

IN THE MATTER OF
GENERAL MOTORS CORPORATION, ET AL.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF THE
CLAYTON AND THE FEDERAL TRADE COMMISSION ACTS

Docket C-3132. Consent Order, April 11, 1984--Set Aside Order, Oct. 29, 1993

The Federal Trade Commission has set aside a 1984 consent order with General Motors Corporation, et al., (103 FTC 374), thus removing the Commission's requirement limiting the duration of the joint venture (New United Motor Manufacturing, Inc.) between General Motors Corporation and Toyota Motor Corporation to produce subcompact cars in California. The Commission concluded that changed conditions in the industry warranted reopening and setting aside the order.

ORDER GRANTING PETITION TO REOPEN AND SET ASIDE ORDER

On June 28, 1993, the respondents, General Motors Corporation ("GM") and Toyota Motor Corporation ("Toyota") (hereafter "the respondents"), together with their joint venture, New United Motor Manufacturing, Inc. ("NUMMI"),¹ filed a Petition To Reopen the Proceeding and To Vacate the Consent Order ("Petition"), pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51. In their Petition, the respondents ask the Commission to reopen the proceeding in Docket No. C-3132 and set aside the consent order issued by the Commission on April 11, 1984, in *General Motors Corporation, et al.*, 103 FTC 374 (1984) ("order"). The Petition was placed on the public record for thirty days, pursuant to Section 2.51 of the Commission's Rules. Seventeen comments, all in favor of granting the Petition, were received.

After reviewing the Petition and other relevant information, the Commission has determined to grant the Petition. The respondents have shown changed conditions of fact that eliminate the need for

¹ NUMMI, the joint venture established by GM and Toyota, is not a respondent under the Commission's order.

the order and make its continued application to the respondents inequitable and harmful to competition.

I. The Complaint and Order and the Respondents' Petition

The Commission's 1984 complaint in this matter alleged that the proposed joint venture between GM and Toyota would violate Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the FTC Act, 15 U.S.C. 45, by lessening competition in the "manufacture and sale of small new automobiles . . . includ[ing] . . . subcompact, compact, and intermediate sized automobiles" in the United States and Canada. The complaint alleged, among other things, that the proposed joint venture could lessen competition (1) by expanding the output of the joint venture beyond what would reasonably be necessary to accomplish the legitimate purposes of the joint venture, and (2) by failing to provide adequate safeguards against the exchange of competitively significant information beyond the minimum reasonably necessary to accomplish the legitimate purposes of the venture. These effects, singly or in combination, allegedly would increase significantly the likelihood of noncompetitive cooperation between GM and Toyota.

The Commission's order, issued with the consent of GM and Toyota, permitted them to undertake the joint venture, but limits the scope of the venture and the exchange of information between GM and Toyota and with any joint venture. The order limits the joint venture to manufacturing for, or selling to, GM not more than approximately 250,000 automobiles per year,² except with the prior approval of the Commission, and limits the duration of the joint venture to the earlier of twelve years from the start of production or December 31, 1997.

The order limits the exchange of nonpublic information concerning prices and costs of GM or Toyota cars or parts, sales or production forecasts, and marketing plans for any product. In

² In addition, the order limits the cars made by the joint venture for GM to cars "derived from the Toyota Sprinter." NUMMI presently makes the Chevrolet Geo Prizm for GM. The order does not similarly limit NUMMI's production for Toyota. NUMMI makes the Corolla and a compact pickup truck for Toyota and also makes automobile parts

addition, the order limits discussions of product designs, sales or production forecasts, and the cost of products supplied by the co-venturers to those "necessary to accomplish, and solely in connection with, the legitimate purposes or functioning" of the joint venture. The order also contains record keeping and other requirements to help monitor the respondents' compliance with the order.

The respondents ask the Commission to set aside the order "in its entirety" to permit GM and Toyota to continue the joint venture. In support of the Petition, the respondents assert, among other things that in the context of what they view as fundamental changes in the market since 1984, setting aside the order's limits on the scope of the joint venture will allow the continuation of important efficiency gains that benefit competition. The respondents also assert that setting aside the order's restrictions on the output of the joint venture and on certain communications would be in the public interest, because the restrictions "are burdens imposed on no other automotive producers and therefore place NUMMI at a serious competitive disadvantage." Petition at 21.

