of the order that were derived from complaint allegations later dismissed in the Thompson proceeding. I would go further, however, and grant some of Ogilvy's other requests.

Before turning to those portions of the Commission's order from which I dissent, I offer a few comments on Ogilvy's request to narrow

the product coverage of Part I of the order to "any OTC topically applied analgesic drug." I find this to be a closer question than the other Commissioners find it. Ogilvy contends that its conduct was no worse than that of the ad agencies involved in the *American Home Products* and *Bristol-Myers* cases, and that the product coverage of its order should therefore be no broader than the product coverage of the orders against those agencies (i.e., coverage should be limited to products of the same pharmacological class and mode of application).

I agree, and Ogilvy does not dispute, that a broader order is appropriate if Ogilvy was more culpable than the other ad agencies. I have reviewed the documents upon which the Commission relied in concluding that Thompson Medical Company, Ogilvy's client, intended to make a false "contains aspirin" claim for Aspercreme. See 104 FTC at 836. In my view, Ogilvy's contention that there is a less sinister interpretation of the documents has some merit—enough, at least, to raise a question whether Ogilvy really acted more egregiously than its competitors.

Nevertheless, I agree with the decision not to grant Ogilvy's request. Since the issue of Ogilvy's culpability was not litigated, I cannot be certain whether Ogilvy's interpretation of the documents would have been refuted or what other evidence the parties would have presented. In addition, my review of the documents leaves me uneasy about the Commission's ability to make such a difficult factual determination on the basis of the information normally before us in an order modification proceeding.¹ Under the circumstances, I conclude that Ogilvy should not be given the benefit of a litigation victory it chose not to pursue.

I dissent from the Commission's decision not to conform Ogilvy's order to the Thompson decree except to the extent expressly required by paragraph 8 of the consent agreement. I would allow the other changes requested by Ogilvy to conform its order to Thompson's. Ogilvy argues that denying its request for other modifications will discourage settlements since ad agencies will perceive that they can obtain a less restrictive order by litigating. I am not persuaded by this argument.² I am persuaded, however, that there is no basis in the record for treating Ogilvy more harshly than Thompson. The two respondents were named in a single complaint on the basis of a single set of facts. I fail to see how the public interest is served by maintain-

¹ The best course of action in this case might have been to reopen the proceeding for an evidentiary hearing to compare the conduct of Ogilvy with that of its competitors.

² Although in this instance the litigated order turned out to be less restrictive than the consent order, that fact became apparent only in hindsight. At the point Ogilvy was considering whether to sign the consent order, Ogilvy did not know whether the litigated order would be more restrictive or less restrictive than the consent order. Future respondents will be faced with the same uncertainty, and thus will have just as much incentive as ever to settle the Commission's charges.

ing tighter restrictions on one respondent than the other absent some factual distinction justifying disparate treatment.

I also dissent from the decision not to exempt the two additional advertising subsidiaries from the Ogilvy order. Ogilvy argues, I believe correctly, that it was understood that subsidiaries would be exempted if it were shown on a case-by-case basis that the subsidiary, by virtue of its management agreement with Ogilvy, would operate independently of Ogilvy. Given this understanding, it is unreasonable to expect Ogilvy to have felt the need to seek more explicit language in the order.³ Clearly, memorializing the understanding would have been the better course, and I would expect such understandings to be committed to writing in future orders. But in this instance, I do not think it is appropriate for the Commission to ignore the intent that guided the negotiation of the order.

The factual determination of whether the new subsidiaries qualify for exemption is a simple one. In my view, Ogilvy has presented sufficient evidence to establish that Rolf Werner Rosenthal and Euramerica, Inc. operate independently of Ogilvy. If these corporations had been advertising subsidiaries of Ogilvy at the time the order was signed, Ogilvy likely would have sought, and the Commission likely would have agreed, to treat them the same as the three subsidiaries specifically exempted in Part VI of the order. The acquisition of RWR and the conversion of Euramerica to advertising after the order was signed are changes of fact that, in my view, justify modification of the order.⁴ Although the emergence of additional subsidiaries was foreseeable at the time the order was signed, Ogilvy, as noted above, had reason to believe that future subsidiaries would be considered for exemption.

³ Moreover, here there was a conscious decision *not* to include a generalized exemption in order to avoid creating a loophole by which Ogilvy could circumvent the order.

⁴ Granting this modification would not enable Ogilvy to circumvent the order by steering clients to RWR and Euramerica. Part VI of the order provides that the exemption does not apply if a product otherwise covered by the order is (1) transferred by Ogilvy to an exempted subsidiary, or (2) assigned by Ogilvy to an exempted subsidiary.

IN THE MATTER OF

MEDICAL STAFF OF MEMORIAL MEDICAL CENTER

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT*Docket C-3231. Complaint, June 1, 1988—Decision, June 1, 1988*

This consent order prohibits, among other things, the medical staff of a Savannah, Ga. medical center from denying, restricting, or recommending denial or restriction of hospital privileges for any nurse-midwife, unless the staff has a reasonable basis for believing that such restriction serves the interest of the hospital in providing health care services. Respondent will also be prohibited from refusing to deal with or coercing the hospital or any person, organization, or institution, if the purpose or effect is to restrict the practice of nurse-midwifery.

Appearances

For the Commission: *Harold Kirtz.*

For the respondent: *John Horthy and Linda Haddad, Horthy, Springer & Mattern, Pittsburgh, PA.*

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 the named respondent has violated the provisions of 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 in that respect as follows:

PARAGRAPH 1. Respondent Medical Staff of Memorial Medical Center ("the Medical Staff") is an unincorporated association, organized and existing under the laws of the State of Georgia, with its mailing address at 4700 Waters Avenue, Savannah, Georgia.

It is composed of all physicians, dentists and podiatrists who have been granted privileges to attend patients at Memorial Medical Center.

PAR. 2. Memorial Medical Center is a 465-bed general, acute-care hospital and is the largest hospital in the Savannah metropolitan area. It is one of three hospitals in the Savannah metropolitan area that provide obstetrical services, and it accounts for nearly half of the births in that area.