

Amended Complaint

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IN THE MATTER OF

LEHIGH PORTLAND CEMENT COMPANY

CONSENT ORDER, ETC., IN REGARD TO THE ALLEDGED VIOLATION OF SEC. 7
OF THE CLAYTON ACT AND THE FEDERAL TRADE COMMISSION ACTS

Docket 8680. Amended Complaint, April 24, 1967—Decision, June 7, 1972

Consent order requiring the third largest manufacturer of portland cement with headquarters in Allentown, Pa., to divest itself of 11 plants in Virginia, 6 plants in Florida, and 22 once acquired, but no longer owned, plants in Florida, Kentucky and Virginia, if respondent regains ownership or control. As for the ready-mixed concrete plants the order requires that they be kept in operating condition prior to divestiture, that respondent not add other ready-mixed concrete plants for two years in any county where acquired plants are to be divested. The order also prohibits acquisition of other ready-mixed concrete and concrete product industries for a period of 10 years without prior Federal Trade Commission approval.

AMENDED COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondent has violated the provisions of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. §§ 18, 45, and that a proceeding in respect thereof would be in the public interest, issues this amended complaint, stating its charges as follows:

I DEFINITIONS

1. For the purpose of this complaint the following definitions shall apply:

a. "Portland cement" includes Types I through V of portland cement as specified by the American Society for Testing Materials. Neither masonry nor white cement is included.

b. "Ready-mixed concrete" includes all portland cement concrete which is manufactured and delivered to a purchaser in a plastic and unhardened state. Ready-mixed concrete includes central-mixed concrete, shrink-mixed concrete and transit-mixed concrete.

c. "The Miami Area" consists of Dade County, Broward County and Palm Beach County, Florida.

d. "The Orlando Area" consists of Orange, Brevard and Seminole Counties, Florida.

e. "The Jacksonville Area" consists of Duval County, Florida.

f. "The Louisville Area" consists of Jefferson County, Kentucky, and Clark and Floyd Counties, Indiana.

g. "The Lexington Area" consists of Fayette County, Kentucky.

h. "The Washington Area" consists of District of Columbia, Arlington and Fairfax Counties, Virginia and city of Alexandria, Virginia and Montgomery and Prince Georges Counties, Maryland.

II LEHIGH PORTLAND CEMENT COMPANY

2. Lehigh Portland Cement Company, hereinafter referred to as "Lehigh," is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania with its principal offices located at Allentown, Pennsylvania.

3. Lehigh, the third largest portland cement manufacturing company in the United States, operates thirteen portland cement manufacturing plants and sixteen distribution terminals located in seventeen different states. In 1964, Lehigh had sales of approximately \$83 million, assets of about \$161 million, and net income of about \$6 million.

4. In the State of Florida, Lehigh operates portland cement manufacturing plants at Bunnell (near Jacksonville), and Miami. The total shipments of portland cement from these two plants, in 1964, amounted to approximately 1,402,564 barrels, and 1,647,202 respectively. The Jacksonville area and the Orlando area are important metropolitan markets, accounting for 22 percent and 15 percent respectively of the total shipments from the Bunnell plant. Approximately 48 percent of the total shipments of the Miami plant were shipped to customers located in the Miami area.

5. In the State of Indiana, Lehigh operates one portland cement manufacturing plant at Mitchell. The total annual capacity of this plant is approximately 2.7 million barrels. The Louisville and Lexington, Kentucky Areas are important metropolitan markets for Lehigh's Mitchell plant.

6. In the State of Virginia, Lehigh operates a portland cement plant at Fordwick and in the State of Maryland, Lehigh operates a portland cement plant at Union Bridge. The total annual capacity of these two plants is approximately 5.14 million barrels. The Washington area is an important metropolitan market for Lehigh.

7. Lehigh is and for many years has been engaged in the shipment of portland cement across state lines. Lehigh is engaged in commerce, as "commerce" is defined in the Clayton and Federal Trade Commission Acts.

III. MATERIALS SERVICE CORP. AND ABC CONCRETE CO.

8. Materials Service Corp., hereinafter referred to as "Materials Service," was a corporation organized and existing under the laws

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of the State of Florida, with its principal office and place of business located at 1707 N. Orange Blossom Trl., Orlando, Florida. ABC Concrete Co., hereinafter referred to as "ABC," was a division of Materials Service with its principal office and place of business located at 57 S. Edgewood Ave., Jacksonville, Florida.

9. At the time of its acquisition by Lehigh, Materials Service (and its ABC Division) were engaged in the production and sale of ready-mixed concrete in the Orlando and Jacksonville areas, respectively, operating from five to seven ready-mixed concrete plants. Materials Service and ABC were substantial consumers of portland cement.

10. Materials Service was, at the time of the acquisition, engaged in commerce, as "commerce" is defined in the Clayton and Federal Trade Commission Acts.

IV. THE ACQUISITION OF MATERIALS SERVICE CORP.

11. During the month of July 1965, Lehigh acquired the stock or assets of Materials Service. The acquisition of Materials Service by Lehigh was an act or practice in commerce within the meaning of the Federal Trade Commission Act.

V ACME CONCRETE CO.

12. Acme Concrete Co., hereinafter referred to as "Acme," was a corporation organized and existing under the laws of the State of Florida, with its principal office and place of business located at 5700 N.W. 37 Avenue, Miami, Florida.

13. At the time of the acquisition by Lehigh, Acme was engaged in the production and sale of ready-mixed concrete in the Miami Area, operating about seven ready-mixed concrete plants. Acme was a substantial consumer of portland cement.

14. Acme was, at the time of the acquisition, engaged in commerce, as "commerce" is defined in the Clayton and Federal Trade Commission Acts.

VI THE ACQUISITION OF ACME CONCRETE CO.

15. During the month of July, 1965, Lehigh acquired the stock or assets of Acme. The acquisition of Acme by Lehigh was an act or practice in commerce within the meaning of the Federal Trade Commission Act.

VII FALLS CITY CONCRETE & STONE COMPANY, INC.

16. Falls City Concrete & Stone Company, Inc., hereinafter referred to as "Falls City," was a corporation organized and existing under the

laws of the State of Kentucky, with its principal office and place of business located at Fern Creek, Kentucky.

17. At the time of its acquisition by Lehigh, Falls City was engaged in the production and sale of ready-mixed concrete in the cities of Louisville, Lexington and Frankfort, Kentucky and surrounding towns. Falls City was a substantial consumer of portland cement.

18. Falls City was, at the time of its acquisition, engaged in commerce, as "commerce" is defined in the Clayton and Federal Trade Commission Acts.

VIII ACQUISITION OF FALLS CITY CONCRETE & STONE COMPANY, INC.

19. On January 7, 1966, Lehigh acquired one hundred per cent of the outstanding common stock of Falls City. The acquisition of Falls City by Lehigh was an act or practice in commerce within the meaning of the Federal Trade Commission Act.

IX VIRGINIA CONCRETE CO., INC.

20. Virginia Concrete Co., Inc., hereinafter referred to as "Virginia Concrete," was a corporation organized and existing under the laws of the State of Virginia, with its principal office and place of business located at Shirley Highway & Edsall Road, Springfield, Virginia.

21. At the time of its acquisition by Lehigh, Virginia Concrete was engaged in the production and sale of ready-mixed concrete in the Washington Area, operating nine ready-mixed concrete plants. Virginia Concrete is one of the four largest producers of ready-mixed concrete and one of the four largest consumers of portland cement in the Washington area.

22. Virginia Concrete was, at the time of the acquisition, engaged in commerce, as "commerce" is defined in the Clayton and Federal Trade Commission Acts.

X THE ACQUISITION OF VIRGINIA CONCRETE CO., INC.

23. On or about July 23, 1965, Lehigh acquired the stock or assets of Virginia Concrete. The acquisition of Virginia Concrete by Lehigh was an act or practice in commerce within the meaning of the Federal Trade Commission Act.

X-A THE ACQUISITION OF CEMENT BLOCK INDUSTRIES OF MIAMI, INC.

Sometime after July in 1965, Lehigh acquired the stock or assets, or both the stock and assets of Cement Block Industries of Miami, Inc., hereinafter referred to as "CBI." The acquisition of CBI by Lehigh was an act or practice in commerce within the meaning of the Federal Trade Commission Act.

CBI was a corporation organized and existing under the laws of the State of Florida, with its principal office and place of business located at 4490 S.W. 74th Avenue, Miami, Florida.

