

## IN THE MATTER OF

## INSTITUT MERIEUX S.A.

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-3301. Consent Order, Aug. 6, 1990--Modifying Order, April 22, 1994*

This order reopens the proceeding and modifies the Commission's consent order issued on August 6, 1990 (113 FTC 742), by deleting the requirement to lease to a third party the rabies vaccine business that the company acquired when it purchased Connaught BioSciences, Inc. The Commission concluded that the record does not show any approvable lessee despite Merieux's efforts to find one, and that retaining the lease requirement imposes significant costs on Merieux and could result in adverse impact on public health needs.

ORDER REOPENING AND MODIFYING ORDER  
ISSUED ON AUGUST 6, 1990

On December 23, 1993, respondent Pasteur Merieux Serums et Vaccins S.A., formerly known as Institut Merieux S.A. ("Merieux"), filed a Request To Reopen the Proceeding and To Set Aside the Divestiture Obligations of the Consent Order ("Request"), 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 its Request, Merieux asks the Commission to reopen the proceeding and modify the consent order in Institut Merieux S.A., Docket No. C-3301 (August 6, 1990) ("order"), by setting aside subparagraphs I(3), (4) and (5), and paragraphs II through IX and XI(A) ("the divestiture provisions"). In support of its Request, Merieux argues that the modification is warranted by changed conditions of fact and by the public interest. Merieux's Request was placed on the public record for thirty days, pursuant to Section 2.51 of the Commission's Rules, and numerous comments were received.

For the reasons discussed below, the Commission has determined that the changed conditions of fact asserted by Merieux do not compel a reopening of the order, but that Merieux has demonstrated

that it is in the public interest to reopen and modify the order by setting aside the divestiture provisions.

### I. The Complaint And Order

The Commission's 1990 complaint in this matter alleged that Merieux's proposal to acquire Connaught BioSciences Inc. ("Connaught") would violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and that consummation of the transaction would violate Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, by, among other things, lessening competition in the manufacture and sale of rabies vaccine in the United States. The complaint alleged that at the time Merieux offered to acquire Connaught, Merieux was the only firm selling rabies vaccine nationwide, with Connaught being one of two potential entrants.

The consent order in this matter requires Merieux to lease on a long-term basis Connaught's Toronto-based rabies vaccine business ("the business") within three (3) months after the order became final on October 15, 1990, to a lessee that receives the prior approval of the Commission. The order contains several provisions relating to the lease obligation, including: that the lease be for a minimum of 25 years, and at reasonable and customary terms; that there be a lump-sum payment under reasonable and customary terms for the existing inventory of Connaught's rabies vaccine; that the lease agreement include a commitment from the lessee to supply rabies vaccine sufficient to satisfy the Canadian demand for vaccine; and that the lease agreement be accomplished in a manner that preserves the product and business leased as a viable rabies vaccine business and as a viable competitor. *See* order paragraphs II-III, VII. The order also provides that the Commission may, in its discretion, appoint a trustee in the event Merieux has not leased the business. *See* order paragraphs IV-VI.

### II. Merieux's Compliance With The Divestiture Provisions

Immediately following issuance of the order, Merieux contacted twenty-eight companies that Merieux believed to be potentially interested in entering into the ordered lease based on their knowledge of the business and of the industry generally. From October 1990

through June 1992, Merieux pursued all contacts with this initial group of candidates, which responded with varying degrees of interest, as well as with one additional party that expressed an interest in leasing the business. Ultimately, none of these firms decided to pursue a lease of the business. All contacts from interested parties ceased by fall of 1992. In September 1992, Merieux advised the Commission that it had concluded that there was no realistic possibility of leasing the business.

### III. Proceedings Prior To Merieux's Request

Based upon its review of the record, the Commission determined that it was in the public interest to reopen the proceeding in Docket No. C-3301 and modify the order in this case by setting aside the divestiture provisions, and issued an order to show cause why the divestiture provisions of the order should not be set aside pursuant to Section 3.72(b)(1) of the Rules. *See* Order to Show Cause (March 9, 1993).

The Commission's determination to issue the order to show cause was based on its conclusion that accomplishment of the required lease was, for all practical purposes, a virtual impossibility, and that Merieux's failure to accomplish the required lease likely was attributable to factors beyond its control, and not to a lack of good faith effort. *See* Order to Show Cause at 2. The Commission further concluded that the costs to Merieux of further divestiture efforts were "an inequitable and unbargained-for element of the consent order." *Id.* at 2. The Commission also concluded that a trustee appointed by the Commission would be unlikely to have any greater success than Merieux in accomplishing a lease of Connaught's rabies vaccine business for the same reasons that Merieux had been unsuccessful. Finally, the Commission determined that requiring Merieux, or a trustee, to continue pursuing a potential lessee could adversely affect the viability of Connaught's rabies vaccine business, and thus, its ability to supply the Canadian rabies vaccine needs. *See* Order to Show Cause at 3.

Before expiration of the thirty-day period set forth in Section 3.72(b)(1) of the Rules, North American Vaccine, Inc. ("NAVA"),<sup>1</sup>

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<sup>1</sup> NAVA is a Canadian company formed in 1989 to consolidate the assets, liabilities and operations of American Vaccine Corporation, and certain assets and vaccine-related technologies of BioChem Pharma Inc. NAVA, headquartered in Beltsville, Maryland, is engaged in the research, development

filed a Motion for Leave to Intervene in the proceeding. *See* Motion for Leave to Intervene (March 30, 1993). Merieux opposed NAVA's motion for leave to intervene, and Commission counsel recommended that the Commission deny NAVA's motion, but defer any action on the order to show cause for a specified period. *See* Respondent's Opposition to Motion to Intervene By North American Vaccine, Inc. (April 8, 1993); Commission Counsel's Response to Motion for Leave to Intervene (April 9, 1993).

Subsequently, the Commission issued an order denying NAVA's motion for leave to intervene, but authorizing NAVA to file a brief *amicus curiae* presenting its views by May 25, 1993. *See* Order Denying Motion for Leave to Intervene (April 23, 1993). NAVA filed its *amicus* brief on May 21, 1993. Thereafter, following its review of NAVA's *amicus* brief, as well as further submissions by Merieux and Commission counsel, the Commission issued an order vacating the order to show cause and terminating the show cause proceeding, on August 17, 1993. *See* Order Vacating Order to Show Cause Issued March 9, 1993, and Terminating Show Cause Proceeding (August 17, 1993) (Commissioner Owen dissenting). That action returned this matter to nonadjudicative status.

