BEFORE THE

DEPARTMENT OF COMMERCE

OF THE STATE OF UTAH

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|---|---|---|
| IN THE MATTER OF THE REQUEST | : | **ORDER TO CEASE** |
| FOR AGENCY REVIEW OF | : | **AND DESIST** |
| **BEUS AUTO SALES** | : | |
| | : | Case No. NMVFA 00-003 |
| | : | |

# ORDER

The Findings of Fact, Conclusions of Law and Recommended Order in this matter are ratified and adopted by the Deputy Director of the Utah Department of Commerce, following recusal of the Executive Director of the Department of Commerce and acting in his stead, and it is, therefore

**ORDERED** that American Suzuki Motor Corporation should be and is hereby ordered to cease and desist from the sale of any new Suzuki motor vehicles at its proposed franchise location of 3146 West 3500 South, West Valley City, Salt Lake County, Utah, or any other new franchise location within Salt Lake County until such time as a good cause hearing shall be held before the New Automobile Franchise Act Advisory Board and an order entered by the designee of the Executive Director of the Utah Department of Commerce finding that good cause exists for the establishment of such franchise. It is further

**ORDERED** that the New Automobile Franchise Act Advisory Board shall convene on September 18, 2000, at 8:30 AM, in Room 205, Heber Wells Building, 2nd Floor, 160 E. 300

South, Salt Lake City, Utah, for the purpose of conducting a hearing to determine whether good cause exists for the establishment of a new Suzuki dealer point in West Valley City, Utah.

**SO ORDERED** this the 8th day of September, 2000.

Klarice A. Bachman

KLARICE A. BACHMAN, Acting Executive Director
and Chair, New Automobile Franchise Act Advisory Board
Utah Department of Commerce

## CERTIFICATE OF MAILING

I certify that on the 8th day of September, 2000, the undersigned mailed a true and correct copy of the foregoing Order to Cease and Desist by facsimile and by certified mail, properly addressed, postage prepaid, to:

Leo R. Beus, Esq.
Beus Gilbert PLLC
Attorneys at Law
1000 Great American Tower
3200 North Central Avenue
Phoenix AZ 85012-2430
ATTORNEY FOR BEUS AUTO SALES

and

Francis M. Wikstrom, Esq.
Parsons Behle & Latimer
Attorneys at Law
P. O. Box 45898
Salt Lake City UT 84145-0898
ATTORNEY FOR AMERICAN SUZUKI MOTOR CORPORATION

MICHAEL R. MEDLEY, Department Counsel
Utah Department of Commerce

BEFORE THE

DEPARTMENT OF COMMERCE

OF THE STATE OF UTAH

| | |
|---|---|
| IN THE MATTER OF THE REQUEST FOR AGENCY ACTION OF<br><br>**BEUS AUTO SALES**<br>PETITIONER | : **FINDINGS OF FACT,**<br>: **CONCLUSIONS OF LAW and**<br>: **RECOMMENDED ORDER**<br>:<br>: Case No. NMVFA 00-003 |

## INTRODUCTION

This matter came on for hearing on September 6, 2000, upon a request for agency action filed by or on behalf of Beus Auto Sales (hereafter "Beus") seeking entry of a Cease and Desist Order against American Suzuki Motor Corporation (hereafter "Suzuki"), barring it from establishing a new franchisee within the relevant market area of Beus unless and until such time as such a franchise might be approved following a good cause hearing before the Utah New Automobile Franchise Advisory Board (hereafter "Board")

## STATUTES OR RULES PERMITTING OR REQUIRING REVIEW

Agency review of the Division's decision is conducted pursuant to Section 63-46b-12, Utah Code Annotated, and Rule R151-46b-12 of the Utah Administrative Code.

## ISSUES REVIEWED

1. Whether the December 2, 1999, notice sent by Suzuki to Beus and not protested

within ninety (90) days precludes Beus from protesting the establishment of a new Suzuki automobile franchise within the Beus relevant market area.

## FINDINGS OF FACT

1. Suzuki sent a notice dated July 9, 1999, of its intent to establish a new dealer point for its products in Salt Lake Count to "Mr. Jay Farrell, Director, Dealership, Motor Vehicle Enforcement Division, Tax Commission" (hereafter "Tax Commission"). In the notice it states that the notification had been delivered to Beus by certified mail. The certified receipts reflect that both the Tax Commission and Beus signed for the notice on July 12, 1999. This notice was never received by the Board.