At the time of its acquisition by Lehigh, CBI and its affiliates were engaged in the production and sale of ready-mixed concrete, cement blocks, and masonry materials in the greater Miami area, operating a ready-mixed concrete plant there. CBI was a substantial consumer of portland cement.

CBI, at the time of the acquisition, was engaged in commerce, as "commerce" is defined in the Clayton and Federal Trade Commission Acts.

XI NATURE OF TRADE AND COMMERCE

24. Portland cement is a material which in the presence of water, binds aggregates, such as sand and gravel, into concrete. Portland cement is an essential ingredient in the production of ready-mixed concrete. There is no practical substitute for portland cement in the production of concrete.

25. The portland cement industry in the United States is substantial. In 1964, there were about 52 cement companies in the United States operating approximately 181 plants. Total shipments of portland cement in that year amounted to approximately 365 million barrels, valued at about \$1.1 billion.

26. Cement manufacturers sell their portland cement to consumers such as ready-mixed concrete companies, concrete products companies, and to contractors and building materials dealers. However, on a national basis, approximately 57 percent of all portland cement is shipped to firms engaged in the production and sale of ready-mixed concrete.

27. In recent years, there has been a significant trend of mergers and acquisitions by which ready-mixed concrete companies in major metropolitan markets in various portions of the United States have become integrated with portland cement companies. Since 1959, there have been at least 35 such acquisitions.

28. The acquisition of ABC is the second acquisition of a substantial portland cement consumer by a portland cement manufacturer in the Jacksonville Area since 1962.

29. Each vertical merger or acquisition which occurs in the portland cement industry potentially forecloses competing cement manufacturers from a segment of the market otherwise open to them and places great pressure on competing manufacturers likewise to acquire portland cement consumers in order to protect their markets. Thus, each such vertical acquisition may form an integral part of a

chain reaction of such acquisitions—contributing both to the share of the market already foreclosed, and to the impetus for further such acquisitions.

XII VIOLATIONS CHARGED

30. The effect of the acquisition of Materials Service (and its ABC Division) by Lehigh, both in itself and by aggravating the trend of vertical mergers and acquisitions, may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale of portland cement and ready-mixed concrete in the United States as a whole and various parts thereof, including the State of Florida, the Orlando area, and the Jacksonville area, in the following ways, among others:

a. Lehigh's competitors may have been and/or may be foreclosed from a substantial segment of the market for portland cement.

b. The ability of Lehigh's non-integrated competitors effectively to compete in the sale of portland cement and ready-mixed concrete has been and/or may be substantially impaired.

c. The entry of new portland cement and ready-mixed concrete competitors may have been and/or may be inhibited or prevented.

d. The production and sale of ready-mixed concrete, now a decentralized, locally-controlled, small business industry, may become concentrated in the hands of a relatively few manufacturers of portland cement.

31. The effect of the acquisition of Acme by Lehigh, both in itself and by aggravating the trend of vertical mergers and acquisitions, may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale of portland cement and ready-mixed concrete in the United States as a whole and various parts thereof, including the State of Florida and the Miami area, in the following ways, among others:

a. Lehigh's competitors may have been and/or may be foreclosed from a substantial segment of the market for portland cement.

b. The ability of Lehigh's non-integrated competitors effectively to compete in the sale of portland cement and ready-mixed concrete has been and/or may be substantially impaired.

c. The entry of new portland cement and ready-mixed concrete competitors may have been and/or may be inhibited or prevented.

d. The production and sale of ready-mixed concrete, now a decentralized, locally-controlled, small business industry, may become concentrated in the hands of a relatively few manufacturers of portland cement.

32. The effect of the acquisition of Falls City by Lehigh, both in itself and by aggravating the trend of vertical mergers and acquisitions, may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale of portland cement and ready-mixed concrete in the United States as a whole and various parts thereof, including the State of Kentucky and the Louisville and Lexington areas, in the following ways, among others:

a. Lehigh's competitors may have been and/or may be foreclosed from a substantial segment of the market for portland cement.

b. The ability of Lehigh's non-integrated competitors effectively to compete in the sale of portland cement and ready-mixed concrete has been and/or may be substantially impaired.

c. The entry of new portland cement and ready-mixed concrete competitors may have been and/or may be inhibited or prevented.

d. The production and sale of ready-mixed concrete, now a decentralized, locally-controlled, small business industry, may become concentrated in the hands of a relatively few manufacturers of portland cement.

33. The effect of the acquisition of Virginia Concrete by Lehigh, both in itself and by aggravating the trend of vertical mergers and acquisitions, may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale of portland cement and ready-mixed concrete in the United States as a whole and various parts thereof, including the States of Maryland and Virginia, the District of Columbia and the Washington area, in the following ways, among others:

a. Lehigh's competitors may have been and/or may be foreclosed from a substantial segment of the market for portland cement.

b. The ability of Lehigh's non-integrated competitors effectively to compete in the sale of portland cement and ready-mixed concrete has been and/or may be substantially impaired.

c. The entry of new portland cement and ready-mixed concrete competitors may have been and/or may be inhibited or prevented.

d. The production and sale of ready-mixed concrete, now a decentralized, locally-controlled, small business industry, may become concentrated in the hands of a relatively few manufacturers of portland cement.

34. The effect of the acquisition of CBI by Lehigh, both in itself and by aggravating the trend of vertical mergers and acquisitions, may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale of portland cement and ready-mixed concrete in the United States as a whole and various parts

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thereof, including the State of Florida and the Miami area, in the following ways, among others:

a. Lehigh's competitors may have been and/or may be foreclosed from a substantial segment of the market for portland cement.

b. The ability of Lehigh's non-integrated competitors effectively to compete in the sale of portland cement and ready-mixed concrete has been and/or may be substantially impaired.

c. The entry of new portland cement and ready-mixed concrete competitors may have been and/or may be inhibited or prevented.

d. The production and sale of ready-mixed concrete, now a decentralized, locally-controlled, small business industry, may become concentrated in the hands of a relatively few manufacturers of portland cement.

Now, therefore, The acquisitions of Materials Service, Acme, Falls City, Cement Block Industries, and Virginia Concrete are in violation of Section 7 of the Clayton Act, as amended, and constitute unfair acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

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The Federal Trade Commission having initiated a complaint charging that the respondent named in the caption hereof has violated the provisions of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 18, 45; and

The Commission, by order issued November 26, 1971, having withdrawn this matter from adjudication pursuant to Section 2.34(d) of its rules; and

The respondent and complaint counsel having thereafter executed an agreement containing a consent order, and admission by respondent of all the jurisdictional facts set forth in the complaint which the Commission issued, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission having thereafter given careful consideration to the executed consent agreement and having determined that the relief provided by the order contained therein is adequate and appropriate in all respects to dispose of this matter, and having thereupon provisionally accepted the executed consent agreement and

placed such agreement on the public record for a period of thirty (30) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its rules, and having determined on the basis of such comments that Paragraph VIII of the provisionally accepted consent order should be modified, and respondent having agreed to such modification, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Lehigh Portland Cement Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal office and place of business located at 718 Hamilton Street, Allentown, Pennsylvania.

2. The Federal Trade Commission has jurisdiction of this proceeding and of the respondent and the proceeding is in the public interest.

ORDER

I

It is ordered, That should respondent regain ownership or control of any ready-mixed concrete plant at the below listed locations which were acquired by respondent as a result of its acquisitions of Fall City Concrete & Stone Co., Inc.; Materials Service Corporation; Acme Concrete Corp.; Virginia Concrete Company, Incorporated; or of respondent's own construction, and which respondent no longer owns, such ownership or control shall be divested as provided in Paragraph V herein:

South Jacksonville, Duval County, Florida
West Jacksonville, Duval County, Florida
South Bayard, Duval County, Florida
Pine Castle, Orange County, Florida
Orange Blossom Trail, Orange County, Florida
Maitland, Seminole County, Florida
Titusville, Brevard County, Florida
Cocoa, Brevard County, Florida
Cocoa Beach, Brevard County, Florida
Merritt Island, Brevard County, Florida
Eau Gallie, Brevard County, Florida
Hialeah, Dade County, Florida
Hypoluxo, Broward County, Florida
Versailles, Woodford County, Kentucky
Prospect, Jefferson County, Kentucky

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Fern Creek, Jefferson County, Kentucky
 Outer Loop, Jefferson County, Kentucky
 Frankfort, Franklin County, Kentucky
 Lexington, Fayette County, Kentucky
 Newington, Fairfax County, Virginia
 Telegraph Road, city of Alexandria, Virginia
 Van Dorn Street, Fairfax County, Virginia

II

It is further ordered. That respondent Lehigh Portland Cement Company and its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns, within forty-eight months from the date this order is accepted by the Federal Trade Commission, shall divest, absolutely, subject to the approval of the Federal Trade Commission, the following ready-mixed concrete plants located in the State of Virginia and acquired by respondent as a result of its acquisition of Virginia Concrete Company, Incorporated or of respondent's own construction, together with such land on which they are located and all equipment and trucks, or their normal replacements, as are used for such plants to operate as producers, sellers and distributors of ready-mixed concrete as of the date this order is accepted by the Federal Trade Commission:

Woodbridge, Prince William County
 Gainesville, Prince William County ¹
 Manassas, Prince William County ²
 Chantilly, Loudon County ¹
 Sterling, Loudon County
 Fairfax Station, Fairfax County
 Edsall Road, Fairfax County ³
 Vienna, Fairfax County
 Falls Church, Fairfax County
 S. Strand Street, city of Alexandria ²
 S. Shirlington Road, Arlington County

III

A. It is further ordered. That respondent Lehigh Portland Cement Company and its officers, directors, agents, representatives, employees,

¹ These plants were not operated in 1970. While respondent would divest the plants and equipment located at these sites, no trucks are used in connection with the plants and are therefore not available for divestiture.