II. Standards for Reopening and Modifying an Order

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage);

Louisiana-Pacific Corp., Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter").³

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification. Hart Letter at 5; 16 CFR 2.51. In such a case, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), at 2 (unpublished) ("Damon Letter"). For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order." *Damon Corp.*, Docket No. C-2916, 101 FTC 685, 692 (1983). Once such a showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. Damon Letter at 2. The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm. Damon Letter at 4.

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified. The Commission "may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 95th Cong., 1st Sess. 9-10 (1979); *see also* Rule 2.51(b) (requiring affidavits in support of petitions to reopen and modify). If the Commission determines that the petitioner has made the necessary showing, the

³ *See also United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) ("A decision to reopen does not necessarily entail a decision to modify the order. Reopening may occur even where the petition itself does not plead facts requiring modification.").

Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders. *See Federated Department Stores, Inc., v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

III. The Respondents Have Shown Changed Conditions of Fact that Require Reopening the Order, and the Restrictions on the Scope of the Joint Venture Should Be Set Aside

The order limited the scope of the joint venture to preserve the incentives of GM independently to make and sell new automobiles and to prevent noncompetitive cooperation between GM and Toyota. The Commission finds that the respondents have made a satisfactory showing of changed conditions in the North American automobile market that require reopening the order. The Commission also finds that the changed conditions demonstrated by the respondents eliminate the need for the order's restrictions on the duration and the output of the joint venture.

Since 1984, when the order was issued, significant new entry and expansion in the automobile industry have occurred in North America,⁴ including the United States, Canada and Mexico.⁵

Sales in the United States of subcompact, compact and midsized automobiles (the product market identified in the complaint) have grown from about 58% to more than 77% of new car sales.⁶ In 1984, U.S. car buyers could choose among 16 subcompacts, 14

⁴ At the same time, new passenger car production in North America has declined from about 8.8 million units (U.S. and Canada) in 1984 to about 7.5 million (U.S., Canada and Mexico) in 1992. *Automotive News*, 1985 Market Data Book at 4.8 (hereafter "(year) Market Data Book"); 1993 Market Data Book at 4. Total U.S. retail sales of domestic and imported cars were about 10.4 million in 1984 (1985 Market Data Book at 4) and about 9.5 million in 1992. 1993 Market Data Book at 4.

⁵ Although Mexico was not in the North American market identified in the complaint, since 1984, cars produced in Mexico have achieved about 10% of U.S. car sales. *See* 1993 Market Data Book at 4.

⁶ 1985 Market Data Book at 22; 1993 Market Data Book at 26.4

compact and 24 midsize cars;⁷ in 1992, U.S. car buyers could choose among 42 subcompact, 20 compact and 37 midsize cars.⁸ GM and Toyota each has made major investments in car production in the United States, outside the NUMMI joint venture. GM has developed new models of its existing lines of cars and introduced the Saturn line of automobiles. Toyota has built two assembly plants in North America and has introduced new vehicles (the Lexus line of automobiles, the T-100 pickup truck and a new larger Camry) to compete with GM's larger cars.

The new automobile market has become less concentrated since 1984.⁹ In 1984, GM was the leading maker and seller of cars in the United States, with 44.4% of passenger car sales.¹⁰ Ford (19.26%) and Chrysler (9.51%) were second and third. Toyota, the third largest motor vehicle manufacturer in the world, had 5.4% of U.S. sales. Manufacturing capacity in the United States of foreign automobile producers ("transplant" producers) consisted of two plants, a Honda facility in Ohio and a Nissan truck facility in Tennessee. Imports from countries such as Korea and Mexico were not significant.

In 1992, GM remains the leading producer and seller of automobiles in the United States, with 34.6% of sales.¹¹ GM is

⁷ See 1985 Market Data Book at 12.

