

UTCHEN, DOYLE, BROWN & ENERSEN-

000021

4

COUNSELORS AT LAW

THREE EMBARCADERO CENTER

SAN FRANCISCO, CALIFORNIA 94111

TELEPHONE (415) 393-2000

SAN FRANCISCO OFFICE

TELEX 34-0817

FACSIMILE G1, II AND III

(415) 989-0428

CABLE ADDRESS MACPAQ

WALNUT CREEK  
WASHINGTON, D.C.  
SHANGHAI

October 6, 1987

1933 Act/3(a)(10)

FEDERAL EXPRESS

Securities and Exchange Commission  
Office of Chief Counsel  
Division of Corporation Finance  
450 Fifth Street, NW  
Washington, D.C. 20549

RECEIVED  
OCT 7 1987

Re: The InFerGene Company

PUBLIC AVAILABILITY DATE: 12-28-87

ACT	SECTION	RULE
1933	---	144
1933	---	145
1933	3(a)(10)	---

Ladies and Gentlemen:

The InFerGene Company (the "Company") is a Delaware corporation engaged in genetic engineering with respect to industrial enzymes. It is located at 433 Industrial Way, Benicia, CA 94510. The Common Stock of the Company is registered under Section 12(g) of the Securities and Exchange Act of 1934 (the "'34 Act") and the Company files periodic reports with the SEC in compliance with the reporting requirements of the '34 Act, furnishes periodic reports and an annual report containing audited financial statements to its stockholders, and makes timely public disclosures of news or information about the Company which might reasonably be expected to materially affect the market for its securities. The Common Stock of the Company and Units consisting of one share of Common Stock and a redeemable Common Stock Purchase Warrant to purchase one-half share of Common Stock are traded in the over-the-counter market. Prices are quoted on the National Association of Securities Dealers Automated Quotations System ("NASDAQ").

The Company proposes to acquire, by triangular merger, all of the outstanding stock of Anderson Sales Company, Inc. ("Anderson"), in exchange for 530,000 shares of its Common Stock, \$200,000 in cash and its promissory note for the principal amount of \$550,000 (the "Consideration"). Anderson, a Georgia corporation located in Atlanta, Georgia, produces industrial baking supplies. Anderson has 100 shares of capital

stock outstanding, all of one class (the "Anderson Stock"), all of which is owned by Gerald E. Anderson. Gerald E. Anderson is an officer and director of Anderson. Anderson is not registered under the '34 Act and the Anderson Stock has never been traded in the securities markets.

The exchange of the Anderson Stock for the Consideration is to be accomplished by a triangular merger. This would be accomplished by the Company organizing a new Georgia corporation ("Newco") as a wholly owned subsidiary of the Company. Anderson would be merged with and into Newco under Georgia law. Upon completion of the merger Anderson would disappear, all of the outstanding Newco stock would continue to be owned by the Company, and the present stockholder of Anderson would receive the Consideration.

The Company will request the Commissioner of Corporations of the State of California to hold a hearing upon the fairness of the terms and considerations of the exchange transaction, pursuant to Section 25142 of the California Corporate Securities Law (the "California Law"), at which hearing the Anderson stockholder will have the right to appear. Pursuant to Section 25142 of the California Law, the Commissioner will be requested to approve the terms and conditions of such exchange and the fairness of such terms and conditions. The consummation of the merger is conditioned upon, among other things, the Commissioner's approval as described in this paragraph.

Upon completion of the hearing, notice of which shall be given to the Anderson stockholder, the entry of an order approving the terms and conditions of the exchange and the fairness of such terms and conditions, and upon consummation of the merger, the Company proposes to issue its Common Stock to the Anderson stockholder in reliance upon an exemption from registration contained in Section 3(a)(10) of the Securities Act of 1933 (the "'33 Act").

Following the merger, the stockholder of Anderson will hold approximately 8% of the outstanding shares of Common Stock of the Company. The stockholder of Anderson will not become an officer or director of the Company.

In addition to our analysis of Section 3(a)(10) of the '33 Act, and Rules 144 and 145 thereunder, we have also reviewed St. Ives Holding Company, Inc. (available July 22, 1987). It is our opinion that the issuance of the Company's

000023

Common Stock pursuant to the transaction described in this letter would be exempt from the registration requirements of the '33 Act pursuant to Section 3(a)(10) of the '33 Act. Further, the Common Stock of the Company received by the Anderson stockholder may be resold pursuant to Rule 145(d) under the '33 Act. The Anderson stockholder would not be entitled to "tack" his holding period of the Anderson Stock for purposes of Rules 145(d)(2) and (d)(3) under the '33 Act. However, his Common Stock of the Company would not be deemed restricted under Rule 144(a)(3) and may be resold pursuant to Rule 145(d)(1) without regard to the holding period requirements under Rule 144(d).

You are requested to advise us that you would not recommend that the Commission take any action if (i) the Common Stock of the Company is issued to the Anderson stockholder in reliance upon the exemption from registration contained in Section 3(a)(10) of the '33 Act and either (ii) such shares are resold pursuant to Section 145(d)(1) under the '33 Act without regard to the holding period under Rule 144(d) under the '33 Act; or (iii) such shares are resold pursuant to Rules 145(d)(2) or 145(d)(3) under the '33 Act without tacking the holding period for the Anderson Stock.

Very truly yours,

MCCUTCHEN, DOYLE, BROWN & SWERSEN

By

*Sandra A. Golze*

Sandra A. Golze

NOV 25 1987

000024

RESPONSE OF THE OFFICE OF CHIEF COUNSEL  
DIVISION OF CORPORATION FINANCE

RE: The InFerGene Company (the "Company");  
Incoming letter dated October 6, 1987

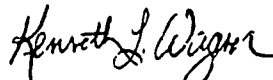
On the basis of the facts presented and assuming approval of the fairness of the transaction by the California Commissioner of Corporations, this Division will not recommend any enforcement action to the Commission if, in reliance upon your opinion as counsel that the exemption provided by Section 3(a)(10) of the Securities Act of 1933 ("the 1933 Act") is available, the proposed merger is effected without compliance with the registration requirements of the 1933 Act.

Also, you have requested that the Division take a no-action position with respect to resales of Company shares in conformity with your opinion. While the Division does not normally issue no-action letters with respect to transactions under Rules 144 and 145 under the 1933 Act, your letter presents interpretative issues to which we will respond.

The Division is of the view that the Company stock to be received in the proposed merger by an affiliate of Anderson Sales Company, Inc. ("Anderson") may be resold in the manner permitted by Rule 145. The Company stock received in the proposed merger will not be deemed "restricted" pursuant to Rule 144(a)(3). Accordingly, the affiliate, who is a person described in Rule 145(c), may resell such shares in the manner permitted by Rule 145(d)(1) without regard to the holding period required by Rule 144(d). In computing the holding period of Company stock for purposes of Rule 145(d)(2) or (3), however, such person may not "tack" the holding period of the Anderson stock.

Because these positions are based on the representations contained in your letter, any different facts or conditions might necessitate a different conclusion. Further, this response only expresses the Division's positions on enforcement action, and does not purport to express any legal conclusions on the questions presented.

Sincerely,



Kenneth L. Wagner  
Special Counsel