2. Suzuki alleged that it had furnished the notice to Mr. Jay Farrell at the Tax Commission as a result of

> . . . several lengthy telephone call to the Motor Vehicle Enforcement Division ("Division") of the Tax Commission to confirm the identity and address of the proper governmental recipient of the Notice of Intent to Establish Dealer . . . to comply with the New Automobile Franchise Act . . . .
>
> The Division instructed Suzuki to send the Notice to the Division. Suzuki then spoke to the Utah Attorney General's office who understood that Suzuki was planning to send the notice to the Division and told Suzuki to continue dealing with the Division on the matter. [June 23, 2000, Suzuki (Bryan Cave LLP) Brief, P. 1].

3. At the hearing one of the Board members, Joe Pacheco, a former Assistant Director of the Motor Vehicle Enforcement Division and still an employee of the Division, pointed out to the Board and parties that there is not now and has not been any individual named "Farrell" employed by the Division. Board member Pacheco further informed the Board and parties that there had been an individual with a similar sounding name employed by the Division in the past, but that that individual had been gone from the Division for over four years. A search of the State Personnel Directory does not reveal any state employee bearing that name.

4. By way of a letter dated August 4, 1999, to Mr. Jay Farrell at the Tax

Commission, and with three copies sent to various employees of Suzuki, Beus advised that it was protesting the establishment of the new franchise. Beus further made the request to "[p]lease proceed with the procedural steps pursuant to the New Automobile Franchise Act." It appears from the record that Suzuki received at least one of the protest letters on August 9, 1999. This protest letter was not received by the Board.

5. According to the representations of Suzuki, it abandoned its efforts to establish that dealer point and refocused its attention to establishing a new point at a different location. There is nothing in the records of the Department of Commerce to reflect how the notice and protest were disposed of, and the briefs of the parties are silent on this issue with no additional elucidation being forthcoming during the oral arguments of the parties.

6. Suzuki filed another notice of intent by letter to Mr. Jay Farrell at the Tax Commission dated December 2, 1999, which reflects that a notification was sent to Beus by certified mail. The certified receipts show that the notice was received by the Tax Commission on December 6, 1999, and by Beus on December 7, 1999. The agent signing for the notice on behalf of Beus was Lilian Alvarenga.

7. Steven R. Beus, President of Beus Auto Sales and Beus Suzuki, filed an affidavit in this matter stating that he never received Suzuki's December 2, 1999 notice. An affidavit was also filed by Lilian Alvarenga, characterized by Beus as a minimum wage employee with limited English comprehension, in which she stated that her job functions do not include retrieving, opening or handling mail, and that she signed for the Suzuki notice during a change of Beus office staff and while many members of management were not available. She further stated under oath that she had no idea of the importance of the mail and did not take the letter to Steven Beus, the party to whom it was addressed.

8. In May, 2000, Beus became aware of a new Suzuki dealer point in West Valley City, and on May 16, 2000, sent a letter to the Board Chair and Deputy Director of the Department of Commerce setting out that he had " . . . filed a protest (within the same county as our dealership, etc.)" and ". . . had heard nothing from the State or any Government Body approving the establishment of this new site or notice of an administrative hearing regarding the same." Receipt of this letter commenced the proceeding leading to the September 6, 2000, show

cause hearing to determine whether Suzuki should be ordered to cease and desist until properly authorized, with the further issue of whether the notice to Beus was sufficient to render the Board without jurisdiction in this matter for lack of a timely protest.

9. Upon request of Suzuki, the Executive Director of the Utah Department of Commerce, Douglas C. Borba, while being of the opinion that no impediment exists which would prevent him from deciding this matter, in order to avoid any possible appearance of impropriety has chosen to recuse himself from consideration of this matter, and has delegated his authority in this case to Klarice A. Bachman, the Deputy Director of the Utah Department of Commerce and his designee as Chair of the New Automobile Franchise Act Advisory Board.