² These plants are located on leased land and respondent will assign its interest in such land insofar as possible.

³ At this location, respondent shall have the option of providing leased land on which the plant is located.

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subsidiaries, affiliates, successors and assigns, within forty-eight months from the date this order is accepted by the Federal Trade Commission, shall divest, absolutely, subject to the approval of the Federal Trade Commission, the following ready-mixed concrete plants located in the State of Florida and acquired by respondent as a result of its acquisitions of Materials Service Corporation and Acme Concrete Corp. or of respondent's own construction, together with such land on which they are located and all equipment and trucks, or their normal replacements, as are used for such plants to operate as producers, sellers and distributors of ready-mixed concrete as of the date this order is accepted by the Federal Trade Commission:

Daytona, Volusia County
Indian River City, Brevard County⁴
Pompano Beach, Broward County
South Miami, Dade County⁵
Fort Lauderdale, Broward County
North Miami, Dade County

B. Notwithstanding the requirements of Paragraph III(a) and in lieu of the divestiture required therein, respondent may elect, within two years from the date this order is accepted by the Federal Trade Commission, to divest, subject to the approval of the Federal Trade Commission, the portland cement manufacturing plant owned by respondent and located in Dade County, Florida, together with respondent's distribution terminal facilities located in the State of Florida; *Provided, however*, That such divestitures may be made singly or in a group, and, *Further provided*, That if the respondent, notwithstanding good faith efforts to divest, shall be unable to divest its terminal located at Orlando, Florida within 2 years after divestiture of its cement plant, respondent may retain such terminal for its own use. The election in accordance with this Paragraph III(b) shall be accomplished by a formal written notification to the Federal Trade Commission, and once made, will be irrevocable. Divestiture in accordance with this Paragraph III(b) shall be accomplished within thirty-six months from the date the notification of election is made to the Federal Trade Commission. In the event respondent elects to divest such cement plant, the provisions of Paragraph VI, VII, VIII, and IX herein shall not thereafter be deemed applicable insofar as they relate to the State of Florida.

⁴This plant was not operated in 1970. While respondent would divest the plant and equipment located at this site, no trucks are used in connection with this plant and are therefore not available for divestiture.

⁵This plant is located on leased land and respondent will assign its interest insofar as possible.

IV

It is further ordered, That, in the aforesaid divestitures, none of the stock and/or assets be sold or transferred, directly or indirectly, to any person who is at the time of divestiture an officer, director, employee, or agent of, or under the control or direction of, Lehigh or any of its subsidiaries or affiliates, or to any person who owns or controls, directly or indirectly, more than one (1) percent of the outstanding shares of common stock of Lehigh or any of its subsidiaries or affiliates.

V

It is further ordered, That with respect to the divestitures provided in Paragraphs II and III herein, nothing in this order shall be deemed to prohibit respondent from accepting consideration which is not entirely cash and from accepting and enforcing a loan, mortgage, pledge, deed of trust or other security interest for the purpose of securing to respondent full payment of the price, with interest, received by respondent in connection with such divestitures; *Provided however,* That should respondent by enforcement of such security interest, or for any other reason, regain direct or indirect ownership or control of any of the divested plants, land, and equipment, said ownership or control shall be redinvested subject to the provisions of this order, within such reasonable period as is granted by the Federal Trade Commission for this purpose, but in no event in excess of one year from the date of reacquisition.

VI

It is further ordered, That pending divestiture, respondent shall not make any changes in the plants specified in Paragraph II and III(a) herein or in the trucks and other equipment presently used by them which shall impair their present capacity for the production, sale and distribution of ready-mixed concrete or their market value.

VII

It is further ordered, That for a period of two years from the date of divestiture of any ready-mixed concrete plant or group of plants described in Paragraph II and III(a) herein, respondent shall not sell or deliver ready mixed concrete within a distance of six miles of the divested plant or group of plants; *Provided, however,* That this Paragraph shall not be applicable to those plants in Dade County, Florida known as the North Miami and South Miami plants.

VIII

It is further ordered, That either (1) for a period of two years from the date of divestiture of any ready-mixed concrete plant or group of plants described in Paragraphs II and III(a) herein, or (2) for so long as respondent retains a bona fide lien, mortgage, deed of trust, or other security interest in any such plant or group of plants divested for the purposes of securing payment of the price at which said plant or group of plants were transferred, whichever is longer, respondent may provide no more portland cement to that plant or group of plants than an amount, in barrels, equal to seventy-five (75) percent of the portland cement consumed by that plant or group of plants during the calendar year immediately preceding that in which divestiture is made: *Provided however,* That this provision may be waived in regard to a particular purchaser should the Commission find upon the application of the purchaser that such a restriction would not be in the public interest. Such determination shall be solely at the discretion of the Commission.

IX

It is further ordered, That respondent shall not install or operate any additional ready-mixed concrete plants in any county where acquired plants are to be divested for a period beginning with the date this order is accepted by the Federal Trade Commission and continuing until two years from the date of divestiture of the last plant required to be divested in that county; *Provided however,* That this provision may be waived in regard to a particular county should the Commission find upon a showing of changed competitive circumstances that such a restriction would not be in the public interest. Such determination shall be solely at the discretion of the Commission.

X

It is further ordered, That in the event the respondent elects to divest the cement plant and distribution terminals pursuant to Paragraph III(b) of this order, respondent shall not install or operate any additional cement plants in the State of Florida for a period beginning with the date this order is accepted by the Federal Trade Commission and continuing until two years from the date of the divestiture required by Paragraph III(b) of this order.

XI

It is further ordered, That commencing upon the date this order is accepted by the Commission and continuing for a period of ten years from and after the date of completing the divestiture required by this order, respondent shall cease and desist from acquiring, directly or indirectly, without prior approval of the Federal Trade Commission, the whole or any part of the stock, share capital or any interest in any domestic concern which in any of the five years preceding the proposed acquisition was either engaged in the production or sale of ready-mixed concrete or concrete products within respondent's marketing area for portland cement at the time of such proposed acquisition, or purchased in excess of 50,000 barrels of portland cement within such marketing area, or of any capital assets of such domestic concern pertaining to such concrete production or sale or cement purchases.

XII

It is further ordered, That respondent within sixty (60) days from the date of service of this order, and every one hundred (100) days thereafter, or at such other times as may be required but not more frequently than ninety (90) days, until it has fully complied with the provisions of this order, shall submit in writing to the Commission a report setting forth in detail the manner and form in which it intends to comply, is complying, and/or has complied with this order. All compliance reports shall include, among other things which may from time to time be required, a summary of all contacts and negotiations with all persons who are contacted by or who express to respondent a possible interest in acquiring ownership or control over the assets, properties, rights or privileges to be divested under this order, the identity of all such persons, copies of any proposed or executed sales contracts, copies of any internal corporate documents discussing such divestiture, and copies of all written communications from and to such potential purchasers.

Respondent shall also submit to the Commission within ninety (90) days of the close of each calendar year a full report of all facts required by the Commission to determine whether respondent is complying with Paragraphs VII, VIII and XI of this order.

XIII

It is further ordered, That respondent notify the Commission at plying with Paragraphs VII, VIII and XI of this order.

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rate respondent which may affect compliance obligations arising out of the order, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries, and that this order shall be binding on any such successor.