#### IV. Merieux's Request

In its Request, Merieux states that it has conscientiously and diligently sought to locate a lessee, but that it has not received an offer from any party that complied with the terms of the order and demonstrated that it was reasonably likely to be a viable long-term operator of the business that would fulfill the objectives of the order. Request at 2. Merieux further asserts that NAVA, the only company to suggest possible terms for leasing the business, is a company that has never produced or sold vaccine or any other product in commercial quantities, and that the terms suggested by NAVA for entering into the lease agreement contemplated by the order were below "reasonable commercial value" and did not comply with the terms or objectives of the order. *Id.* at 3. Consequently, Merieux argues that it is unlikely that it would receive a *bona fide*, commercially reasonable offer that complies with the terms of the

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and production of vaccines for the prevention of human infectious diseases. Its development efforts to date have focused on pediatric vaccines.

order from a company that is experienced in vaccine production and sale, and that is likely to fulfill the remedial objectives of the order.

Merieux asserts that, in issuing the order to show cause, the Commission has already determined that: (1) Merieux has made a good faith effort to comply with the order's divestiture provisions; (2) Merieux is being prejudiced in its business by the continuation of the lease obligation; (3) the fact that a potential lessee (other than NAVA) has not been located is attributable to a combination of elements beyond Merieux's control; and (4) the costs to Merieux of further divestiture efforts are an inequitable and unbargained-for element of the order. Request at 6.

Merieux argues that changed circumstances since the order was issued and public interest considerations justify eliminating the divestiture provisions. Merieux asserts that the entry of SmithKline Beecham Pharmaceuticals (USA), and the potential entry of two additional suppliers, constitute a significant change in market conditions that eliminates the competitive need for the order's lease obligation. Merieux also suggests that the continuing lease requirement may be harmful to competition at the time of a growing rabies epidemic in the United States and Canada because it adversely affects Connaught's ability to respond to the increased demand for vaccine with capital investments to upgrade and expand the business's productive capacity. Merieux further suggests that a transfer of the business to a lessee would likely have the effect of removing the business's productive capacity from the market beyond the point of exhausting marketable inventory while the lessee sought the necessary regulatory approvals. In addition to the public health considerations raised by the continuing lease obligation, Merieux cites the interests of Canada in preserving a proven source of rabies vaccine and its own good faith effort to comply with the order's lease provisions as support for modifying the order on public interest grounds.

#### V. NAVA'S Comment

On January 31, 1994, NAVA filed Comments of North American Vaccine, Inc. Opposing Request of Institut Merieux S.A. to Reopen

and Modify Consent Order (“NAVA Comment”).<sup>2</sup> In its Comment, NAVA requests that the Commission deny Merieux’s Request and appoint an independent trustee to negotiate the terms of a lease with NAVA. NAVA argues, among other things, that Merieux continues to “maintain and exploit its monopoly” in the United States rabies vaccine market and that competitive conditions have not materially changed in the relevant market since the Commission issued the order. NAVA Comment at 2, 25.

NAVA states that it is a qualified lessee that will fulfill the remedial purposes of the order. NAVA Comment at 11. Specifically, NAVA asserts that it: (1) can secure the necessary regulatory approvals in a timely manner; (2) has the requisite manufacturing expertise, as well as the necessary access to critical raw materials and subcontractor services, to operate the business effectively; (3) has the financial capacity to lease the business on reasonable terms and to maintain such business in Canada and expand into the United States. *Id.* at 13, 16. Finally, NAVA argues that its offer to lease the business complies with all of the terms of the consent order and is commercially reasonable, but that Merieux has refused to negotiate with NAVA in good faith. *Id.* at 17.<sup>3</sup>

## VI. Standards for Reopening and Modification

Section 5(b) of the FTC 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” require such modification. A satisfactory showing sufficient to compel reopening is made when a request to reopen identifies significant changes in circumstances and

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<sup>2</sup> Prior to this date, NAVA supplied extensive and detailed information voluntarily and in response to requests from Commission staff. The information supplied by NAVA concerned, among other things, NAVA’s financial condition, its valuation of Connaught’s rabies vaccine business, its ability to obtain necessary regulatory approvals, and its capability to operate the business in a manner consistent with the requirements of the order’s divestiture provisions.

<sup>3</sup> On April 7, 1994, Merieux filed a Reply Memorandum responding to NAVA’s Comment. Among other things, Merieux stated that it was unable to reply fully to NAVA’s Comment because it had not received an unredacted version of the Comment. (NAVA filed both redacted (public) and unredacted (confidential) versions of its Comment.) Merieux also requested, both in a February 9, 1994 submission and in its Reply Memorandum, that the Commission either provide Merieux with the unredacted version of NAVA’s Comment or refuse to consider that Comment. In view of the Commission’s disposition of Merieux’s Request, Merieux’s request that it receive access to the unredacted version of NAVA’s Comment or that the Commission refuse to consider that Comment is denied as moot.

shows that the changes eliminate the need for the order, or make continued application of it inequitable or harmful to competition. Louisiana-Pacific Corp., Docket No. C-2956, Letter to John C. Hart (June 5, 1986) at 4.<sup>4</sup> Reopening is not compelled, however, for changes in circumstances that were reasonably foreseeable at the time the consent order was entered.<sup>5</sup>

The Commission may also modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest requires such action. Therefore, Section 2.51 of the Commission's Rules of Practice invites respondents in petitions to reopen to show how the public interest warrants the modification. In the case of a request for modification based on public interest grounds, a petitioner must demonstrate as a threshold matter some affirmative need to modify the order. *See* Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983) at 2. If the showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. *Id.* The Commission will also consider whether the particular modification sought is appropriate to remedy the identified harm.

Whether the request to reopen is based on changed conditions or on public interest considerations, the burden is on the respondent to make the requisite satisfactory showing. The language of Section 5(b) plainly anticipates that the petitioner must make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes it clear that the petitioner has the

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<sup>4</sup> *Cf. United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992), where the court noted that "[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." *Id.*

<sup>5</sup> In *Louisiana-Pacific Corp.*, Docket No. C-2956, 112 FTC 547, 551 (1989), the respondent argued that reduced production capacity which caused a reduction of market power was sufficient grounds to reopen and modify the order based on the changed conditions standard. The Commission denied the respondent's petition, holding that "[m]odification of a final order is warranted when significant unanticipated changes in circumstances . . . eliminate the need for the order or make continued application of the order inequitable or harmful to competition." (Emphasis added). Likewise, in *Union Carbide Corp.*, Docket No. C-2902, 108 FTC 184 (1986), the respondent alleged that the number of national industrial gas producers was increasing and that, consequently, its market share was declining. The Commission granted in part and denied in part the respondent's petition, finding, among other things, that the respondent had "failed to show that these changes were unforeseeable, or that they reflect more than the natural evolution of the industry." 108 FTC at 187-88. *See also* Pay Less Drug Stores Northwest, Inc., Docket No. C-3039, Letter to H.B. Hummelt (Jan. 22, 1982) (changed conditions must be unforeseeable, create severe competitive hardship, and eliminate the dangers that the order sought to remedy).

