UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of MOTOR UP CORPORATION, INC., and MOTOR UP AMERICA, INC., corporations, and KYLE BURNS, individually and as an officer of the corporations.	DOCKET NO. 9291
In the Matter of DURA LUBE CORPORATION, AMERICAN DIRECT MARKETING, INC., HOWE LABORATORIES, INC., CRESCENT MANUFACTURING, INC., NATIONAL COMMUNICATIONS CORPORATION, THE MEDIA GROUP, INC., corporations, and HERMAN S. HOWARD, individually and as an officer of the corporations, and SCOTT HOWARD, individually and as an officer of the corporations.	DOCKET NO. 9292

ORDER ON MOTION TO CONSOLIDATE

I.

Complaint counsel have filed a Motion to Consolidate the above captioned proceedings pursuant to Federal Trade Commission Rule 3.41(2) on the basis that judicial economy will be served by consolidation. Respondents Motor Up Corp., Inc., Motor Up America, Inc., and Kyle Burns ("Motor Up Corp."), and Respondents Dura Lube Corp., American Direct Marketing, Inc.,

Howe Laboratories, Inc., Crescent Manufacturing, Inc., National Communications Corp., The Medical Group, Inc., Herman S. Howard, and Scott Howard ("Dura Lube Corp.") have filed separate responses in opposition to the Motion to Consolidate. Although both sets of respondents have not put forth identical arguments supporting a denial of the motion, due to the similarity of their responses and arguments, they will be discussed together rather than with reference to each separate response filed.

The principal reasons put forth by complaint counsel in support of their motion are that both sets of respondents are marketers of products advertised to provide similar benefits; both products are marketed with similar advertising themes and through similar advertising methods; the same evidence will be introduced about chemical compounds, industry practices, use of bench tests, and the appropriate level of substantiation; both involve allegations that the product claims were unsubstantiated at the time they were made; and that the proposed orders for relief issued by the Commission against each are virtually identical.

All respondents oppose consolidation, asserting that there are differences in the products and marketing claims, and that testimony and evidence on the tests performed by each company will be different. Further, respondents assert that consolidation is inappropriate because the respondents are direct competitors, with Dura Lube touting its product as superior to Motor Up, and that a consolidated case will be cumbersome as each set of respondents tries to protect its confidential proprietary information against disclosure to a direct competitor.

For the reasons set forth below, the Motion to Consolidate is DENIED.

II.

Federal Trade Commission Rule 3.41(2) provides, in pertinent part:

> When actions involving a common question of law or fact are pending before the Administrative Law Judge, . . . the Administrative Law Judge may order all the actions consolidated; the Administrative Law Judge may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

16 C.F.R. § 3.41(2). Pursuant to Federal Trade Commission Rule 3.43(a), complaint counsel, as movants, have the burden of proof on their motion.

An Administrative Law Judge must determine whether consolidation will result in a demonstrable savings of costs or time to the parties and the court. *In re Chrysler Motors Corp., et al.*, 1976 FTC LEXIS 448, *6 (March 19, 1976). Consolidation should not be ordered if it has the negative potential for creating complications and confusion, causing delay, and increasing the burdens of the defense. *Id.* at *5.

Complaint counsel assert that the following alleged facts are common: (1) both sets of respondents are marketers of products advertised to provide long lasting benefits to an automobile engine when added to a car's motor oil; (2) both products have the same principal active ingredient; (3) both products are marketed with similar advertising themes; and (4) both products are marketed through infomercials, with product demonstrations, and through product labeling and print advertising. Respondents counter that there are differences in the following: (1) the roles played by each in developing and creating the product advertising; (2) the formulas used by each; and (3) the advertising claims made by each.

In *F.W. Fitch Co. and F.W. Fitch Manufacturing Co.*, 46 F.T.C. 1122, 1950 FTC LEXIS 122 (Feb. 1, 1950), while refusing to issue complaints against all members of an industry committing similar marketing acts and to consolidate all such proceedings for hearings and determinations on an industry wide basis, the Commission held:

> The preparations would undoubtedly have different formulae and the advertisements would be worded differently and would have different approaches to what are perhaps common advertising objectives. In other words, it would be necessary to try each case on its merits and it would be impractical to consolidate all the cases and have one series of hearings.

Id. at *15-16. In the instant cases, the compositions of the motor oil additives are purportedly different and the advertisements are worded differently. These express differences of fact weigh against consolidation because different evidence will be necessary to prove many of the allegations, as discussed below.