⁸ See 1993 Market Data Book at 26. The top selling cars in the United States in 1992 were (1) Ford Taurus, (2) Honda Accord, (3) Toyota Camry, (4) Ford Escort, (5) Honda Civic, (6) Chevrolet Lumina, (7) Chevrolet Cavalier, (8) Pontiac Grand Am, (9) Ford Tempo, (10) Saturn, (11) Toyota Corolla, (12) Chevrolet Corsica-Beretta, (13) Nissan Sentra, (14) Buick LeSabre and (15) Cadillac Deville. *Id.* at 21.

⁹ According to the respondents, based on 1983 and 1992 unit sales, the Herfindahl-Hirschmann Index ("HHI") for car manufacturing has declined from 2455 to 1959 for the United States and from 2,363 to 1,859 for North America. Petition at 5. The amount of the decline in the HHI between 1983 and 1992 (about 500 points) is greater than the increase that would have resulted from a full merger between GM and Toyota in 1983 (about 480 points). Although the HHI has declined to 1959, the respondents' figures show that it remains above 1800, the level at which the 1992 Horizontal Merger Guidelines, *reprinted in* 4 Trade Reg. Rep. (CCH) paragraphs 13, 104, at Section 1.5, define a market as highly concentrated.

¹⁰ GM had 43% of North American automobile sales in 1984. Glassman & Cronin, Economic Justifications for Authorizing Unrestricted Production of Automobiles by NUMMI 8-9 (June 29, 1993), submitted in support of respondents' Petition.

¹¹ GM's share of North American car sales was 33.4% in 1992. In 1984, GM produced cars in 24 facilities in the United States and Canada; in 1992, GM had 18 plants in the United States and Canada and one in Mexico. GM expects to close additional plants by 1996. Petition at 5.

followed by Ford (21.6%), Honda/Acura (9.4%), Toyota/Lexus (9.3%), Chrysler (8.3%), Nissan/Infiniti (5%) and VW/Audi (1.1%).¹² In 1992, 12 Japanese and 2 European transplant car assembly plants operated in North America (including Mexico).¹³ The transplant assembly plants operated by Japanese car manufacturers, either directly or through joint ventures, during the period from 1982 through 1989, have added more than 2.5 million units of production capacity in North America. Hyundai, a Korean car manufacturer, sold more than 1.2 million cars in North America between 1986 and 1992 and in 1989 opened a plant in Quebec with a capacity of 100,000 vehicles.¹⁴ The transplant operations for the most part emphasize smaller cars, and their presence in North America ensures that their ability to expand sales is not limited by export restrictions.¹⁵ Imports from other countries, including Korea, Mexico and Brazil, amounted to 412,471 cars in 1992.¹⁶ Honda, Toyota and Nissan have expanded into new market niches by marketing Acura, Lexus and Infiniti cars in the "luxury" segment of the market.

A number of joint ventures and other cooperative arrangements between automobile manufacturers have been formed since 1984. Ford and Mazda formed Auto Alliance International, Inc., a joint venture that assembles small cars (Ford Probe, Mazda MX6 and Mazda 626) in a plant in Flat Rock, Michigan.¹⁷ Ford and Mazda also cooperate in other areas. For example, Ford makes the Mazda Navajo sport-utility vehicle, which competes with Ford's Explorer,

¹² The transplant assembly plants in the United States accounted for 25% of 1992 U.S. car production. 1993 Market Data Book at 12.

¹³ In addition, BMW and Mercedes Benz recently have announced plans to build plants in the United States, with a combined announced capacity of 120,000 cars. Petition at 5.

¹⁴ Petition at 4 and Tab 10.

¹⁵ In 1984, when the order was issued, voluntary restraint agreements ("VRA") limited the number of cars that could be imported from Japan for sale in the United States. The VRAs expired in 1985. Since 1985, the government of Japan has implemented voluntary export restraints ("VER"). In recent years, the number of cars exported from Japan to the United States consistently has fallen below the VER limits. See 1993 Market Data Book at 4.

¹⁶ Petition, Tab 11.