## CONCLUSIONS OF LAW

1. The *New Automobile Franchise Act* (hereafter "Act") provides in UTAH CODE ANN. §13-14-302 that:

> (1) (a) Except as provided in Subsection (2), **a franchisor shall comply** with Subsection (1)(b) **if the franchisor seeks to**:
>
> (i) **enter into a franchise establishing a motor vehicle dealership within a relevant market area where the same line-make is represented by another franchisee**; or
>
> (ii) relocate an existing motor vehicle dealership.
>
> (b) (i) If a franchisor seeks to take an action listed Subsection (1)(a), **prior to taking the action, the franchisor shall in writing notify the board and each franchisee** in that line-make in the relevant market area that the franchisor intends to take an action described in Subsection (1)(a).
>
> (ii) **The notice** required by Subsection (1)(b)(i) **shall**:
>
> (A) specify the good cause on which it intends to rely for the action; and
>
> (B) **be delivered by registered or certified mail or by any form of reliable electronic communication through which receipt is verifiable.**
>
> (c) **Within 45 days of receiving notice** required by Subsection (1)(b), **any franchisee** that is required to receive notice under Subsection (1)(b) **may protest to the board** the establishing or relocating of the dealership. **When a protest is filed, the board shall inform the franchisor that:**
>
> **(i) a timely protest has been filed;**

**(ii) a hearing is required;**

**(iii) the franchisor may not establish or relocate the proposed dealership until the board has held a hearing; and**

**(iv) the franchisor may not establish or relocate a proposed dealership if the board determines that there is not good cause for permitting the establishment or relocation of the dealership.** (Emphasis added).

2. The Act defines the terms used in the Act in UTAH CODE ANN. § 13-14-102, and includes the following definitions:

> (1) "Board" means the Utah Motor Vehicle Franchise Advisory Board . . . .
> (3) "Department" means the Department of Commerce.
> (4) "Executive director" means the executive director of the Department of Commerce.

3. Although the language of the Act is clear regarding the required notice to be sent to the Board, Suzuki has repeatedly and continually failed to abide by the notification provisions of the Act:

a. The initial registration letter to all manufacturers and dealers in 1996 was on Department of Commerce (hereafter "Department") letterhead and advised the recipient to address any inquiries to Mike Medley at the Department, and furnished his direct telephone number. The registration form required Suzuki to designate a person to be the contact person for receipt of any notices from the Department. Suzuki duly designated Carmen Hodges with their Government Relations Department to fulfill this function.

b. In February, 1998, the Department received a protest from a dealer, Jerry Seiner Midvale, against Suzuki. The Department had not received a copy of the required notice and was forced to request that it be sent a copy. The request was sent by the Department to Carmen Hodges, the designated responsible individual at Suzuki. This matter was subsequently resolved short of a hearing, and upon notice by both Seiner and Suzuki, the case was dismissed.

c. In May, 1999, the Department received another dealer protest against Suzuki. Again the Department received no notice from Suzuki, but was put on notice of the

action through the filing of a protest with the Board by the franchisee. This protest went to an all-day hearing at the Department participated in by Suzuki's in-house counsel, and resulted in an order being entered and sent to Suzuki's counsel. The order contained a heading, in 20 point type, reading "BEFORE THE DEPARTMENT OF COMMERCE OF THE STATE OF UTAH", and was executed by "DOUGLAS C. BORBA, Executive Director Utah Department of Commerce" The certified mail return receipt shows that this order was received by the Suzuki outside counsel on November 8, 1999, and by the Suzuki in-house attorney on November 9, 1999.

d. In the present case, which was alluded to by Suzuki's attorney at the September, 1999 hearing held at the Department, a Suzuki employee allegedly engaged in numerous lengthy phone calls to the Division of Motor Vehicle Enforcement and the Office of the Utah Attorney General making sure that notice was sent to the proper party at the proper address. This sleuthing by Suzuki resulted in notice being sent on or about July 9, 1999 to a non-existent party at a division within another completely separate governmental department. The Department never received this notice.

e. On or about December 2, 1999, Suzuki again sent notice to the non-existent person at another governmental department. The Department did not receive this notice either.

4. While no nefarious intent is being attributed to Suzuki's repeated failure to comply with the Act and send notice to the proper party, it certainly highlights the problems that Suzuki has experienced over the years with internal and external communications, insofar as the giving of statutory notice is concerned. It is utterly inconceivable that Suzuki could have participated in a protracted hearing before the Department in September, 1999, with full knowledge of the August 4, 1999 protest by Beus, and then not be able to figure out where or to whom to send a notice less than a month after receiving an order from the Executive Director of the Department of Commerce, ruling on a franchise relocation issue.