burden of showing, other than by conclusory statements, why an order should be modified.<sup>6</sup> If the Commission determines that the petitioner has made the required showing, the 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 given the public interest in repose and the finality of Commission orders.<sup>7</sup>

#### VII. Reopening And Modifying Order Of August 6, 1990

The Commission has concluded that the changes in fact asserted by Merieux do not meet the standards for compelled reopening. Nearly all of the current factual circumstances and conditions in this matter were known and present, or were foreseeable, when Merieux executed the consent agreement and on the date the order became final. For example, although the complaint alleges that entry into the United States rabies vaccine market is "difficult or unlikely," the complaint recognizes Connaught as "one of two potential entrants." See Complaint paragraphs VI(9) and VII(10). Thus, new or potential entry into the United States rabies vaccine market cannot be characterized as an unforeseeable change in market conditions that would compel reopening the order.

The Commission has concluded, however, that it would be in the public interest to reopen the order and set aside the divestiture provisions. Over one year ago, on March 9, 1993, the Commission issued its order to show cause why the proceeding in Docket No. C-3301 should not be reopened to modify the order by setting aside Merieux's obligation to enter into the lease agreement mandated by the consent order. The Commission's determination to issue the order to show cause, almost two and one-half years after the order became final, was based upon its review of the record at that time. The information contained in that record suggested to the

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<sup>6</sup> 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, 96th Cong., 1st Sess. 9-10 (1979). See also Rule 2.51(b), which requires affidavits in support of petitions to reopen and modify.

<sup>7</sup> See *Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

Commission that (i) there did not appear to be any potential lessee that was interested in Connaught's rabies vaccine business or that was likely to receive the necessary governmental approvals, and (ii) to require Merieux to continue to pursue a potential lessee could prejudice the business to the possible detriment of Canadian public health authorities and other consumers who rely on the business as a source of supply for rabies vaccine. Nevertheless, in furtherance of the Commission's interest in determining whether there was in fact a viable lessee for the business that could fulfill the remedial purposes of the order, the Commission permitted NAVA to file an *amicus* brief and, subsequently, set aside the order to show cause.

Except for NAVA, no other party interested in leasing the business has emerged since the Commission issued the order to show cause. Having reviewed Merieux's submissions, as well as the public comments received by the Commission, and all other material submitted by NAVA, *see* n.2, *supra*, the Commission is satisfied that the modification requested by Merieux is in the public interest. The Commission has determined, in this regard, that the record does not support the conclusion that NAVA would be an approvable lessee under the order,<sup>8</sup> or that Merieux failed to negotiate in good faith with NAVA.

The Commission thus finds that Merieux has made the required threshold showing to support reopening the order, *i.e.*, that the order's lease requirement continues to impose significant costs on Merieux and may adversely affect public health needs. The Commission also concludes that there are substantial reasons supporting modification,

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<sup>8</sup> In reviewing a divestiture application to determine whether to approve a proposed acquirer (or, as in this case, a proposed lessee), the Commission typically examines several factors that evidence the prospective acquirer's capability and intention to operate the divested assets in a manner that fulfills the remedial purposes of the order. Those factors include: the acquirer's financial capability; technical, marketing, management and other relevant capabilities; business plans and other evidence of the acquirer's intention and ability to compete; and whether divestiture to the proposed acquirer will achieve the competitive relief sought by the order. In the present case the Commission has been particularly concerned to evaluate those factors in light of the public health considerations at issue in connection with the production and distribution of rabies vaccine.

Based on the extensive record on these issues, the Commission has serious reservations whether NAVA would be a viable lessee of the business, and whether the Commission would approve NAVA as a lessee even if a trustee were able to negotiate a lease with it. For example, NAVA has never produced or marketed a vaccine for commercial use; its vaccines have not yet been licensed for commercial sale; without commercial sales, its operating revenues fall far short of its operating costs; and, particularly in light of the public health concerns at issue, a lease to NAVA at this stage in its development would entail risks that the Commission would have serious reservations about accepting.

The decision whether to appoint a trustee under the order is a matter reserved for the Commission's discretion. For the aforementioned reasons, the Commission has determined that the appointment of a trustee to negotiate a lease with NAVA is unwarranted.

including the actual entry of SmithKline into the United States rabies vaccine market, which reduces the need for further relief pursuant to the order's lease requirement, and the potential adverse impact on public health needs in the United States and Canada resulting from continued application of the lease requirement. Finally, there are no countervailing public interest concerns that outweigh the reasons in support of granting the modifications requested by Merieux.

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened; and

*It is further ordered*, That the order in Docket No. C-3301 be, and it hereby is, modified by setting aside the following provisions: subparagraphs I(3), (4), and (5); and paragraphs II; III; IV; V; VI; VII; VIII; IX; and XI(A).

Commissioner Azcuenaga and Commissioner Starek dissenting.

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

I concur in the Commission's decision to reopen and modify the consent order in this matter. I write separately only to clarify a point of possible confusion. It is suggested in a dissenting statement that the Commission has departed from precedent and from sound law enforcement practice by determining that the continued costs imposed on Merieux by the lease requirement contribute to a demonstration of affirmative need to modify the order. I fully agree that the ordinary costs of complying with an order cannot satisfy the burden of showing a need to reopen and modify that order. However, the costs here present must be construed in the context of (i) Merieux's good-faith, but unsuccessful, efforts to locate a lessee and (ii) the Commission's reservations -- three and one-half years after the consent order became final -- about approving the only lease candidate that remains. Viewed in that context, the costs imposed by continued application of the lease requirement are an inequitable and unbargained-for element of the consent order, and appropriately contribute to a determination of affirmative need for modification.

## DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

The Commission today decides to reopen and modify the consent order in this matter, eliminating the requirement that Institut Merieux S.A. ("Merieux") divest the Connaught rabies vaccine business.<sup>1</sup> Although I did not support the Commission's decision in 1990 to accept this order,<sup>2</sup> mere disagreement with the terms of an order is not sufficient reason to disregard the Commission's established standards for reopening and modifying final orders. Merieux has not made a sufficient showing to warrant reopening, and the willingness of the Commission to eliminate the divestiture requirement on the basis of Merieux's petition evidences a lack of concern for the fate of Commission orders in which I cannot join.

Once the Commission accepts an order, it is incumbent on us to enforce it, absent a showing of changed conditions or public interest considerations sufficient to warrant reopening and modification or a confession of error. The history of this order reflects a pattern of neglect that raises serious questions about the Commission's commitment to enforcing its orders. Indeed, the disparate treatment accorded this respondent may even raise questions about arbitrary and capricious administrative action.