¹⁷ Ford has a 25% equity interest in Mazda. Petition at 6.

and Mazda and Ford collaborated on the development of Ford's subcompact Escort.¹⁸ Ford recently formed a "cooperative association" with Nissan, Japan's second largest automobile producer (after Toyota), to produce Mercury Villager and Nissan Quest minivans at Ford's plant in Avon Lake, Ohio.¹⁹

In 1985, Chrysler and Mitsubishi Motors Corporation established Diamond-Star Motors to produce cars.²⁰ Although Chrysler sold its interest in Diamond-Star to Mitsubishi in 1991,²¹ the two companies continue jointly to develop models produced by Diamond-Star. Chrysler distributes Japanese-made Mitsubishi vehicles in the United States, and Chrysler and Mitsubishi collaborate in design, engineering and manufacturing technology and know-how. Subaru and Isuzu²² have established a North American assembly joint venture, Subaru-Isuzu Automotive, Inc. ("SIAI"). SIAI has a plant in Lafayette, Indiana, with an annual capacity of about 169,000 units.²³ GM and Suzuki²⁴ are partners in a joint venture called CAMI Automotive, Inc. CAMI's plant in Ontario, Canada, with an annual capacity of 205,000 cars, makes Chevrolet Geo Tracker and Metro vehicles for GM.²⁵

Since the inception of NUMMI, GM has continued to make small cars (the "J" car (Chevrolet Cavalier and Pontiac Sunbird)) and has added two families of compact cars to its fleet (the "N" car

¹⁸ Petition, Tab 12 ("How Ford and Mazda Shared the Driver's Seat," Business Week, March 26, 1990, at 94).

¹⁹ Petition, Tab 13 (A. Harmon, "A Van Vanguard; Ford, Nissan Overcome Distrust To Build Their First Vehicle Together," Los Angeles Times, July 20, 1992, at D1).

²⁰ Diamond-Star began making small cars in the U.S. in 1988. In 1991, it was making the Mitsubishi Eclipse and Mirage, the Plymouth Laser, and the Eagle Talon and Summit at its Normal, Illinois plant. Petition, Tab 14 ("Chrysler, Mitsubishi Motors Agree to Major Restructuring of Diamond-Star Joint Venture," PR Newswire, October 29, 1991).

²¹ Chrysler has a 5.9% equity interest in Mitsubishi.

²² GM owns a 38% equity interest in Isuzu. Petition, Tab 7 (Rogers Affidavit).

²³ In 1992, SIAI produced 57,623 Subaru Legacy sedans and station wagons. The plant also produces Isuzu pickup trucks and sport-utility vehicles. Petition at 7.

²⁴ GM owns a 5.3% equity interest in Suzuki. Petition, Tab 7 (Rogers Affidavit).

²⁵ Petition, Tab 7 (Rogers Affidavit). In 1992, CAMI produced 96,404 small cars, the Geo Metro and the Suzuki Swift. 1993 Market Data Book at 10.

(Pontiac Grand Am, Oldsmobile Achieva and Buick Skylark) and the "L" car (Chevrolet Corsica and Beretta). GM produced more than 9 million "Y," "L" and "N" cars in the United States between 1985 and 1992, which is more than ten times the number of cars that NUMMI produced for GM during the same period. Petition at 14-15. In 1985, GM created the Saturn Corporation, which began making cars in 1990. The Saturn plant in Spring Hill, Tennessee, currently makes 240,000 cars annually, and GM plans to increase production to more than 300,000 units by the end of 1993.²⁶ In addition, in the last six years, Toyota has built two plants in North America, in Georgetown, Kentucky and Cambridge, Ontario, Canada. After completion of an expansion at the Georgetown plant, Toyota will have a North American capacity of 500,000 vehicles annually.²⁷ The changes in the industry that are described above are changed circumstances that eliminate the need for the order's limitations on the output and the duration of the joint venture. Entry and expansion in the automobile market in North America, although costly and time-consuming, have occurred on a significant scale. In the face of such entry and expansion, the joint venture is unlikely to create or facilitate the exercise of market power.²⁸ In addition, the development by GM of the Saturn line of cars is a significant change that eliminates the concern that the establishment of NUMMI would deter independent development and production of small cars in North America by GM. GM's substantial investment in Saturn, the increasing presence of transplant operations and the substantial increase in small car models available to consumers since 1984 all