XIV

It is further ordered, That respondent provide a copy of this order to each purchaser of plants divested pursuant to this order at or before the time of purchase.

IN THE MATTER OF

CRANSON CARS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE TRUTH IN LENDING AND THE FEDERAL TRADE COMMISSION ACTS

Docket C-2231. Complaint, June 7, 1972—Decision, June 7, 1972

Consent order requiring a Pompano Beach, Florida, retail seller and distributor of used cars to cease violating the Truth in Lending Act by failing to disclose to customers the annual percentage rate, the total number of payments, the deferred payment price, the amount financed, and other disclosures required by Regulation Z of the said Act.

COMPLAINT

Pursuant to the provisions of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Cranson Cars, Inc., a corporation, and Michael J. Cranson, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and implementing regulation, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Cranson Cars, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at 1030 South Federal Highway, Pompano Beach, Florida.

Respondent Michael J. Cranson is an officer of the corporate respondent. He formulates, directs and controls the policy, acts and

practices of the corporation, including the acts and practices herein-after set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been engaged in the advertising, offering for sale and retail sale and distribution of used cars to the public.

PAR. 3. In the ordinary course of their business as aforesaid, respondents regularly extend consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve Board.

PAR. 4. Subsequent to July 1, 1969, respondents, in the ordinary course of business as aforesaid, and in connection with credit sales, as "credit sale" is defined in Regulation Z, have caused and are causing customers to execute a binding Purchase Agreement, hereinafter referred to as the "Agreement."

Respondents have caused and are causing certain customers to also sign blank Retail Installment Contracts, hereinafter referred to as "installment contract," thereby failing to furnish these customers with any additional consumer credit cost disclosures.

Respondents do not provide any customers with any other consumer credit cost disclosures.

By and through the use of the agreement, respondents:

1. Fail to use the term "cash price" to describe the price at which respondents offer, in the regular course of business, to sell for cash the property which is the subject of the credit sale, as required by Section 226.8(c) (1) of Regulation Z.

2. Fail to use the term "cash downpayment" to describe the downpayment in money made in connection with the credit sale, as required by Section 226.8(c) (2) of Regulation Z.

3. Fail to use the term "trade-in" to describe the downpayment in property made in connection with the credit sale, as required by Section 226.8(c) (2) of Regulation Z.

4. Fail to disclose the sum of the "cash downpayment" and the "trade-in," and to describe that sum as the "total downpayment," as required by Section 226.8(c) (2) of Regulation Z.

5. Fail to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment, as required by Section 226.8(c) (3) of Regulation Z.

6. Fail to use the term "amount financed" to describe the amount of credit extended, as required by Section 226.8(c) (7) of Regulation Z.

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7. Fail to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price," as required by Section 226.8(c)(8)(ii) of Regulation Z.

8. Fail to disclose the "annual percentage rate" determined in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

9. Fail to use the term, "total of payments" to describe the sum of the payments scheduled to repay the indebtedness, as required by Section 226.8(b)(3) of Regulation Z.

10. Retain a security interest in property in connection with the credit sale and fail to describe the type of that security interest, as required by Section 226.8(b)(5) of Regulation Z.

PAR. 5. In the ordinary course of their business as aforesaid, respondents cause to be published advertisements of their goods and services, as "advertisement" is defined in Regulation Z. These advertisements aid, promote or assist directly or indirectly extensions of consumer credit in connection with the sale of these goods and services. By and through the use of the advertisements, respondents state the amount of the downpayment required and the amount of monthly installment payments which can be arranged in connection with a consumer credit transaction, without also stating all of the following items, in terminology prescribed under Section 226.8 of Regulation Z as required by Section 226.10(d)(2) thereof:

1. The cash price;
2. The amount of the downpayment required or that no downpayment is required, as applicable;
3. The number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;
4. The amount of the finance charge expressed as an annual percentage rate; and
5. The deferred payment price.

PAR. 6. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with

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a copy of a draft of complaint which the Atlanta Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in Section 2.34(b) of the rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Cranson Cars, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 1030 South Federal Highway, Pompano Beach, Florida.

Respondent Michael J. Cranson is an individual and is a corporate officer of Cranson Cars, Inc. He directs, formulates, and controls the acts and practices of the respondent corporation including the acts and practices under investigation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Cranson Cars, Inc., a corporation, and its officers, and Michael J. Cranson, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with any extension of consumer credit or any advertisement to aid, promote or assist directly or indirectly any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 CFR § 226) of the Truth in Lending Act

(Pub.L. 90-321, 15 U.S.C. 1601 *et seq.*), do forthwith cease and desist from:

1. Failing to use the term "cash price" to describe the price at which respondents offer in the regular course of business to sell for cash the property which is the subject of the credit sale, as required by Section 226.8(c)(1) of Regulation Z.

2. Failing to use the term "cash downpayment" to describe the amount of any downpayment in money made in connection with any credit sale, as required by Section 226.8(c)(2) of Regulation Z.

3. Failing to use the term "trade-in" to describe the amount of any downpayment in property in connection with any credit sale, as required by Section 226.8(c)(2) of Regulation Z.

4. Failing to disclose the sum of the "cash downpayment" and the "trade-in," and to describe that sum as the "total downpayment," as required by Section 226.8(c)(2) of Regulation Z.

5. Failing to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment, as required by Section 226.8(c)(3) of Regulation Z.

6. Failing to use the term "amount financed" to describe the amount of credit extended, as required by Section 226.8(c)(7) of Regulation Z.

7. Failing to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price," as required by Section 226.8(c)(8)(ii) of Regulation Z.

8. Failing to disclose the "annual percentage rate" determined in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

9. Failing to use the term "total of payments" to describe the sum of the payments scheduled to repay the indebtedness, as required by Section 226.8(b)(3) of Regulation Z.

10. Failing to describe the type of any security interest in property held, or to be retained in connection with any extension of credit, as required by Section 226.8(b)(5) of Regulation Z.

11. Stating, in any advertisement, the amount of the downpayment required and the amount of monthly installment payments which can be arranged in connection with a consumer credit transaction, without also stating all of the following

items, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) thereof:

- (i) The cash price;
- (ii) The amount of the downpayment required or that no downpayment is required, as applicable;
- (iii) The number, amount, and due dates, or period of payments scheduled to repay the indebtedness if the credit is extended;
- (iv) The amount of the finance charge expressed as an annual percentage rate; and
- (v) The deferred payment price.

12. Failing in any consumer credit transaction or advertising to make all disclosures determined in accordance with Sections 226.4 and 226.5 of Regulation Z at the time and in the manner, form and amount required by Sections 226.6, 226.8, and 226.10 of Regulation Z.

It is furthered ordered, That respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents engaged in the consummation of any extension of consumer credit or in any aspect of preparation, creation, or placing of advertising, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale, resulting in the emergence of a successor corporation; the creation or dissolution of subsidiaries; or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

VANGUARD INDUSTRIES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE FLAMMABLE FABRICS ACTS

Docket C-2232. Complaint, June 8, 1972—Decision June 8, 1972

Consent order requiring a Dalton, Georgia, manufacturer of carpets and rugs to cease manufacturing for sale, selling, importing, or distributing any

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product made of fabric which fails to conform with the applicable standards and regulations as defined in the Flammable Fabrics Act.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Flammable Fabrics Act, as amended, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Vanguard Industries, Inc., a corporation, and James G. Henderson and John E. McKinney, individually and as officers of the said corporation, hereinafter referred to as respondents, have violated the provisions of the said Acts and the rules and regulations promulgated under the Flammable Fabrics Act, as amended, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Vanguard Industries, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia. Respondents James G. Henderson and John E. McKinney are officers of the said corporate respondent. They formulate, direct, and control the acts, practices, and policies of the said corporation.

Respondents are engaged in the manufacture and sale of carpets and rugs, with their principal place of business located at Cuyler and Henderson Streets, Dalton, Georgia.

PAR. 2. Respondents are now and for some time last past have been engaged in the manufacturing for sale, sale and offering for sale, in commerce, and have introduced, delivered for introduction, transported and caused to be transported in commerce, and have sold or delivered after sale or shipment in commerce, products, as the terms "commerce" and "product," are defined in the Flammable Fabrics Act, as amended, which products fail to conform to an applicable standard or regulation continued in effect, issued or amended under the provisions of the Flammable Fabrics Act, as amended.

Among such products mentioned hereinabove were carpets and rugs Style "Spring Valley."