5. In considering this matter it is necessary to divide it into two parts: Suzuki's July 9, 1999 notice of intent to establish an additional franchise; and Suzuki's December 2, 1999 notice.

6. Suzuki offered the affidavit of an employee of the Tax Commission stating that the misdirected December 2, 1999 notice was purportedly forwarded to the Department. Despite this affidavit, accounting for only one of four (actually five, including the original Beus protest) misdirected notices sent by Suzuki to the Tax Commission and never received by the Department, there is no need to challenge her statement. The affidavit does not aver receipt by the proper party of any misdirected notice from Suzuki she supposedly sent. And the Board can affirmatively assert that it has never received a statutorily mandated notice from Suzuki.

7. Suzuki argues that it delivered its December 2, 1999 notice to Beus precisely as required by the Act, and that the failure of Beus to file a protest within 45 days causes the Board and Department to be barred from hearing any challenge to Suzuki's establishment of a new dealer point. Beus argues, and submits in support, affidavits from its president, Steven Beus, and the signatory of the certified receipt, Lilian Alvarenga, maintaining that the notice never made it into the hands of any management personnel capable of acting upon the notice, and therefore Beus lacked any actual notice of the intentions of Suzuki.

8. Beus relies primarily upon *Matter of the Discipline of Schwenke*, 849 P.2d 573 (Utah 1993) and its holding that:

> . . . service by certified or registered mail must be on the attorney *personally* and cannot be accomplished by delivery to a common-area receptionist at the address of the attorney's office. Such delivery does not amount to constructive notice. (p. 576)

9. Although not stressed by Beus in oral argument, the Court's application of the facts to law in the *Schwenke* case is interesting. The rule governing service required that the notice ". . . shall be made personally upon the attorney in question or by registered or certified mail to the last known address . . . ." Although the Court's recitation of facts is more than a little vague, the notice was sent to a post office box which, judging from the holding, was shared by several attorneys and serviced by receptionist for the sundry attorneys. The question of whether the attorney received actual notice is not even touched in *Schwenke*, since the Court deemed the method of delivery, although appearing to fall within the parameters of the service rules, was fatally defective.

10. The service of notice under the Act is similar to *Schwenke*, providing that it ". . . be delivered by registered or certified mail or by any form of reliable electronic communication through which receipt is verifiable." The notice is required to be delivered to the "franchisee" which is defined by the Act as ". . . **a person with whom a franchisor has agreed** . . . in writing . . . to purchase, sell, or offer for sale . . . vehicles manufactured . . . by the franchisor." [UTAH CODE ANN. § 13-14-102(6)]. It is not clear from the record and briefs whether notice on an alleged minimum wage errand person with minimal English would comport with the notice requirements of the Act when confronted with the sworn denial of receipt of notice by Steven Beus - the President, Vice President, Secretary, Treasurer and Registered Agent of the Suzuki franchisee - and whether such delivery could be argued to meet the due process requirements of effective notice.

11. It is also questionable whether the equities in this case, upon the facts, could deprive Beus of the right to a hearing when such deprivation could possibly result in the loss of hundreds of thousands of dollars. However, this is an administrative proceeding and, as such, concerns of equity cannot be delved into.

12. It is unnecessary for us to attempt to determine the "what ifs": What if the December 2, 1999 notice was the only statutory filing under the auspices of the Act made in this matter; What if the notice received by Lilian Alvarenga could be deemed effective notice on Beus; etc. All of these considerations are rendered moot by the July 9, 1999 notice of intent by Suzuki and the August 4, 1999 protest thereto by Beus.

13. Suzuki argues that its failure to notify the Department was not a fatal defect. The Department agrees with Suzuki's "no harm, no foul" assertion as a proposition of law in cases where there are no consequences attached by law or rule to such failure, and no undue hardship is caused as a result of statutory notice not being furnished. *Stahl v. Utah Transit Auth.*, 618 P.2d 480 (Utah 1980).

14. Although this would appear such a case on a cursory review, it does not in fact fall into such a category since, had the notices been given as mandated by the statute, there is only a very small likelihood that the Board would have been considering whether to recommend a cease and desist order at all.