²⁶ Although the Commission has at times looked skeptically at certain evidence of post-acquisition exculpatory conduct that is within the control of the respondent, *see, e.g., B.F. Goodrich*, 110 FTC 207, 340-42 (1988), GM's substantial investment in Saturn Corp., both in terms of dollars (more than \$2 billion in the Tennessee plant and a similar amount in marketing the Saturn line) and good will, and Saturn's success in the market suggest that GM is unlikely to abandon the Saturn line in favor of output from NUMMI. In 1992, only two years after beginning production, the Saturn line of cars accounted for almost 8% of GM's total sales.

²⁷ Petition, Tab 8 (Yasuda affidavit).

²⁸ *See* 1992 Horizontal Merger Guidelines Section 3.0; *Genstar Limited*, 104 FTC 264. (1984) (order modified on showing of expansion and entry in the relevant market that eliminated need for order restriction); *cf. Louisiana-Pacific Corp.*, 112 FTC 547, 559 (1989) (no claim of changes in structural characteristics of market, such as ease of entry, that might obviate need for remedy provided by order).

suggest that the basis for the concern reflected in the complaint and order about diminished competition in the small car market has been eliminated. There appears to be no continuing need for the order's restrictions on the duration and scope of the joint venture, and continuing the restrictions in the context of the changed conditions may hinder the ability of the joint venture to respond to consumer demand.

The Commission has determined that the changes in the industry are significant changes that eliminate the need for the order's limitations on the output and the duration of the joint venture. Accordingly, the order should be reopened and paragraphs II and III of the order should be set aside.

In addition to the changed conditions of fact that have eliminated the need for the order's limitations, GM and Toyota also assert significant efficiencies that have been realized and that will continue to be realized if the order is set aside and the joint venture is not terminated.²⁹ The record appears to show that NUMMI may be one of the more efficient assembly plants in the United States.³⁰ GM states that it is continuing to reap the benefits of gaining first-hand experience with an efficient production system.³¹ Moreover, the parties assert that permitting NUMMI to continue its operations beyond 1996 will facilitate GM's efforts to reduce costs and give GM continued access to small cars, consistent with the recognition that NUMMI benefits GM by enabling it to obtain a low-cost

²⁹ The respondents state that NUMMI is a successful project of comparative labor/management relations that facilitates GM's efforts to learn the Toyota Production System, supplies the market with more than 300,000 high quality, low cost vehicles annually and diffuses trade frictions. Petition at 8-12. Because the Petition is granted on the ground of changed conditions of fact, the Commission need not address the question whether the public interest justifies the requested relief, including any efficiencies.

³⁰ Petition, Tab 1 (Convis Affidavit) (describing NUMMI's efficiency efforts). See Petition at 9 (referring to studies by industry authorities, management experts and academicians that show NUMMI's efforts to improve efficiency); Petition, Tab 16 at 97 (case study of NUMMI appearing in the February 1993, Harvard Business Review concluding, in part, that NUMMI "has succeeded in employing an innovative form of ... time-and-motion regimentation on the factory floor not only to create world-class productivity and quality but also to increase worker motivation and satisfaction.").

³¹ Petition, Tab 6 (Mutchler Affidavit) (GM initially adopted "a piece-meal approach to the learning process"; in 1989-90, however, GM "began to understand that each element of the Toyota Production System is an essential part of the whole."). See Petition at 11 (GM states that it "is still the high cost producer in North America. ").

domestic subcompact economy car.³² Thus, NUMMI's benefits may well continue beyond 1996. Extending NUMMI will permit the continuance of any efficiency gains that benefit competition in the relevant markets.