The consent order gave Merieux three months within which to lease the Connaught rabies vaccine business (until January 15, 1991). The order provides that after three months, Merieux shall consent to the appointment by the Commission of a trustee to accomplish the divestiture. Although Merieux did not accomplish the divestiture either within three months or in the following three and a half years, the Commission has not appointed a trustee. Even at this late date, the Commission has clear authority under the order to appoint a

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<sup>1</sup> The "divestiture provisions" set aside today are unusual in several respects. Instead of full divestiture, Merieux is required to lease the acquired business for a minimum of twenty-five years. Most of the other unusual features of the order follow from the anticipated difficulties that might arise from the implementation of the required lease. See *Institut Merieux S.A.*, 113 FTC 742, 747 (1990). Some of these same difficulties are now urged as a basis for granting the petition to reopen and modify the order.

<sup>2</sup> Although I did not issue a statement to accompany my dissent from the consent order, I dissented because I disfavor orders, such as this one, that are difficult to administer and threaten to embroil the Commission in highly regulatory supervision of respondents. Azcuenaga, *The Evolution of International Competition Policy: A Federal Trade Commission Perspective* at 6-7 in 1992 Corporate Law Institute, *International Antitrust Law and Policy* (B. Hawk ed. 1993).

trustee to accomplish divestiture, and the appointment should be made.<sup>3</sup>

In March 1993, more than two years after the end of the three month divestiture period given Merieux, the Commission issued an order to show cause why the consent order should not be reopened and the divestiture obligation set aside. In the order to show cause, the Commission found, on the basis of Merieux's compliance reports, that Merieux "has contacted all of the parties that would have an interest in the [Connaught rabies vaccine] operation" and that each had declined to lease the facility. The Commission stated that the record, consisting primarily of the compliance reports, "establishes 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."

The Commission was thus prepared to relieve Merieux of its divestiture obligation when, lo and behold, immediately after the show cause order was issued, a prospective lessor appeared: North American Vaccine moved for leave to intervene in the show cause proceeding, claiming that it was interested in acquiring the Connaught rabies vaccine business that Merieux was obliged to divest. As a result, the show cause proceeding was terminated on August 17, 1993. North American and Merieux apparently having failed to come to terms, Merieux filed its petition to reopen and modify the order on December 23, 1993, again alleging the impossibility of finding a qualified divestiture candidate and bemoaning the costs of complying with the divestiture requirement in the order. The Commission, in its order granting Merieux's petition, states that the divestiture requirement "continues to impose significant costs on Merieux and may adversely affect public health needs."

Despite the clear authority available since November 6, 1990, to appoint a trustee to effect the divestiture, the Commission has taken no action to select or appoint a trustee. This failure to employ the divestiture procedures set forth in the order is unexplained in the order granting Merieux's petition to reopen and modify the consent order. In the show cause proceeding, the Commission concluded that appointment of a trustee was unlikely to be successful in light of

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<sup>3</sup> The trustee, a neutral party, has incentives to identify prospective acquirers and to report when none is available. We can draw some conclusions about "good faith" and impossibility of divestiture from the evidence that a trustee's search provides.

Merieux's representation that it had unsuccessfully contacted all potential purchasers. North American Vaccine's appearance as an interested buyer, however, undercuts any basis for the finding that Merieux had contacted all potential purchasers. Accordingly, a trustee should be appointed now regardless of whether a divestiture to North American can be achieved.

### I. Standard for Reopening an Order

The order reopening and modifying the consent order states, correctly, that Merieux "must demonstrate as a threshold matter some affirmative need to modify the order," citing *Damon Corp.*, Docket C-2916, Letter to Joel C. Hoffman, Esq. (March 29, 1983). The Commission then concludes that Merieux has made the requisite showing, because the lease requirement "continues to impose significant costs on Merieux and may adversely affect public health needs." Order Reopening and Modifying Order at 9.

In the past, the Commission has squarely rejected arguments that the costs of compliance provide a basis for reopening and modifying an order. The notion that the costs to a respondent from a divestiture requirement under a final order of the Commission may be sufficient basis for reopening and modifying the order is inconsistent with precedent, sound law enforcement, and previous pronouncements of the Commission in this case.

The order granting the petition to reopen is silent on the nature and amount of the costs that have moved the Commission to this extraordinary decision to cite costs as a basis for granting the petition. We are left to consider the usual costs of complying with a divestiture requirement in an order. One cost is forgoing the profits from a business that the respondent acquired and presumably would like to keep. As the Commission pointed out in *Louisiana-Pacific Corporation*, 112 FTC 547, 569 (1989), "[s]ome loss of prospective profits attributable to particular assets is . . . reasonably foreseeable whenever the Commission requires a divestiture to remedy the alleged anticompetitive effects of a proposed acquisition. This is not sufficient reason to forestall imposition of a divestiture order in the first place, see *United States v. E.I. duPont de Nemours & Co.*, 366

U.S. 316 (1961), or to avoid compliance with the order after the fact.”<sup>4</sup>

The costs of compliance also include the costs of identifying and negotiating with prospective acquirers and of maintaining the viability of the business to be divested. These costs clearly are contemplated at the time the order is entered and cannot be the basis for an “affirmative need” to reopen the order. Merieux also would have been required to bear the cost of a trustee appointed under the order, yet another example of clearly foreseeable and foreseen costs of compliance. In precedent and in logic, the usual costs of complying with an order cannot satisfy the burden of showing a need to reopen and modify the order. As in *Louisiana-Pacific*, “[i]n effect,” Merieux has argued that “the divestiture requirement should be modified because *Louisiana-Pacific* [here Merieux] should not have agreed to the order in the first place.” 112 FTC at 570.

From a law enforcement perspective, reopening and modifying the order on the basis of the costs of complying with the order threatens the integrity of every order on the Commission’s books. I doubt there is any such thing as a costless law enforcement order. At a minimum, virtually every outstanding divestiture order would be subject to reopening and modification under the standard that the Commission employs today.

