

IN THE MATTER OF

INSTITUT MERIEUX S.A.

Docket C-3301. Interlocutory Order, August 17, 1993

ORDER VACATING ORDER TO SHOW CAUSE

On March 9, 1993, the Commission issued an order to show cause why the proceeding in Docket No. C-3301 should not be reopened to modify the August 6, 1990 consent order against respondent Pasteur Merieux Serums et Vaccins S.A., formerly known as Institut Merieux S.A. ("Merieux"), by setting aside the provisions pertaining to respondent's obligation to lease the Connaught Bio Sciences, Inc. rabies vaccine business ("March 9 Order to Show Cause"). By order dated April 23, 1993, the Commission authorized North American Vaccine, Inc. ("North American Vaccine") to file a brief *amicus curiae* presenting its views as to this show cause proceeding. The Commission has received North American Vaccine's brief as well as responsive submissions from Commission counsel and Merieux.

The Commission's March 9 Order to Show Cause was based on its assessment at that time that there did not "appear to be any potential lessee that is interested in the rabies vaccine business or that is likely to receive the necessary governmental approvals" and that "accomplishment of the required lease is, for all practical purposes, a virtual impossibility, despite respondent's good faith efforts to comply with the order." March 9 Order to Show Cause at 2. Subsequently, however, North American Vaccine has come forward to express its interest in leasing the Connaught rabies vaccine business, stating that it is "committed to moving forward with negotiations." North American Vaccine Amicus Brief at 22 (May 21, 1993). Respondent Merieux asserts that North American Vaccine has failed to demonstrate a likelihood that it can acquire and operate Connaught's rabies vaccine business and argues that the consent order should be modified in accordance with the March 9

Order to Show Cause. However, Commission counsel state that North American Vaccine's brief "adequately demonstrates that [North American Vaccine] is an interested, serious, and potentially acceptable candidate to lease the Connaught rabies vaccine business." Commission Counsel's Response to Brief of North American Vaccine at 3 (June 2, 1993). Commission counsel further argue that North American Vaccine's demonstration "is sufficient to raise issues of compliance under the final order in this matter, which, in accordance with the Commission's Rules of Practice, should be resolved in a nonadjudicative setting." *Id.* Commission counsel have moved that the March 9 Order to Show Cause be vacated and that this proceeding be terminated.

Based on the submissions by the parties and the brief *amicus curiae*, the Commission is not prepared to determine at this time that the August 6, 1990 consent order should be reopened and modified as contemplated in the March 9 Order to Show Cause. The Commission has considered Commission counsel's motion and has determined that it should be granted. This conclusion is not meant to preclude reopening and modification of the consent order at a later date if warranted by then-existing circumstances.

Accordingly, *it is ordered*, that the Order to Show Cause issued on March 9, 1993, be and it hereby is vacated and that this show cause proceeding be and it hereby is terminated.

Commissioner Owen dissenting.

DISSENTING STATEMENT OF COMMISSIONER DEBORAH K. OWEN

When I dissented from the Commission's vote to issue the consent order as final in August 1990, I expressed in detail my concerns with the government enforcement action in this matter. I noted that this matter raised serious questions as to the judicious exercise of our prosecutorial discretion, and potential, grave complications stemming from the remedies provided in the consent order. For separate reasons, I now dissent from the Commission's determination to vacate the Order to Show Cause that would have set aside the requirement that respondent lease on a long-term basis

Connaught Bio Sciences, Inc.'s rabies vaccine business.¹ In my view, North American Vaccine, Inc. ("NAV") has failed to provide sufficient evidence to meet its burden of showing cause why the consent order in this matter should not be modified.

The Commission's Order to Show Cause, issued five months ago, noted that the costs to respondent of further divestiture efforts are an "inequitable and unbargained-for element of the consent order." Order to Show Cause, March 9, 1993, at 2. Under the consent order, respondent was required to lease Connaught's rabies vaccine business by January 15, 1991.² The order provides for the appointment of a trustee to lease the business within an additional nine-month period, in the event respondent failed to accomplish the lease within three months. Thus, the divestiture period could have terminated as early as October 15, 1991.³ Respondent has described in its nine interim compliance reports submitted to the Commission its on-going efforts to accomplish the lease agreement required by the order, including all contacts and negotiations with interested parties concerning the vaccine business. Despite these efforts, respondent has been unable to accomplish the divestiture mandated by the consent order.⁴ I fear that the Commission's determination to vacate its Order to Show Cause will further delay, for an indefinite period, a final resolution to this matter, which has already languished for nearly three years.

In my judgment, NAV has failed to meet its burden of showing cause why the consent order should not be modified. It has failed adequately to explain its untimely expression of interest in the divestiture assets, made almost two and one-half years after the

¹ See subparagraphs I(3), (4), and (5); and paragraphs II; III; IV; V; VI; VII; VIII; IX; and XI(A) of the consent order in Docket No. C-3301.

² The order became final on October 15, 1990 and provided that respondent Merieux must lease the rabies vaccine business within three months.

³ Section VI(B) of the consent order permits a three-month extension of the divestiture period; however, the circumstances in this case did not trigger this extension.

⁴ Commission counsel's determination that the appointment of a trustee would not serve the interests of the Commission attests to respondent's good faith effort to comply with the relevant order provisions and the fact that its inability to locate a lessee results from circumstances beyond its control.

consent order became final and was widely reported in the trade journals and other media in Canada and the United States. Further, in my view, none of NAV's submissions in this proceeding satisfy its burden of overcoming the public interest considerations which underlie the Commission's Order to Show Cause. NAV's self-interested generalizations concerning its capability to operate the rabies vaccine business have not been sufficiently substantiated so as to outweigh the various factors which prompted the Commission to initiate this proceeding to relieve respondent of the divestiture obligation. These include respondent's good faith efforts to accomplish the lease requirements, and the futility of further costly efforts by respondent. Indeed, it is hard to imagine why any company would choose to enter into a similar settlement. This case serves as notice that the Commission will permit the final resolution of a seemingly endless matter to be derailed by any suitor, even of questionable qualification, which might interject itself into the process at the last minute, after years of silence.

For these reasons, I dissent from the Commission's determination to vacate its Order to Show Cause in this matter.

IN THE MATTER OF

NATIONWIDE INDUSTRIES, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3457. Complaint, Aug. 26, 1993--Decision, Aug. 26, 1993*

This consent order prohibits, among other things, a North Carolina-based manufacturer of automotive maintenance and cleaning products from making false and misleading environmental claims by representing, through the use of certain terms, that any product containing a Class I or Class II ozone-depleting substance, will not deplete, destroy, or otherwise adversely affect ozone in the upper atmosphere, and also prohibits the respondent from representing that any of its products offer any environmental benefit, unless the respondent possesses competent and reliable scientific evidence that substantiates such representation.

Appearances

For the Commission: *Michael Dershowitz and Kevin M. Bank.*

For the respondent: *Laura Luger, Moore & Van Allen, Durham, N.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Nationwide Industries, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Nationwide Industries, Inc. is a Pennsylvania corporation, with its office and principal place of business located at 2200 West Main Street, Suite 3000, Durham, North Carolina.