Complaint counsel submit that the same evidence will be introduced in both cases about: (1) the properties of organic chlorine compounds when used in motor oil; (2) engine oil and additive industry practice regarding product testing, acceptable testing protocols, and certification standards; (3) the nature and uses of bench tests and their validity to support the claims at issue in both cases; and (4) the appropriate level of substantiation necessary. According to the respondents, each will defend the claims against it with witnesses and documents relating to the production of the competing products, infomercials, packaging, labeling and advertising. Respondents further claim that the testimony and evidence on the tests performed by each company in the substantiation of its claims will be different.

Although similarities of fact and law do exist, the proof in each proceeding will undoubtedly be different. There will be different witnesses, different documents, and different facts in each case. *See Chrysler Motors*, 1976 FTC LEXIS 448, *7. The fact that at least some of the evidence may be the same does not provide an adequate basis for ordering consolidation of these matters. *See Crush Int'l Ltd., et al.*, 1970-76 Trade Reg. Rep. (CCH) ¶ 19,806 (FTC Sept. 28, 1971). The differences in the evidence needed to prove the allegations in the instant cases dictate against consolidation.

III.

Complaint counsel assert that the following costs or delays may be avoided if these cases are consolidated: (1) respondents will be able to pursue joint discovery of complaint counsel's experts; (2) complaint counsel will avoid having to present repetitive expert testimony in two separate trials; and (3) the Administrative Law Judge will have to handle evidentiary issues only once.

Despite complaint counsel's claims, these cost savings may actually not be avoided if the instant cases are consolidated since both sets of respondents will still have a full opportunity to depose the expert(s) with respect to his or her complete opinion(s) as they relate to respondents' respective products. Moreover, the expert(s) would still be subjected to two cross-examinations during the trial, to be followed by the presentation of separate experts during each set of respondents' case-in-chief. Any potential time savings in the testimonial process is outweighed by: (1) additional procedures necessary to deal separately with separate proprietary information; (2) additional procedures to distinguish testimony that is generic from that which applies to Motor Up and from that which applies to Dura Lube; and (3) the possibility of confusion of all parties concerned.

Consolidation of these cases may even add to the costs and delays. Each set of respondents might feel compelled to be represented by counsel and in person at all combined hearings, even though only part of the evidence submitted might be relevant and material to the issues in their case. *See In re Food Fair Stores, Inc., et al. and Giant Food Shopping Center, Inc.*, 52 F.T.C. 1152, 1154 (Apr. 25, 1956). Thus, efficiency would not be served by consolidation.

IV.

Consolidation was ordered in *In re Automotive Breakthrough Sciences, Inc., et al.*, Docket Numbers 9275, 9276, 9277, 1995 FTC LEXIS 378 (Dec. 18, 1995), where three cases were brought against three sets of respondents who manufactured after-market braking devices and used similar themes in advertising their products. Without the benefit of the information and evidence available to Judge Parker at the time, and based upon the discretion allowed in Federal Trade Commission Rule 3.41(2), I decline to follow his reasoning in the instant cases. Similar to the cases in *Automotive Breakthrough Sciences, Inc.*, much of the evidence that will be elicited in the instant cases about the oil additive industry and testing in general will be the same in both Motor Up and Dura Lube. However, that is where any similarities apparently end. Because the witnesses, documentary evidence, and the ultimate facts relating to what steps each set of respondents took to substantiate its claims are completely different and will require separate proof with respect to each set, it is more likely that consolidation will not result in a significant savings of cost or time.

Cost savings may be achieved and efficiency will be served by one Administrative Law Judge handling the instant cases. *See Chrysler Motors*, 1976 FTC LEXIS 448, *9 (listing related cases assigned to a single judge as an alternative to consolidation which "would create the most favorable conditions possible for effecting such cost savings and efficiencies"). That step has already been taken by Chief Administrative Law Judge James P. Timony's May 19, 1999 Order which reassigned the Dura Lube case to the Administrative Law Judge handling the Motor Up case.

V.

Accordingly, I find that complaint counsel have failed to make a sufficient showing that consolidation would result in a demonstrable savings of costs or time to the parties and the court. I also find that any savings of costs or time are outweighed by the potential for complications and confusion in the instant cases. Therefore, the Motion to Consolidate is DENIED.

It is SO ORDERED.

D. Michael Chappell
Administrative Law Judge

Dated: June 11, 1999