The alleged “public health needs” are of similarly unpersuasive origin. Although the Commission does not explain what is meant by “public health needs,” presumably it refers to Merieux’s claim that the divestiture obligation creates a disincentive for it to invest in the Connaught rabies vaccine business. The Connaught rabies vaccine business, you will recall, is the business that Merieux acquired in a transaction that the Commission alleged violated Section 7 of the Clayton Act and that the order requires Merieux to divest in settlement of the allegations of the complaint. The possibility that Merieux might have disincentives to invest in a business that it agreed to divest, in settlement of a complaint, surely was evident to the Commission and to Merieux when the order was issued. We

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<sup>4</sup> See also *RSR Corp.*, 88 FTC 800, 895, *aff’d*, 602 F.2d 1317 (9th Cir. 1979), *cert. denied*, 445 U.S. 927 (1980) (“[T]he possibility that a corporation . . . may suffer some loss of value as a result of actions necessary to redress the results of the corporation’s illegal conduct can be of no relevance to the determination of proper relief in a Section 7 case. . . . The antitrust laws would deserve little respect if they permitted those who violated them to escape with the fruits of their misconduct on grounds that imposition of an effective remedy would incidentally result in even a substantial monetary loss.” (Citation omitted.))

must assume that the possibility was not thought to threaten the public health when the order was entered, and it is not clear why the threat should now arise.

Finally, the Commission's finding of affirmative need appears to be inconsistent with previous statements of the Commission in this case. In the 1993 show cause order, the Commission declined to treat the foreseeable costs of complying with the order as exceptional. Instead, in 1993, the Commission carefully distinguished the costs of accomplishing a "virtually impossible" divestiture (impossibility was an "unbargained-for element of the consent order") from the "costs ordinarily imposed by an order." Order To Show Cause at 2 n.2. In the standard used today, the costs of complying are divorced from the 1993 "virtual impossibility" standard, and we are left with nothing more than the "costs ordinarily imposed" by compliance with an order.

## II. Reasons for the Order Modification

Having decided that Merieux has demonstrated an affirmative need for reopening, the Commission then concludes that it is in the public interest to reopen the order and set aside the divestiture requirement. According to the Commission, the modification is warranted by the "entry of SmithKline into the United States rabies vaccine market, which reduces the need for further relief pursuant to the order's lease requirement." Order Reopening and Modifying Order at 10. In the alternative, the Commission suggests that setting aside the divestiture requirement is warranted by its "potential adverse impact" on public health needs. Neither of these theories withstands even a brief examination.

The entry of SmithKline or some other competitor in the U.S. rabies vaccine market was anticipated when the order was entered. Indeed, paragraph 8 of the complaint alleges that Connaught is one of two potential entrants in the rabies vaccine market. Although the complaint does not identify SmithKline, clearly additional and imminent entry was anticipated. The Commission, to its credit, recognizes that SmithKline's entry is not an "unforeseeable change in market conditions that would compel reopening the order." Order Reopening and Modifying Order at 8. It is not clear, however, why the realization of entry that was anticipated in the complaint should "reduce[] the need" for the divestiture required in the order. The

Commission in 1990 foresaw entry by two firms (which, because Connaught was one of the two potential entrants, would result, if the Commission did not challenge the acquisition, in a two-firm market: (1) Merieux/Connaught, and (2) a new entrant). It nevertheless required divestiture (which, if effected, would result in a three-firm market). The Commission in 1994 sees entry by one firm and decides to set aside the divestiture requirement (which leaves us with a two-firm market: (1) Merieux/Connaught, and (2) SmithKline). Now if two firms were not enough to insure a competitive market in 1990, but two firms are enough in 1994, then what is our guiding principle?

The Commission may have concluded that two firms now suffice to produce a competitive market, and it is possible that I would not take issue with that conclusion on a careful analysis of a particular market. But we have no serious analysis of competition in the rabies vaccine market, and the Commission does not make an explicit finding that two firms are sufficient for competition. Indeed, the record contains little evidence about the state of competition in the rabies vaccine market, and the little evidence that is available tends to undermine any claim that the entry of SmithKline has eliminated competitive concerns.

The record contains some anecdotal evidence, in the form of customer complaints about high prices and deteriorating service. The Arkansas State Epidemiologist opposes the order modification, on the ground that the price of rabies vaccine has more than doubled and service has declined. The Kentucky Department of Health Services complains about the escalating price of rabies vaccine and the precarious availability of the product. The Texas Department of Health expresses similar concerns, stating that the price in Texas for rabies vaccine has doubled and that there have been vaccine shortages. These concerns, expressed in 1994 by customers for rabies vaccine, are consistent with the decision of the Commission in 1990, expressed in the order, that relief was necessary, and they tend to show that relief still is necessary.

The alleged effects of the divestiture requirement on “public health needs” are not articulated by the Commission, and we are left with Merieux’s claim that the divestiture order has created a disincentive for it to invest in the Connaught rabies vaccine business. It should be noted that the order does not bar Merieux from investing

in and upgrading the business,<sup>5</sup> and Merieux would be free to negotiate whatever return on the investment an acquirer was willing to pay.<sup>6</sup> What is noteworthy here is that the claimed disincentive, which clearly existed from the day that Merieux agreed to the consent order and was both foreseeable and foreseen,<sup>7</sup> should now provide a ground for setting aside the divestiture requirement. It is fundamental in *Damon Corp.*, *supra*, *Louisiana-Pacific*, 112 FTC at 569, and other cases discussing the Commission's standard for reopening and modifying orders that under the public interest standard, the respondent must demonstrate that the order has consequences that were not contemplated when the order was entered. There simply is no basis for concluding here that the foreseeable burden of compliance with the order outweighs the need for the remedy provided in the order.

### III. A Divestiture Candidate?

Procedurally, the question whether North American Vaccine would be an acceptable acquirer under the divestiture order is not before the Commission. Given the history of this order, however, and Merieux's claims that the divestiture obligation should be set aside, it is appropriate to consider the qualifications of North American Vaccine not for the purpose of deciding whether it is an acceptable acquirer but rather for the purpose of evaluating Merieux's petition. The appearance of North American Vaccine makes abundantly clear that Merieux did not contact all of the parties that would have an interest in the Connaught rabies vaccine business and it raises questions about Merieux's good faith in its search for an acquirer under the order. If North American Vaccine is qualified or appears likely to be qualified to take a lease under the order, then we can no longer assume that performance under the order is impossible.

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<sup>5</sup> In addition, of course, Merieux has no comparable disincentive to invest in its non-Connaught rabies vaccine business.

<sup>6</sup> As a sole supplier, Merieux has not been subject to the discipline of competition. Although the Commission appears entirely willing to accept Merieux's version of its incentives without investigating the underlying facts, it seems entirely possible that the absence of competition explains the failure, if any, to make necessary capital investments.

<sup>7</sup> Section VII of the order addresses this concern. It sets forth a long list of specific requirements designed to prevent deterioration of the assets to be divested, including a requirement to maintain and preserve the assets of the rabies vaccine business so that it "can be leased and operated as an effective and viable business in accordance with the requirements of this order."

The appearance of North American Vaccine underscores the importance of seeking a trustee to accomplish divestiture before setting aside the principal remedial provision of a final order of the Commission.