PAR. 3. The aforesaid acts and practices of respondents were and are in violation of the Flammable Fabrics Act, as amended, and the rules and regulations promulgated thereunder, and as such constituted, and now constitute unfair methods of competition and unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Flammable Fabrics Act, as amended; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Vanguard Industries, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia. Respondents James G. Henderson and John E. McKinney are officers of the corporation.

Respondent corporation is engaged in the manufacture and sale of carpets and rugs. Its office and principal place of business is located at Cuyler and Henderson Streets, Dalton, Georgia.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Vanguard Industries, Inc., a corporation, its successors and assigns, and its officers, and respondents James G. Henderson and John E. McKinney, individually and as

officers of said corporation and respondents' agents, representatives and employees directly or through any corporation, subsidiary, division, or other device, do forthwith cease and desist from manufacturing for sale, selling, offering for sale, in commerce, or importing into the United States, or introducing, delivering for introduction, transporting or causing to be transported in commerce, or selling or delivering after sale or shipment in commerce, any product, fabric, or related material; or manufacturing for sale, selling, or offering for sale, any product made of fabric or related material which has been shipped or received in commerce, as "commerce," "product," "fabric" and "related material" are defined in the Flammable Fabrics Act, as amended, which product, fabric or related material fails to conform to an applicable standard or regulation continued in effect, issued or amended under the provisions of the aforesaid Act.

It is further ordered, That respondents notify all of their customers who have purchased or to whom have been delivered the products which gave rise to this complaint, of the flammable nature of said products and effect the recall of said products from such customers.

It is further ordered, That the respondents herein either process the products which gave rise to the complaint so as to bring them into conformance with the applicable standard of flammability under the Flammable Fabrics Act, as amended, or destroy said products.

It is further ordered, That respondents herein shall, within ten (10) days after service upon them of this order, file with the Commission a special report in writing setting forth the respondents' intentions as to compliance with this order. This special report shall also advise the Commission fully and specifically concerning (1) the identity of the products which gave rise to the complaint, (2) the identity of the purchasers of said products, (3) the amount of said products on hand and in the channels of commerce, (4) any action taken and any further actions proposed to be taken to notify customers of the flammability of said products and effect the recall of said products from customers, and of the results thereof, (5) any disposition of said products since July 16, 1971, and (6) any action taken or proposed to be taken to bring said products into conformance with the applicable standard of flammability under the Flammable Fabrics Act, as amended, or to destroy said products, and the results of such action. Respondents will submit with their report, a complete description of each style of carpet or rug currently in inventory or production. Upon request, respondents will forward to the Commission for testing a sample of any such carpet or rug.

It is further ordered, That respondents notify the Commission at least 30 days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

ASSOCIATED-EAST MORTGAGE CO.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
TRUTH IN LENDING AND THE FEDERAL TRADE COMMISSION ACTS

Docket 8852. Complaint, July 14, 1971—Decision, June 12, 1972

Consent order requiring a Camden, New Jersey, mortgage loan company to cease requiring mortgage loan applicants to grant respondent the exclusive right to process their loans and to cease failing to make all disclosures to customers required by Regulation Z of the Truth in Lending Act.

COMPLAINT

Pursuant to the provisions of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Associated-East Mortgage Co., formerly known as South Jersey Mortgage Co., a corporation, hereinafter referred to as respondent, has violated the provisions of said Acts and regulation, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Associated-East Mortgage Co., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 500 Market Street, Camden, New Jersey.

Until its name was changed on November 1, 1970, said corporation was known as South Jersey Mortgage Co.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the business of arranging and extending mortgage loans in connection with consumer purchase of dwellings which are used or expected to be used as the principal residence of the consumer.

PAR. 3. In the ordinary course and conduct of its business as aforesaid, respondent arranges and for some time last past regularly has extended consumer credit and arranged for the extension of consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondent in the ordinary course and conduct of its business and in connection with its extensions and arranging for consumer credit, has:

Failed and is failing to render consumer credit cost disclosure statements "before the transaction is consummated" as required by Section 226.8(a) of Regulation Z. Specifically, respondent causes borrowers to execute loan applications granting it an exclusive right to process the loan and obligating borrowers to pay a service charge upon receipt of a letter of commitment which conforms to the terms set forth in the application. However, despite these obligations respondents render the required disclosures only at the real estate settlement.

PAR. 5. Pursuant to Section 103(k) of the Truth in Lending Act, respondent's aforesaid failures to comply with the requirements of Regulation Z constitute violations of that Act and, pursuant to Section 108 subsection (c) thereof, respondent thereby has violated the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having issued its complaint on July 14, 1971, charging respondent with violation of the Federal Trade Commission Act and the Truth in Lending Act (15 U.S.C. Section 1601 *et seq.*), and the implementing regulation promulgated thereunder, and the respondent having been served with a copy of that complaint; and

The Commission having duly determined upon a joint motion of complaint counsel and respondent's counsel that in the circumstances presented the public interest would be served by waiver here of the provisions of Section 2.34(d) of its rules that the consent order procedure shall not be available after issuance of complaint; and

The respondent, its counsel and complaint counsel having executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission having considered the aforesaid agreement and having determined that it provides an adequate basis for appropriate disposition of this proceeding, the agreement is hereby accepted, the following jurisdictional findings made, and the following order is entered:

1. Respondent Associated-East Mortgage Co., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 500 Market Street, Camden, New Jersey.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Associated-East Mortgage Co., a corporation, its successors and assigns, its officers, agents and representatives and employees, directly or through any corporate or other device, in connection with any extension or arrangement of consumer credit, as "consumer credit" is defined in Regulation Z (12 CFR § 226) of the Truth in Lending Act (Pub.L. 90-321, 15 U.S.C. 1601 *et seq.*), do forthwith cease and desist from:

Requiring mortgage loan applicants to grant respondent the exclusive right to process their loans and be required to pay a service charge to respondent upon receipt of a firm mortgage loan commitment conforming to the terms set forth in the loan application, or creating a contractual relationship between respondent and loan applicant within the meaning of Section 226.2(cc) of Regulation Z, prior to making the necessary disclosures required by the Truth in Lending Act and Regulation Z.

It is further ordered, That respondent, at the time of and in conjunction with issuance of its firm mortgage loan commitment make all disclosures required to be made by Section 226.8 of Regulation Z, in the manner and form required by Regulation Z.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions or departments, and that respondent secure from each person in

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charge of such divisions or departments a signed statement acknowledging receipt of said order.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the respondent, such as dissolution, assignment, or sale, resultant in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist contained herein.

IN THE MATTER OF

SOUNDARAMA MARKETING COMPANY, INC., ET AL.

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

Docket C-2233. Complaint, June 12, 1972—Decision, June 12, 1972

Consent order requiring a Denver, Colorado, seller of stereo sound systems and related products to cease, among other things, misrepresenting the earnings the franchisees can expect or will make; misrepresenting the sales that franchisees can expect or will make; misrepresenting the period of time necessary for franchisees to realize the return of their investment; using hypothetical statistical data to project expected earnings; and misrepresenting that only one franchise is available in one specific geographical area. A further requirement is that the two officers of the respondent company may not sell any type franchise until full restitution has been made to every purchaser of a Soundarama franchise within the last three years. Respondent is also required to provide all prospective franchisees a 16 item information sheet which contains a provision to cancel any contract with franchisor within ten business days.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reasons to believe that Soundarama Marketing Company, Inc., a corporation, Oscar Herman Turk, Jr., and Roxie R. Turk, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act (15 U.S.C. 45), and it appearing to the Commission that

a proceeding by it in respect thereof would be in the interest of the public, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Soundara Marketing Company, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Colorado. It maintains its principal offices and place of business at 1035 South Galapago Street, Denver, Colorado.

Respondents Oscar Herman Turk, Jr., and Roxie R. Turk are individuals and officers of said corporation. Together they formulate, direct, and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent, Soundarama Marketing Company, Inc.

PAR. 2. Respondents have been and are now engaged in the purchase and modification of stereo sound systems and the subsequent advertisement, promotion, and sale of their stereo sound system franchises, related products, and services.

PAR. 3. Respondents Soundarama Marketing Company, Inc., Oscar Herman Turk, Jr., and Roxie R. Turk, in the course and conduct of their business as aforesaid, now cause, and for some time last past have caused, their stereo sound system franchises, related products, and services to be advertised and sold to purchasers thereof located in the various States of the United States and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said franchises, related products, and services in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition in commerce with corporations, firms, and individuals in the sale of stereo sound system franchises, related products, and services; said stereo sound system franchises, related products, and services being of the same general kind and nature as those sold by respondents' competition.