IV. The Order's Restrictions on Communications Also Should Be Set Aside

Having determined to reopen the order on the ground of changed conditions of fact and to set aside the order's restrictions on the duration and output of the joint venture, we next consider whether the remaining provisions of the order should be retained. The order's limitations on the exchange of certain nonpublic information among GM, Toyota and NUMMI addressed the concern, alleged in the complaint, that the joint venture might facilitate noncompetitive cooperation between GM and Toyota. The respondents claim that the restrictions of the order impede the ability of the joint venture to do business. They also claim that communications between participants in other automobile industry cooperative ventures created since the order was issued are not similarly restricted and that, as a result, GM, Toyota and NUMMI are unable to communicate as do their competitors.

The provisions of the order were designed to restrict communications that might facilitate noncompetitive cooperation between GM and Toyota, while permitting communications necessary to accomplish the legitimate purposes and functioning of the joint venture. The respondents have shown that, in some circumstances, the specific limitations of the order impede the ability of the respondents and the joint venture to engage in legitimate activity. For example, the respondents have shown that the limitation on the exchange of information concerning the prices of component parts supplied to the joint venture prevents the joint venture from obtaining savings that may result from combining its market search activity with Toyota's, and from realizing cost savings to be

³² Petition at 2, 11 (GM will be able to continue to obtain from NUMMI what it characterizes as a "high quality, low cost sedan -- the Prizm -- that is the flagship of the Geo distribution network").

generated by combining its purchases with Toyota's.³³ The provision of the order that bars GM from discussing marketing plans with Toyota or NUMMI allegedly has hindered the ability of the parties to realize market opportunities and increased their costs. For example, the respondents state that because GM was unable to tell NUMMI about a potential sale of cars in the fleet market, GM was unable to persuade NUMMI to make a price concession that might have resulted in a transaction beneficial to all of the parties. On another occasion, according to the respondents, as a result of GM's perceived inability under the order to tell the joint venture about GM's plans to re-badge the Nova as the Geo Prizm, NUMMI wastefully spent funds on tooling that was specific to Nova and that later had to be scrapped.³⁴

The respondents have shown that in the context of significant changed conditions in the industry, the restrictions in the order on business communications may increase the costs of the joint venture and hinder the ability of the respondents and the joint venture to respond to competitive conditions. At the same time, the communications that are limited by the order are not *per se* unlawful, and setting aside these provisions of the order will not excuse the respondents from compliance with laws that prohibit collusive activity in restraint of trade. *See General Railway Signal.*, 108 FTC 181 (1986) (modifying order). The Commission has concluded that in the context of the changed conditions in the industry, paragraphs IV and V of the order should be set aside to permit the respondents and NUMMI to engage in communications ancillary to and reasonably necessary for the operation of the joint venture.³⁵

Accordingly, *it is ordered*, That this matter be and it hereby is reopened and that the Commission's order in Docket C-3132, issued on April 11, 1984, be and it hereby is set aside, as of the effective date of this order.

³³ Petition at 16-17

³⁴ Petition at 17-19; Kimura Affidavit; Rogers Affidavit.

³⁵ The recordkeeping requirements of the order are intended to assist the Commission in monitoring the respondents' compliance with the order's restrictions on the exchange of information. If the order's restrictions on communications are set aside, the recordkeeping and other compliance requirements of the order (paragraphs VI through IX) also should be set aside.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I concur in the decision of the Commission to reopen and set aside the order in this matter on the ground of changed conditions in the automobile industry that eliminate the need for the order. I do not endorse as relevant to this decision the purported efficiency gains from NUMMI alleged by GM and Toyota. *See* Order at 9-10.

GM and Toyota have asserted efficiencies that may or may not be realized in the future, if the respondents decide to continue their joint venture.¹ I hope that the asserted efficiencies will be realized and that NUMMI will indeed benefit competition, but these are not independent reasons for reopening and setting aside the order. Nor would it matter, in the context of determining whether the order should be reopened, if NUMMI were inefficient. If the projected efficiencies of the joint venture were not sufficient to forestall imposition of the order in the first place, how could the failure fully to achieve those efficiencies² or even their continuation justify setting the order aside?

The order of the Commission is not premised on the efficiency (or inefficiency) of the joint venture but rather on concerns, described in the complaint, about the potential effects on competition of noncompetitive cooperation between GM and Toyota. When we are persuaded that changed conditions of fact in the market have eliminated that concern, our task is done, and we need not speculate, in the context of a petition to reopen, about the parties' predictions of potential efficiencies.