North American Vaccine apparently has not had access to information that would enable it fully to assess the Connaught rabies vaccine business. A trustee, with “full and complete access” under the order “to the personnel, books, records and facilities of Connaught’s rabies vaccine business,” Merieux’s cooperation, and “such financial or other information relevant to the assets to be leased as such trustee may reasonably request” (consent order at paragraph VI.D), would be in a position to develop a record on which North American Vaccine’s qualifications could be assessed. With the trustee’s recommendation in hand, the Commission would be in a far better position to decide whether the divestiture requirement should be enforced or set aside.

Based on the information that is available, the majority appears too willing to conclude that North American Vaccine is not an acceptable acquirer under the order. According to the Commission, in reviewing a potential divestiture, the Commission should consider “the acquirer’s financial capability, technical, marketing, management and other relevant capabilities; business plans and other evidence of the acquirer’s intention and ability to compete,” in addition to whether “divestiture to the proposed acquirer will achieve the competitive relief sought by the order.” Order Reopening and Modifying Order at 9 n.8. North American Vaccine appears to be well qualified on all counts. The reasons that the Commission gives for rejecting North American Vaccine as a potential acquirer are not persuasive.

First, the Commission states that North American’s revenues have fallen short of its “operating costs” (Order Reopening and Modifying Order, note 8), presumably reflecting adversely on North American’s financial ability to make the acquisition. This focus on historical revenue for a start-up company that is in the process of developing vaccines and obtaining regulatory approval for them is misleading. The company appears quite capable of making the acquisition. Because North American Vaccine is developing vaccines and obtaining regulatory approvals and not yet marketing vaccines, it had losses of about \$11 million in 1992 and \$12 million in 1993. Despite these losses, North American Vaccine had \$17

million on hand in cash and cash equivalents and \$38 million in securities as of December 31, 1993, according to its 1993 10K Report, filed with the Securities and Exchange Commission. North American's current financial reserves seem sufficient to fund the acquisition and to continue its new product development for a number of years, and the company recently filed a registration statement with the SEC concerning a proposed new stock offering that should provide an even more comfortable cash cushion.

In addition, North American Vaccine seems well qualified in terms of its technical, marketing and managerial abilities. Given its experience in developing new vaccines, it likely would be capable of continuing an existing process for producing the rabies vaccine. North American recently hired a former Merck executive with experience in manufacturing, testing, release and registration of biological products. Hiring managerial and technical talent from an established producer is a common and effective way for a young firm to acquire expertise rapidly. North American has not yet submitted a detailed business plan (in part, because it has not had full access to the Connaught plant), but it has submitted a general marketing outline that appears more sophisticated than what we often see in connection with divestiture applications.

Merieux has expressed some reservations about the difficulty of obtaining regulatory approval for the transfer of licenses to North American Vaccine. Vaccines are subject to strict regulation in the United States and Canada, and the Commission was fully aware of the regulations when it accepted the consent order. Indeed, the Commission addressed that issue in paragraph II.D of the consent order, which requires Merieux to use its best efforts to secure an FDA product license for Connaught's vaccine and directs that Merieux "shall assist in securing such license for the lessee as a part of the lease agreement." Presumably, the Commission thought this was an adequate safeguard when it entered the order and, absent a reason to change that view, the Commission should hold Merieux to this agreement to assist in securing the license. Further, North American has recognized the possibility of regulatory delay and has proposed a plan to stockpile what would appear to be more than sufficient inventory to continue to supply the vaccine during any reasonably foreseeable interim delay in obtaining a license.

Third, and perhaps most important for competition, North American Vaccine is a new entrant into the vaccine market. It is

independent of Merieux and, unlike a monopolist supplier, it has every incentive to invest in and upgrade the Connaught facility in order to expand production and revive competition in this market. But we need not decide today whether North American Vaccine is an acceptable acquirer of the Connaught rabies vaccine business. A trustee can and should make a recommendation on that question. What does seem clear is that we know enough about North American Vaccine to refer this matter to a trustee for further review.

The evidence of increasing prices and supply shortages provided by state public health officials supports the Commission's 1990 determination that a violation of Section 7 of the Clayton Act occurred and that relief in this market is necessary. By the criteria usually employed by the Commission in reviewing potential acquirers, North American Vaccine appears to be an excellent, possibly ideal, candidate to effect the remedy the Commission chose to impose in this case. The Commission's order granting Merieux's petition to set aside its obligation to divest the rabies vaccine business places into question well established precedent that sets standards for the reopening and modification of orders, raises a question whether any candidate now or ever could meet the Commission's exacting standards for potential acquirers and, if so, fails to suggest what those standards might be, and perhaps most troubling, suggests a lack of will to enforce Commission orders. This in turn may have other adverse effects. Respondents under Commission order may be less likely to fulfill their obligations under the order, and promising new competitors may be less willing to step forward and bid on assets subject to divestiture order.

Although my original view of the inadequacy of the order remains unchanged, that order having been imposed, I cannot join in today's decision, which seriously undermines the Commission as an institution. I dissent.

SEPARATE STATEMENT OF COMMISSIONER DEBORAH K. OWEN

I write separately to clarify my views on Institut Merieux, a matter that has spanned my career at the Federal Trade Commission.

The Commission's opinion accompanying the instant order modification makes clear our continuing dedication to the sanctity of Commission orders, and our view that extraordinary circumstances alone will justify alleviation. This case, like the recent Promodes

matter, presents the Commission with the sad dilemma of a well-intentioned remedy which later proves totally impractical to fulfill for reasons apparently beyond anyone's control. The issue, then, is how much writhing will we demand of the respondents in their efforts to comply, and how many fruitless years of staff resources will we expend to effectuate a remedy that simply cannot be realized?<sup>1</sup>

The Commission has had inordinate opportunity to exercise its trustee option. At the earliest, it could have acted over three years ago; or it could have been prompted since that time upon receipt of any one of ten compliance reports submitted by respondent. The most logical opportunity, of course, was in March, 1993, in lieu of the Order to Show Cause. But the Commission consciously determined that a trustee appointment would not be appropriate in light of the excruciating, unsuccessful efforts of Institut Merieux to license the business. If there was sufficient information about NAVA's potential to warrant terminating the Show Cause proceeding, or indeed now to question Merieux's good faith and the Commission's previous assessment thereof, one wonders why the Commission found that information insufficient to justify appointing a trustee last year.