The aforementioned respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 5. In the course and conduct of their aforesaid business, respondents Soundarama Marketing Company, Inc., Oscar Herman Turk, Jr., and Roxie R. Turk, for the purpose of inducing the purchase of their stereo sound system franchises, related products, and services, have made, and are now making, numerous statements and representations in advertisements inserted in newspapers of general

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interstate circulation. Typical and illustrative of the foregoing, but not all inclusive thereof, are the following:

SALESMAN WANTED

BRAND X

is coming to town

and needs good representation
for a product that has been de-
scribed as the greatest item
since TV.

Phenomenal public acceptance. You have to see it to believe it.

Lazy man's dream—ambitious man's paradise.

\$1200 per month average commission.

For personal interview see: Mr. Campbell, 6901 E IVth St. July 13-14-15,
10 A.M.-5 P.M."

* * * * * * *

\$ \$ \$ \$ \$ \$ \$ \$ \$

\$12,000

TOTAL INVESTMENT

Will put you in an extremely lucrative business. Six figure income possible.

Complete investment should be returned first 90 days.

Exclusive Dealership for Product that has been acclaimed as the greatest since TV.

Phenomenal public acceptance. You have to see it to believe it.

Assistance and Training furnished by Factory.

Factory Agent will be in Lubbock Tuesday, Feb. 16th through Saturday the 20th.

CALL MR. TURK AT 795-5281

Between the hours of 10 A.M. and 9 P.M.

Soundarama Marketing Inc. Denver

* * * * * * *

PAR. 6. Through the use of the statements and representations set forth above, and others similar thereto but not specifically set out herein, and through said statements orally made by respondents, their employees, agents, and representatives, respondents have represented, and do now represent, directly or by implication, to the purchasing public that:

1. Persons purchasing respondents' stereo sound system franchises, including related products and services, costing five thousand dollars (\$5,000), or more, can earn as much as one hundred thousand dollars (\$100,000) per year.
2. Persons purchasing one of respondents' stereo sound system franchises, including related products and services, can expect to have gross sales in excess of three hundred thousand dollars (\$300,000) per year.

3. Persons purchasing one of respondents' stereo sound system franchises, including related products and services, can expect to have their investment returned within ninety (90) days.

4. Persons purchasing one of respondents' stereo sound system franchises, including related products and services, need not have any business or electronic experience as respondents will hire a sales manager and a sales crew, and will train them, and arrange for all financing and advertising.

5. Respondents will place each stereo sound system franchise on a producing basis before the initial training assistance is terminated and will continue to assist their franchisees on a regular basis thereafter.

6. Respondents' franchisees will have continuous factory support, training, direction, and other assistance in becoming successful franchisees.

7. No selling will be necessary on the part of the persons investing in a stereo sound system franchise.

8. Geographical areas offered to prospective franchisees have not been previously franchised, and those persons purchasing a stereo sound system franchise, including related products and services, from respondents will receive an exclusive area in which to operate.

9. Respondents' stereo sound systems sell for five hundred ninety-nine dollars (\$599) per unit and are available solely through respondents.

10. Respondents unconditionally guarantee their Soundarama Tel Star sound systems for one year against defects in parts or labor.

11. Franchisees utilizing newspaper advertising provided by respondents will realize forty (40) telephone inquiries per week, or more, which will result in thirteen (13) appointments per week or more.

12. Franchisees' sales representatives will make three (3) sales for each five (5) demonstrations they give.

13. Respondents' stereo sound systems, and related products and services, have had phenomenal public acceptance and there is great demand by the consuming public for respondents' products.

14. Only one franchise is available in a specific area; therefore, persons must decide whether or not to execute a franchise agreement at the time of respondents' first call, or very shortly thereafter.

PAR. 7. In truth and in fact:

1. Persons purchasing one of respondents' stereo sound system franchises, including related products and services, have not realized the income in the manner, form, and amount as indicated by respond-

ents and, in fact, have realized little, if any, net profit from their investments.

2. Persons purchasing one of respondents' stereo sound system franchises, including related products and services, have not realized gross sales in excess of three hundred thousand dollars (\$300,000) and, in fact, have consummated very few, if any, sales.

3. Persons purchasing one of respondents' stereo sound system franchises, including related products and services, do not realize a return of their investment within ninety (90) days, or in any other period of time.

4. Persons purchasing one of respondents' stereo sound system franchises, including related products and services, are required to have a business and electronics background because respondents do not hire and train a sales manager and a sales crew, nor do they arrange for the franchisee's financing and advertising.

5. Respondents do not place each stereo sound system franchise on a producing basis prior to terminating the initial training assistance and do not continue to assist their franchisees on a regular basis thereafter.

6. Respondents' franchisees do not have continuous factory support, training, direction, or other assistance.

7. Selling is necessary on the part of the franchise purchaser inasmuch as it is very difficult, if not impossible, for respondents and/or the franchisee to recruit and retain a sales manager and a sales crew to sell respondents' products.

8. Persons investing in one of respondents' stereo sound system franchises, including related products and services, are not always the first to purchase such a franchise in a specified territory and do not, in fact, receive an exclusive territory in which to operate.

9. Respondents' stereo sound system does not retail for five hundred ninety-nine dollars (\$599) per unit and, in fact, is difficult to sell for any amount, nor is similar merchandise available only through respondents.

10. Respondents do not unconditionally guarantee their Soundarama Tel Star sound system for one year against defects in parts or labor.

11. Franchisees who utilize newspaper advertising do not realize forty (40) telephone inquiries or any other specified number of inquiries per week from such advertising, nor does such advertising result in thirteen (13) appointments per week, or any other specified number of appointments.

12. Franchisees' sales representatives do not make three (3) sales out of every five (5) demonstrations made of respondents' stereo sound system and, in fact, seldom make any sales.

13. Respondents' stereo sound systems, and related products and services, have not had phenomenal public acceptance, nor is there a great demand by the consuming public for respondents' products, as such products are poorly designed and usually defective.

14. The number of franchises available in a specified area is not limited to one, and persons purchasing a franchise from respondents need not execute a franchise agreement during the first time they are contacted, or shortly thereafter, because there is not a great demand for such franchises.

Therefore, The statements, representations, and failures to make certain disclosures, as set forth in Paragraph Six hereof were and are unfair, false, misleading, and deceptive.

PAR. 8. The use by respondents of the aforesaid false, misleading, and deceptive statements, representations, and practices has had, and now has, a capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations are true, and into the purchase of respondents' stereo sound system franchises and related products by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were all to the prejudice and injury of the public and of respondents' competitors, and constituted, and now constitute, unfair methods of competition in commerce, and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement

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is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Soundarama Marketing Company, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Colorado, with its principal office and place of business located at 1035 Galapago, Denver, Colorado.

Respondents Oscar Herman Turk, Jr., and Roxie R. Turk are individuals and officers of said corporate respondent. Together they formulate, direct, and control the policies, acts, and practices of the corporate respondent. Their address is 4605 Tule Lake Drive, Littleton, Colorado.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Soundarama Marketing Company, Inc., a corporation, and Oscar Herman Turk, Jr., and Roxie R. Turk, individually and as officers of said corporation, and their successors, assigns, officers, directors, agents, representatives, and employees, individually or in concert, directly or through any corporate device, in connection with the advertising, promotion, and sale of stereo sound system franchises and related products and services, or any other business in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

- A. 1. Misrepresenting the earnings that franchises can expect or will make; or in any manner misrepresenting the earnings of its franchisees.
2. Misrepresenting the sales that franchisees can expect or will make; or in any manner misrepresenting the sales of its franchisees.
3. Misrepresenting the period of time necessary for franchisees to realize the return of their investment.

4. Using any hypothetical statistical data of any nature which projects expected earnings not based on the actual earnings of a substantial number of their franchisees within the past 12 months.

5. Misrepresenting the quality, amount, and nature of assistance to be provided franchisees by respondents.

6. Representing the value of their products to be other than the price at which they customarily are sold by a substantial number of respondents' franchisees.

7. Representing that respondents' stereo sound systems can be sold with ease; or misrepresenting, in any manner, the saleability of respondents' stereo sound systems or the acceptance of respondents' stereo sound systems.

8. Representing that any geographical area offered as a franchise has not been previously franchised by the respondents, unless in fact the said geographical area has not been previously franchised by the respondents.

9. Representing that a franchisee needs no skill, knowledge, prior training, or experience to operate a successful franchise.

10. Representing that a franchisee need not engage in personal sales efforts or actively work in their franchise business to have a successful franchise.