GM and Toyota, in their business judgment, would prefer to continue their joint venture beyond the twelve years provided in the order, because they believe that it will be profitable. To accept this reason as a basis for reopening and setting aside the order would

¹ The order having been set aside, GM and Toyota will be at liberty at any time (as they were at liberty while the order was in effect) to discontinue their joint venture. The alleged "formidable regulatory, tax and logistical disadvantages to operating an auto plant in California," the "inherent difficulties in assembling vehicles" in the 30-year-old plant, the cost of required improvements to NUMMI's plant (expected to exceed \$500 million), Petition at 13, and the fact that NUMMI "has not been consistently profitable." Kimura Affidavit at 1, may provide incentives for doing so.

² *See* Jennings Affidavit at 4; Mutchler Affidavit at 2.

relegate the decision whether to reopen final orders of the Commission to the business preferences of the respondent. The Commission has rejected this argument in the past, *see Louisiana-Pacific Corp.*, 112 FTC 547, 569 (1989) (rejecting as a basis for reopening the order the argument that retaining rather than divesting a profitable plant would enhance the respondent's ability to compete), and it should continue to do so.

I fully concur in the decision to reopen and set aside the order on the ground of changed conditions of fact.

CONCURRING STATEMENT OF COMMISSIONER DEBORAH K. OWEN

When the Commission accepted the consent order in this matter in 1984, it was generally recognized as a landmark effort to balance our dual responsibilities of vigorously enforcing the competition laws, while refraining from unnecessarily interfering with legitimate business activities. In light of marked changes in circumstances since that time, I believe that the Commission's determination to vacate the order today follows in the tradition of its original decision, and I strongly endorse it.

The Merger Guidelines recognize that the "larger universe" of combinations are "either competitively beneficial or neutral." Section 0.1.¹ As part of their Petition for reopening, the parties have presented an impressive array of information about the positive contributions of NUMMI, including assorted efficiencies that have resulted from the joint venture. While the Order (at 9-10 n.29) notes that "[b]ecause the Petition is granted on the ground of changed conditions of fact, the Commission need not address . . . any efficiencies," the Commission nonetheless proceeds to comment on this issue. Order at 9-10. Without meaning to disparage the parties' assertions in this regard, because of the basis for our decision, it is not necessary for the Commission, in my judgment, to evaluate, much less opine on, the existence, extent and effect of such efficiencies as part of this endeavor. Engaging *in dicta* is not without peril.

¹ U.S. Dept. of Justice and Federal Trade Commission Horizontal Merger Guidelines, *reprinted* in 4 Trade Reg. Rep.(CCH) paragraph 13,104.

IN THE MATTER OF

S.C. JOHNSON & SON, INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT*Docket C-3418. Consent Order, Mar. 16, 1993--Modifying Order, Nov. 8, 1993*

This order reopens the proceeding and modifies the Commission's consent order issued on March 16, 1993 (116 FTC 184), by removing the requirements that the respondent hold separate and divest the international Renuzit assets to a Commission-approved acquirer. The Commission concluded that the hold separate and divestiture requirements are imposing costs on the respondent and that there do not appear to be any competitive reasons to retain the divestiture requirement.

ORDER REOPENING PROCEEDING AND MODIFYING ORDER

On July 8, 1993, S.C. Johnson & Son, Inc. ("Johnson") filed a Request To Reopen and Modify Consent Order ("Request") pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51. The request was placed on the public record, and the thirty-day comment period expired on August 23, 1993. No comments were received.

In the request, Johnson asks that the Commission reopen and modify the order to eliminate any remaining obligation under paragraph II to divest the "Renuzit air freshener business outside the United States and all non-domestic territories or countries in North America, north of and including Panama, the Caribbean and Cuba" ("international Renuzit assets"). In the alternative, Johnson requests that the Hold Separate Agreement ("Hold Separate"), dated December 17, 1992, and made a part of the order, be terminated promptly since Johnson has completed the sale of all of the North American Renuzit assets.