The mere fact that a self-proclaimed qualifier for the business arrived on the scene at the auspicious and coincidental point of the Commission's Order to Show Cause is not, in and of itself, cause for the Commission to question Merieux's good faith effort to locate a licensee, nor this agency's own previous judgment with respect thereto. It is not unprecedented in Commission history for a competitor (itself, or via an entity in which it has a financial interest) to attempt to use Commission process to disadvantage a rival. It is not unheard of for an applicant to overestimate its credentials. Thus, the mere appearance of a licensee alone should not be enough for the Commission to conclude that the search was flawed. Rather, we must look objectively at the search itself to see wherein it may have been lacking. The fact that many established, experienced companies

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<sup>1</sup> I supported the Commission's 1990 order in Promodes, as well as the subsequent order modifications. Promodes S.A., FTC Dkt. No. D-9228, Order Granting Request to Reopen and Modify Order Issued May 17, 1990 (Jan. 28, 1994) (setting aside paragraphs II.A.3. and II.A.6.) (Commissioner Owen concurring in part and dissenting in part); Order Reopening and Modifying Order Issued May 17, 1990 (May 21, 1993) (setting aside paragraphs II.A.1. and II.A.2.) (Commissioner Owen concurring in part and dissenting in part). In this case, while I opposed taking action against Merieux at the outset, as noted in my statement last year, my belief that the order should be modified is based on "separate reasons." See Order Vacating Show Cause Proceeding (Aug. 17, 1993) (Comm. Owen dissenting).

chose to forgo entry via the “advantage” of the Commission-mandated license suggests that a reasonable business reaction may very well have been that, for some reason or another, the license was simply not a viable deal. In short, no qualified licensee wanted it. Despite Merieux’s detailed articulation of its efforts in its compliance reports and in conversations with staff, I am not aware that anyone has identified with any specificity precisely what avenue it was that Merieux failed to pursue, what part of the maze it left unexplored. I personally am unable to discern one.

This brings us to the spurned suitor. As I noted in my statement last year, the information available as to the qualifications of this licensee left me underwhelmed. Now having the benefit of extensive financial information, and expert analysis thereof, I feel even more confident in my judgment, based on my own business experience.

I fear one outcome of this case may be to discourage the Commission from approaching remedies in merger cases with calculated flexibility. I do not believe that divestitures or deal-cratering are the only avenues available to us. The Commission’s initiative in recent years to minimize our intrusion into legitimate business activities by refusing to demand in remedies more than we need to serve our purposes is a commendable achievement. Yes, there will be the rare occasion when the remedy does not work; but as our recent Promodes case illustrates, there are also rare cases where traditional remedies fail for reasons beyond everyone’s control. The respective overall benefits of both approaches far outweigh the occasional disadvantage. Nor do I believe that creative remedies should be eschewed because we may be duped by the respondents with all their expertise. This curious reasoning would appear to undermine our credentials to take any kind of action whatsoever.

At some point, our inexhaustible search for perfection must give way to reality. Any further prolongation of these proceedings will simply encourage applicants in other matters to postpone their expressions of interest until well after the tardy bell has rung. An additional nine months of trusteeship, while paling beside the Jurassic Period, is, in my observation, an onerous limbo in the fast-paced world of business, particularly where it follows a multi-year delay. The Commission has many important considerations to balance in a situation like this, but ultimately, in the interests of encouraging others to settle, a final resolution must accrue, albeit not

our first choice. When an order, after lengthy effort on both sides, proves unworkable, we should not expect contortions on the part of respondents and staff that would rival Barnum & Bailey.

In my closing words on this difficult, sensitive matter, I would like to pay particular tribute to our Compliance Division and the assisting economists and accountants. Although I have not always agreed with them on their ultimate recommendations, I found their work on this matter highly professional, fastidious, and reasoned. I greatly appreciate their help.

DISSENTING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I respectfully dissent from the Commission's decision to reopen and modify the consent order in this matter. The Commission issued this consent order in 1990, settling charges that Institut Merieux's acquisition of the rabies vaccine business of Connaught Bioscience would violate Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 45 U.S.C. 45.<sup>1</sup> The core remedial provision in the consent order requires Institut Merieux to lease the acquired rabies vaccine business on a long-term basis to a Commission approved lessee.<sup>2</sup> The consent order further provides that, should Institut Merieux fail to lease the business "at customary and reasonable terms,"<sup>3</sup> within three months of the date the order becomes final, the Commission may appoint a trustee to lease the business "at the best price and terms available consistent with this order's absolute obligation to lease Connaught's rabies vaccine business."<sup>4</sup> In its decision to reopen and modify this consent order, the Commission eliminates Institut Merieux's "absolute obligation" to lease the rabies vaccine business. I agree with Commissioner Azcuenaga that, under the circumstances, the more appropriate course of action would have been to appoint a trustee to lease the business.

Even assuming *arguendo* that Institut Merieux has made the threshold "affirmative need" showing, I disagree with the majority

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<sup>1</sup> 113 FTC 742 (1990).

<sup>2</sup> The core provision of the consent order requires the respondent, *inter alia*, (i) to lease Connaught's rabies vaccine business for a minimum of 25 years to a Commission-approved lessee and (ii) to use "best efforts to secure from the [FDA] a product license for Connaught's rabies vaccine" for the lessee. See 113 FTC at 747-48 (consent order paragraph II).

<sup>3</sup> *Id.* at 747 (consent order paragraph II (A)).

<sup>4</sup> *Id.* at 748 (consent order paragraph IV).

that the public interest requires eliminating the core remedial obligation from the consent order.<sup>5</sup> The majority cites three reasons favoring the modification:<sup>6</sup> (i) Institut Merieux's inability to identify an interested potential lessee that is likely to receive the necessary governmental approvals; (ii) SmithKline Beecham's "actual entry" into the relevant market; and (iii) "the potential adverse impact on public health needs in the United States and Canada resulting from continued a placation of the lease requirement." In light of countervailing public interest concerns, I am unpersuaded that any of these factors militates strongly in favor of vacating the core obligations of the consent order. On the record before the Commission, the reasons opposing the requested modification outweigh the reasons favoring the modification.

The record before the Commission should cast into substantial doubt Institut Merieux's assertion that no viable lessee is likely to be found. This record is considerably larger and more complicated than the record as of March 1993, when the Commission issued an Order to Show Cause why the proceeding in Docket No. C-3301 should not be reopened and modified to set aside the lease obligation. The Commission instituted the show cause proceeding based, in large part, on Institut Merieux's apparent inability to lease its rabies vaccine business. Until North American Vaccine filed its Motion for Leave to Intervene in that proceeding, there appeared to be little reason to believe that a lessee would be found or that a trustee would have any greater success than Institut Merieux in this endeavor. North American Vaccine's Motion and subsequent filings as an *amicus curiae*, however, directly implicated the central issue in the show cause proceeding, namely, whether it is reasonably likely that any firm will be able to execute a lease for the rabies vaccine business that will receive the Commission's approval. Consequently, in August 1993, the Commission terminated the show cause proceeding.