11. Representing, in any manner, that respondents' stereo sound system has received national acceptance; or misrepresenting, in any manner, the extent or degree of acceptance or approval of respondents' stereo sound systems and/or stereo sound system franchises.

12. Representing that newspaper or any other form of advertising will be effective in the solicitation and sale of respondents' stereo sound systems.

13. Representing that respondents' stereo sound system units are guaranteed without disclosing in writing the identity and address of the guarantor, the nature of the guarantee as to refund, replacement, and/or repair, and what, if anything, the purchaser must do in order to make the guarantee operative.

B. Failing to furnish any prospective franchisee with all of the following information, in a clear, permanent, and straight-forward form, at the time when contact is first established between such prospective franchisee and respondents or their representatives:

1. A factual description of the franchise offered or to be sold.

2. The business experience stated individually, of each of the franchisor's directors, stockholders owning more than ten percent of the stock, and the chief executive officers for the past ten years; and biographical data concerning all such persons.

3. The business experience of the franchisor, including the length of time the franchisor has conducted a business of the type to be operated by the franchisee; has granted franchises for such business; and has granted franchises in other lines of business.

4. Where such is the case, a statement that the franchisor or any of its directors, stockholders owning more than ten percent of the stock, or chief executive officers:

a. has been held liable in a civil action, convicted of a felony, or pleaded *nolo contendere* to a felony charge in any case involving fraud, embezzlement, fraudulent conversion, or misappropriation of property; or

b. is subject to any currently effective injunctive or restrictive order or ruling relating to business activity as a result of action by any public agency or department; or

c. has filed bankruptcy or been associated with management of any company that has been involved in bankruptcy or reorganization proceedings; or

d. is, or has been, a party to any cause of action brought by franchisees against the franchisor.

Such statement shall set forth the identity and location of the court, date of conviction or judgment, any penalty imposed or damages assessed, and the date, nature, and issuer of each such order or ruling.

5. The financial history of the franchisor, including balance sheets and profit and loss statements for the most recent five-year period; and a statement of any material changes in the financial condition of the franchisor since the date of such financial statements.

6. A description of the franchise fee; and a statement indicating whether all or part of the franchise fee may be returned to the franchisee and the conditions under which the fee will be refunded.

7. The formula by which the amount of such franchise fee is determined if the fee is not the same in all cases.

8. A statement of the number of franchises presently operating and the number proposed to be sold, indicating which existing franchises, if any, are company owned and their addresses.

9. A statement of the number of franchises, if any, that operated at a loss during the previous year.

10. A statement that the prospective franchisee may inspect the profit and loss statements of all existing franchisees. (The names and addresses of the franchisees may be deleted from these profit and loss statements, which must be provided to any prospective franchisee requesting to inspect them.)

11. A statement of the conditions under which the franchise agreement may be terminated or renewal refused, or repurchased at the option of the franchisor, and a statement of the number of franchisees that fell into each of these categories during the past 12 months.

12. A statement of the conditions and terms under which the franchisor allows the franchisee to sell, lease, assign, or otherwise transfer his franchise, or any interest therein.

13. A statement of the terms and conditions of any financing arrangements offered directly or indirectly by the franchisor or affiliated persons, and a description of any payments received by the franchisor from any persons for the placement of financing with such persons.

14. A list of at least ten representatives operating franchisees with addresses and telephone numbers, similarly situated to the franchise offered and located in the same geographic area, if possible.

15. A statement of the average length of service of personnel who are responsible for assisting the franchisee at his location, and the average number of hours such personnel spent during the past year with each franchisee that was in business for less than one year.

16. If the franchisor informs the prospective franchisee that it intends to provide him with training, the franchisor must state the number of hours of instruction and furnish the prospective franchisee with a brief biography of the instructors who will conduct the training.

All of the foregoing information 1. to 16. is to be contained in a single disclosure statement, which shall not contain any promotional claims or other information not required by this order. The statement shall carry a distinctive and conspicuous cover sheet with the following notice (and no other) imprinted thereon in bold face type of not less than 10 point size:

INFORMATION FOR PROSPECTIVE FRANCHISEES
REQUIRED BY FEDERAL TRADE COMMISSION DECISION AND ORDER

This information is provided for your own protection. It is in your best interest to study it carefully before making any commitment. If you do sign a contract, you may cancel it, and obtain a full refund of any money paid, for any reason, within ten business days after either signing such contract or receiving this disclosure statement, whichever occurs later. Details appear on the contract itself.

C. Failing to include immediately above and on the same page as the franchisee's signature line of any contract establishing or confirming a franchise agreement, the following statement in bold face print at least 50 percent larger than any other print in the body of such contract, or in bold face print of a contrasting color:

NOTICE: YOU ARE ENTITLED TO CERTAIN IMPORTANT INFORMATION CONCERNING THIS TRANSACTION ENTITLED, "INFORMATION FOR PROSPECTIVE FRANCHISEES REQUIRED BY FEDERAL TRADE COMMISSION DECISION AND ORDER." IT IS IN YOUR BEST INTEREST TO DEMAND AND STUDY SUCH INFORMATION. YOU MAY CANCEL THIS CONTRACT FOR ANY REASON WITHIN TEN BUSINESS DAYS AFTER EITHER SIGNING THIS CONTRACT OR RECEIVING THE REQUIRED INFORMATION, WHICHEVER OCCURS LATER. If you do choose to cancel, you will be entitled to receive a full refund within ten business days after franchisor receives notice of your cancellation. You may use any reasonable method to notify franchisor of your cancellation within the grace period. For your own protection you may wish to use certified mail with return receipt requested, or a telegram, either of which should be sent to the address below. (Franchisor will insert here the address and telephone number to which such notices should be sent.)

D. Failing to cancel any contract for which a notice of cancellation was sent by any reasonable means within ten business days after either the contract's execution, or the franchisee's receipt of all required information, whichever occurs later, or to refund any money paid by franchisee within ten business days after the date of receipt of such notice of cancellation.

E. Failing to furnish the prospective franchisee, upon request at any time and in the absence of any request, before consummation of any agreement, with a copy of the franchise agreement proposed to be used.

It is further ordered, That respondents provide each and every person, who purchased one of their franchises within the past three (3) years, a true and correct copy of this cease and desist order.

It is further ordered, That respondents Oscar Herman Turk, Jr., and Roxie R. Turk not engage in the promotion, advertisement, solicitation and/or sale of any type of franchise, until such time as full restitution of all monies has been made to those persons who purchased a Soundarama Telstar Sound System franchise within the past three (3) years.

It is further ordered, That respondents Oscar Herman Turk, Jr., and Roxie R. Turk shall not act as officers or directors, or become agents or employees of any corporation or partnership or other form of business engaged in the promotion, advertisement, or solicitation and/or sale of any type of franchise, until such time as full restitution of all monies has been made to each and every person who purchased a Soundarama Telstar Sound System franchise within the past three (3) years.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in any of the corporate respondents such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporations, or any of them, which may affect compliance obligations arising out of this order.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all of their present and future personnel engaged in the offering for sale, or sale of franchises, services, or any other products or services, or in any aspect of preparation, creation, or placing of advertising, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

IN THE MATTER OF
GEM FURNITURE, ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE TRUTH IN LENDING ACTS

Docket C-2234. Complaint, June 14, 1972—Decision, June 14, 1972

Consent order requiring an Evansville, Indiana, retail seller of household furniture to cease violating the Truth in Lending Act by failing to disclose to customers the finance charge, annual percentage rate, the amount

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financed, the amount of the downpayment required, and other disclosures required by Regulation Z of the said Act.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the regulations promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Gem Furniture, a corporation, and Louis Mack and Jesse Green, individually and as officers and directors of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts, and of the regulations promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Gem Furniture is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its principal office and place of business located at 15 Northwest Sixth Street, Evansville, Indiana.

Respondents Louis Mack and Jesse Green are officers and directors of said corporation. They formulate policy, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been engaged in the advertising, offering for sale, sale and distribution of retail household furniture to the general public.

PAR. 3. In the ordinary course and conduct of their business, as aforesaid, respondents regularly extend and for some last past have regularly extended, consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondents in the ordinary course and conduct of their business and in connection with credit sales as "credit sale" is defined in Regulation Z, have caused and are causing their customers to execute retail installment contracts, hereinafter referred to as the contract.

PAR. 5. By and through the use of the contract, respondents:

1. In a number of instances fail to disclose the finance charge expressed as an annual percentage rate, as required by Section 226.8(b)(2) of Regulation Z.