15. The importance of the July 9, 1999 notice of Suzuki's intent to establish a new dealer point is not that it was sent to the wrong place, but rather that it caused or contributed to Beus also filing its protest in the improper forum. As stated hereinabove, there is no rationally acceptable excuse for Suzuki having made this error. Given that this was the first Beus exposure to filing a protest, it is easy to understand that it was merely, although erroneously, following the path blazed by Suzuki.

16. Suzuki argues vehemently and persuasively that by filing with the Tax Commission it was in substantial compliance with the Act. Assuming, *arguendo*, that Suzuki is correct, then it would also have been substantial compliance with the Act for Beus to file its protest with the Tax Commission. If judged on a basis of who should be granted the greater latitude for bad practice on both sides, Beus would have to prevail.

17. The August 4, 1999, protest filed by Beus objected to the establishment of the proposed dealership and requested that the recipient of Suzuki's notice and the Beus protest ". . . proceed with the procedural steps pursuant to the New Automobile Franchise Act."

18. The law is clear as to what is to happen upon the joinder of the issue after a protest is filed. UTAH CODE ANN. § 13-14-302(c) requires that upon the protest being filed: the Board is required to notify the franchisor of the protest; a hearing is required to be set; the franchisor cannot establish the proposed dealership until after the hearing; and then can establish the new franchise only if the Board finds good cause at the hearing.

19. Without counting any experience it might have had in other jurisdictions, this was Suzuki's third trip through the Utah protest process. Beus sent Suzuki a copy of the protest letter, which was received by Suzuki, so Suzuki is chargeable upon past experience with knowing that a letter from the Department would be forthcoming as a result of the protest filed by Beus.

20. In addition to notifying the franchisor of the filing of a protest, the Board is required, within 10 days from receipt of the protest [§13-14-304(1)(a)], to enter an order setting a hearing to be furnished by the Board to both sides. As stated hereinabove, Suzuki has been through the drill and as a veteran of the process should have been put on notice, to a greater extent than the rookie Beus, that there was something wrong with the process.

21. The Act requires that the good cause hearing be conducted within 120 days of the

protest, with a decision to be handed down no later than 30 days following the hearing. [§13-14-304(1)(b)(4)].

22. It is obvious that there has been no hearing within 120 days of the filing of the Beus protest, and understandably so since neither of the parties nor the non-existent Mr. Farrell bothered to let the Board in on their proceedings. It was the initial action of Suzuki in filing its notice in the wrong place, compounded by Beus following Suzuki's lead with its protest, which prevented the Board and Department from acting in a timely manner in this case, and the actions of the parties were the sole proximate cause of the delay in proceeding to a hearing in this matter. Immediately upon becoming aware of the situation the Department moved to rectify the situation and bring this case to a speedy conclusion. UTAH CODE ANN. § 13-14-304(b) contains a savings provision for cases such as this where hearings are not conducted within 120 days, if:

> (i) the delay is caused by acts of the franchisor . . . . or
> (ii) the delay is waived by the parties.

23. Although the provision governing the issuance of the notice of hearing does not contain the savings provision, it is part of the same section of the Act and the 10 day period is included within the 120 period for a hearing which is covered by the savings umbrella.

24. Suzuki alleges that through some unspecified mechanism it "abandoned" its initial notice of its intention to establish a new dealer point, but there has been no motion to dismiss filed with the Board and Suzuki has offered no evidence that "Mr. Farrell" entered such an order or allowed a voluntary dismissal prior to the joinder of the issue through the filing of the Beus protest. Suzuki is aware from past experience with the Department (*e.g.* the Seiner protest) that an order is required to dismiss a proceeding which has been placed under the jurisdiction of the Board and Department.

25. Suzuki would have the Board find that its second notice to Beus was somehow a new proceeding, superceding the pending notice/protest, and that the failure of Beus to protest within 45 days somehow precluded any further proceedings from being conducted. The parties in the second notice are identical to those in the first, Beus and Suzuki, and the subject matter, establishment of a new franchisee within the Beus relevant market area, is the same. The only

material difference from the first notice is a change in location of the proposed new dealer point, but which would still be within the Beus relevant market area and falling under his initial protest. Suzuki also argues an apparent change in the composition of the ownership of the proposed new franchise. However the proposed new franchisee is not a party to this action and has not sought to intervene. The change between the initial notice and the amended notice might alter the final recommendation of the Board at a good cause hearing, but does not alter the procedure for arriving at that recommendation.