North American Vaccine's continuing expression of interest in Connaught's rabies vaccine business suggests that the reasons for terminating that proceeding continue to apply. Moreover, for the reasons stated by Commissioner Azcuenaga and on the record before us, I believe that North American Vaccine cannot be dismissed as

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<sup>5</sup> I concur in the conclusion of the majority that Institut Merieux has not made a satisfactory showing that changed conditions of fact warrant reopening.

<sup>6</sup> These are in addition to the costs imposed on Institut Merieux by maintaining the obligation. These costs form the basis of Institut Merieux's affirmative need showing.

lacking the potential to be an acceptable acquirer. The uncertainty regarding North American Vaccine and the potential for executing an acceptable lease can be resolved only through the appointment of a trustee.

SmithKline's "entry" cannot reasonably be said to reduce the need for further relief. The Commission issued the Section 7 complaint in the face of imminent potential entry and the acknowledged existence of the Michigan production facility whose rabies vaccine SmithKline will distribute.<sup>7</sup> Thus, there is nothing new about SmithKline's "entry" for purposes of evaluating competition under Section 7 of the Clayton Act or of modifying an order under the Commission's standards.

Consistent with the Commission's 1990 complaint, some evidence suggests a lessening of competition in the relevant market since the acquisition.<sup>8</sup> Thus, however one characterizes SmithKline's activities or the current structure of the relevant market, certain measures of market performance indicate that antitrust relief remains necessary. Having issued an order on which the respondent has failed to perform the core remedial obligation, the Commission should strongly presume the continuing necessity of relief. Institut Merieux has not effectively carried its burden of rebutting this presumption.<sup>9</sup>

Nothing in the record supports the conclusion that modification is necessary to avoid a "potential adverse impact on public health needs." One concern may be that an inexperienced lessee will not operate the facility efficiently. On the other hand, now that the Commission has vacated the lease requirements from the consent order, the Commission could not prevent Institut Merieux from closing the Connaught facility tomorrow -- a result clearly at odds with public health needs. Moreover, the obligation "to supply rabies vaccine sufficient to satisfy the Canadian demand" would have

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<sup>7</sup> See 113 FTC at 744.

<sup>8</sup> Comments of North American Vaccine, Inc. Opposing Request of Institut Merieux S.A. to Reopen and Modify Consent Order at 2, 25; Letter from Reginald F. Finger, Director, Division of Epidemiology, Department for Health Services, Commonwealth of Kentucky, to office of the Secretary, Federal Trade Commission (Jan. 27, 1994); Letter from Suzanne R. Jenkins, President, National Association of State Public Health Veterinarians, Inc., to Office of the Secretary, Federal Trade Commission (Jan. 24, 1994); Letter from Christopher G. Atchison, Director, Department of Public Health, State of Iowa, to Office of the Secretary, Federal Trade Commission (Jan. 24, 1994).

<sup>9</sup> The burden is not a light one given the public interest in repose and finality of government antitrust orders. See *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981) (strong public interest considerations support repose and finality).

applied only to the lessee; it does not apply to Institut Merieux.<sup>10</sup> Whatever uncertainties existed about a lessee, the Commission's decision to vacate the lease requirement leaves Institut Merieux free to restrict output further or to terminate production at the Connaught facility altogether. In addition, to the extent that the "potential adverse impact" arises from Institut Merieux's asserted disincentive to invest in the Connaught facility, I concur in Commissioner Azcuenaga's conclusion that Institut Merieux has not made a satisfactory showing.

I disagree most strongly with the majority's conclusion that "there are no countervailing public interest concerns that outweigh the reasons in support of granting the modifications." The overriding public interest concern here should be the continuing necessity of the relief given the state of competition in the relevant market. In addition, the public interest in enforcement of final orders weighs heavily against the modifications at this time. Of course, the marginal decision at this stage is whether to appoint a trustee. Even if one agrees with the majority's public interest calculus, and even if the trustee fails to execute the lease, the appointment of a trustee simply maintains the status quo for another nine months. Confronted with evidence consistent with a substantial lessening of competition and with evidence casting doubt on Institut Merieux's assertions regarding the likelihood of finding a lessee, the Commission should take the relatively obvious next step of appointing a trustee to effectuate Institut Merieux's "absolute obligation" to execute the required lease. Unless and until it appears that an independent trustee is unable to execute the required lease with North American Vaccine or any other firm, vacating the lease requirement does not appear to be in the public interest.

The Commission's experience with this consent order is a lesson in the perils of accepting non-standard relief in merger consent orders. The consent order here departed from the traditional "divestiture of a going concern" model in a number of respects, some of which undermined its likely effectiveness from the beginning.<sup>11</sup> As finally approved, the order was much more likely than standard

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<sup>10</sup> See 113 FTC at 748 (proviso to consent order paragraph IV).

<sup>11</sup> For example, assuming *arguendo* that the lease is considered an analytical equivalent of divestiture, Merieux is subject to a requirement to lease the business "at reasonable and customary terms" rather than the usual requirement to divest "at no minimum price." As another example, the order provides that the lease "shall include a commitment from the lessee to supply rabies vaccine sufficient to satisfy Canadian demand for rabies vaccine," which obviously limits the pool of acceptable licensees and makes the lease less attractive.

divestiture orders to fail. In general, the Commission should enter into non-standard relief in merger cases only with great trepidation. Firms entering into transactions creating exploitable market power have strong incentives to induce the Commission to accept relief (i) that cannot be implemented or (ii) that is consistent with a course of action that the firm would have undertaken in any event. Because the respondent firm always has a comparative advantage over the Commission in its knowledge and understanding of the relevant business, the firm has considerable latitude to shape nonstandard relief to its advantage. Substantial deviations from the standard divestiture model in this case have brought us to this very unsatisfactory result.

Complaint

117 F.T.C.

IN THE MATTER OF

UNOCAL CORPORATION, ET AL.

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

*Docket C-3493. Complaint, April 28, 1994--Decision, April 28, 1994*

This consent order prohibits, among other things, the companies from making claims about the attributes or performance of any gasoline without first having competent and reliable scientific evidence to substantiate their claims. In addition, the respondents are required to mail their credit-card customers, in certain states, a notice advising consumers to check their owner's manual to determine the proper octane level of gasoline to purchase.

*Appearances*

For the Commission: *Russell S. Deitch* and *Sue L. Frauens*.

For the respondents: *William C. MacLeod, Jr., Collier, Shannon, Rill & Scott*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondents Unocal Corporation, Union Oil Company of California and Leo Burnett Company, Inc., corporations, hereinafter sometimes referred to as respondents, have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it would be in the public interest, hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. Respondent Unocal Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware. Respondent's office and principal place of business is located at 1201 West Fifth Street, Los Angeles, California.

Respondent Union Oil Company of California is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California. Respondent's office and principal