26. Suzuki used the basketball terminology of "no harm, no foul" to characterize its misfiling in this case. Turning to football terminology, Beus was "drawn offside" by Suzuki. It is obvious from the record, considering documented actions rather than the conflicting affidavits of Beus and Suzuki's employee of alleged conversations, that Beus at all times from the initial notice intended to oppose the placement of another Suzuki franchise within its relevant market area. There is no question among the members of the Board that had Suzuki not drawn Beus offside with its initial erroneous filing, Beus would not have filed a protest with the Tax Commission. It is equally clear from the record that had Beus had actual knowledge of the second notice from Suzuki it would have reacted just as strongly as it did to the first.

27. Suzuki's argument that filing with the Tax Commission instead of the Board was inconsequential is erroneous in several regards:

a. If Suzuki had properly filed its notice with the Board, Beus would have followed suit and filed his protest in the proper place, thus establishing a case before the Board and triggering the hearing requirement which and other procedural requirements of the Act to bring the matter to a timely hearing as contemplated by the Act.

b. If the initial pleadings had been properly filed by Suzuki with the Board, there would have been an open case on the Department's docket, and Suzuki's change of proposed franchisee and proposed franchise location would have been considered an amendment to its original filing, requiring that the amendment be filed by Suzuki with the Board and copied to the party opposite, rather than starting a new jurisdictional clock running on Beus.

c. If the initial notice had been properly filed and subsequently dismissed upon the motion of Suzuki, or upon joint motion of the parties, with an appropriate order entered

by the Department, the subsequent filing of notice with the Board would have prompted the Board to immediately contact Beus - knowing its previous posture - to determine if a protest would be forthcoming in order to facilitate a potential timely hearing by getting the conflicts of the Board members so that potential hearing dates could be obtained. Had this occurred, there would be no issue of delivery of the notice or whether Beus had been put on actual notice to be considered.

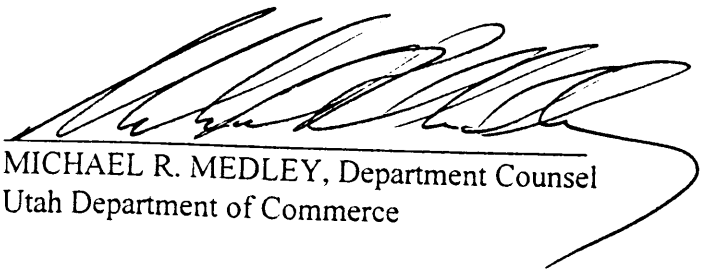
28. It would be perhaps an understatement to say that this case has been fraught with mistakes up to this point: Suzuki being unable to figure out the proper forum within which to file its notice; Beus blindly following the lead of Suzuki without bothering to consult the Act; and the Tax Commission in repeatedly failing to get misfiled documents to the proper agency. However, but for the actions of Suzuki, the other errors would not have followed and Suzuki must bear the brunt of the blame for the situation leading to the cease and desist hearing.

29. Based upon the factual findings of the Board, the Acting Executive Director should enter a cease and desist order against Suzuki but, in recognition of the apparent lack of bad faith by Suzuki, should not impose sanctions other than putting this matter on hold until a speedy good cause hearing might be held. In recognition of the public good and considering the potential harm to the parties which might occur between the date of this order and the good cause hearing set for September 18, 2000, the cease and desist should be limited to the sale of new vehicles only, and should not restrict repairs and maintenance services.

## RECOMMENDED ORDER

**ORDERED** that American Suzuki Motor Corporation should be and is hereby ordered to cease and desist from the sale of any new Suzuki motor vehicles at its proposed franchise location of 3146 West 3500 South, West Valley City, Salt Lake County, Utah, or any other new franchise location within Salt Lake County until such time as a good cause hearing shall be held before the New Automobile Franchise Act Advisory Board and an order entered by the designee of the Executive Director of the Utah Department of Commerce finding that good cause exists for the establishment of such franchise.

Dated this the 8th day of September, 2000.



MICHAEL R. MEDLEY, Department Counsel
Utah Department of Commerce