2. Fail to disclose the "finance charge" and the "annual percentage rate" more conspicuously than other required terminology as required by Section 226.6(a) of Regulation Z.

3. Have failed to use the term "amount financed" to describe the amount of credit extended to a customer, as required by Section 226.8(c)(7) of Regulation Z.

PAR. 6. Subsequent to July 1, 1969, respondents in the ordinary course and conduct of their business and in connection with credit sales as "credit sale" is defined in Regulation Z, have caused and are causing to be published advertising to aid, promote, or assist credit sales other than open end credit.

PAR. 7. By and through the use of the above-mentioned advertising, respondents have stated that no downpayment is required without disclosing the items required by Section 226.10(d)(2)(i-v) of Regulation Z.

PAR. 8. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failure to comply with the provisions of Regulation Z constitute violations of that Act, and, pursuant to Section 108 thereof, respondents thereby violated the Federal Trade Commission Act.

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The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with a violation of the Federal Trade Commission Act and the Truth in Lending Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the ex-

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ecuted consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Gem Furniture is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its principal office and place of business located at 15 Northwest Sixth Street, Evansville, Indiana.

Respondent Louis Mack is an officer of said corporation. He formulated, directed and controlled the acts and practices being investigated. His address is 6610 Washington Avenue, Evansville, Indiana.

Respondent Jesse Green is an officer of said corporation. He formulated, directed and controlled the acts and practices being investigated. His address is 806 Van Avenue, Evansville, Indiana.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Gem Furniture, a corporation, and its successors and assigns and officers, and Louis Mack and Jesse Green, as individuals and officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with any extension of consumer credit or any advertisement to aid, promote or assist directly or indirectly any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 CFR §226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. 1601 *et seq.*), do forthwith cease and desist from:

1. Failing to disclose the finance charge expressed as an annual percentage rate, computed in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

2. Failing to disclose the terms "finance charge" and "annual percentage rate" more conspicuously than other required terminology, as required by Section 226.6(a) of Regulation Z.

3. Failing to use the term "amount financed" to describe the amount of credit extended, as required by Section 226.8(c) of Regulation Z.

4. Stating, in the advertising of credit sales other than open end credit, the amount of downpayment required or that no downpayment is required, the amount of any installment pay-

ment, the dollar amount of any finance charge, the number of installments or the period of repayment, or that there is no charge for credit, without disclosing the items required by Section 226.10 (d) (2) (i-v) of Regulation Z.

5. Failing in any consumer credit transaction or advertisement to make all disclosures, determined in accordance with Section 226.4 and Section 226.5 of Regulation Z, in the manner, form and amount required by Section 226.6, Section 226.7, Section 226.8 and Section 226.10 of Regulation Z.

It is further ordered, That respondents shall forthwith deliver a copy of this order to cease and desist to all present and future salesmen or other persons engaged in the sale of respondents' products or services, and shall secure from each such salesman or other person a signed statement acknowledging receipt of said order.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

HELEN FILOGLU DOING BUSINESS AS HELENE'S ORIGINALS

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE FLAMMABLE FABRICS ACTS

Docket C-2235. Complaint, June 14, 1972—Decision, June 14, 1972

Consent order requiring a Brooklyn, New York, manufacturer of custom designed cocktail and evening dresses, among other things, to cease manufacturing for sale, selling, importing, or distributing any product, fabric, or related material which fails to conform to an applicable standard of flammability or regulation issued under the provisions of the Flammable Fabrics Act.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Flammable Fabrics Act, as amended, and by virtue of the

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authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Helen Filooglu, an individual trading as Helene's Originals, hereinafter referred to as respondent, has violated the provisions of said Acts and the rules and regulations promulgated under the Flammable Fabrics Act, as amended, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Helen Filooglu is an individual trading as Helene's Originals under and by virtue of the laws of the State of New York, with her office and principal place of business located at 899 E. 15th Street, Brooklyn, New York.

Respondent is a manufacturer of custom designed cocktail and evening dresses.

PAR. 2. Respondent is now and for some time last past has been engaged in the manufacture for sale, the sale or offering for sale, in commerce, and has introduced, delivered for introduction, transported and caused to be transported in commerce and has sold or delivered after sale or shipment in commerce, products as the terms "commerce" and "product" are defined in the Flammable Fabrics Act, as amended, which products failed to conform to an applicable standard or regulation continued in effect, issued or amended under the provisions of the Flammable Fabrics Act, as amended.

Among such products mentioned hereinabove are custom designed cocktail and evening dresses.

PAR. 3. The aforesaid acts and practices of respondent were and are in violation of the Flammable Fabrics Act, as amended, and the rules and regulations promulgated thereunder, and constituted and now constitute unfair methods of competition and unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

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The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Division of Textiles and Furs proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act and the Flammable Fabric Act, as amended; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by

the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Helen Filooglu is an individual trading as Helene's Originals under and by virtue of the laws of the State of New York, with her office and principal place of business located at 899 E. 15th Street, Brooklyn, New York.

Respondent is a manufacturer of custom designed cocktail dresses.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Helen Filooglu, an individual trading as Helene's Originals, or under any other name or names, and respondent's representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from manufacturing for sale, selling or offering for sale, in commerce, or importing into the United States, or introducing, delivering for introduction, transporting or causing to be transported in commerce, or selling or delivering after sale or shipment in commerce any product, fabric or related material; or manufacturing for sale, selling or offering for sale any product made of fabric or related material which has been shipped or received in commerce, as "commerce," "product," "fabric" and "related material" are defined in the Flammable Fabrics Act, as amended, which product, fabric or related material fails to conform to an applicable standard or regulation continued in effect, issued or amended under the provisions of the aforesaid Act.

It is further ordered, That respondent notify all of her customers who have purchased or to whom have been delivered the products which gave rise to this complaint of the flammable nature of said products, and effect recall of said products from such customers.

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It is further ordered, That the respondent herein either process the products which gave rise to the complaint so as to bring them into conformance with the applicable standard of flammability under the Flammable Fabrics Act, as amended, or destroy said products.

It is further ordered, That the respondent herein shall, within ten (10) days after service upon her of this order, file with the Commission a special report in writing setting forth the respondent's intentions as to compliance with this order. This special report shall also advise the Commission fully and specifically concerning (1) the identity of the products which gave rise to the complaint, (2) the number of said products in inventory, (3) any action taken and any further actions proposed to be taken to notify customers of the flammability of said products and effect the recall of said products from customers, and of the results thereof, (4) any disposition of said products since September 7, 1971 and (5) any action taken or proposed to be taken to bring said products into conformance with the applicable standard of flammability under the Flammable Fabrics Act, as amended, or destroy said products, and the results of such action. Such report shall further inform the Commission as to whether or not respondent has in inventory any product, fabric, or related material having a plain surface and made of paper, silk, rayon and acetate, nylon and acetate, rayon, cotton or any other material or combination thereof in a weight of two ounces or less per square yard, or any product, fabric or related material having a raised fiber surface. Respondent shall submit samples of not less than one square yard in size of any product, fabric or related material with this report.

It is further ordered, That the respondent herein shall, within sixty (60) days after service upon her of this order, file with the Commission a report in writing setting forth in detail the manner and form in which she has complied with this order.

IN THE MATTER OF

KANTOR BROS. NECKWEAR CO., INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE TEXTILE FIBER PRODUCTS
IDENTIFICATION ACTS

Docket C-2236. Complaint, June 19, 1972—Decision, June 19, 1972

Consent order requiring a Brooklyn, New York, manufacturer of men's neckties to cease misbranding textile fiber products, furnishing false guaranties, and failing to maintain required records.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Textile Fiber Products Identification Act and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Kantor Bros. Neckwear Co. Inc., a corporation, and Cyril Kantor, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of the said Acts and rules and regulations promulgated under the Textile Fiber Products Identification Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Kantor Bros. Neckwear Co., Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 2425 Pacific Street, Brooklyn, New York.

Respondent Cyril Kantor is an officer of said corporation. His address is the same as that of the corporate respondent.

Respondents are engaged in the manufacture of men's neckties.

PAR. 2. Respondents are now and for some time last past have been, engaged in the introduction, delivery for introduction, manufacture for introduction, sale, advertising and offering for sale, in commerce and in the transportation or causing to be transported in commerce and in the importation into the United States, of textile fiber products; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, textile fiber products which have been advertised or offered for sale in commerce; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products; as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 3. Certain of said textile fiber products were misbranded by respondents within the intent and meaning of Section 4(a) of the Textile Fiber Products Identification Act and the rules and regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, invoiced, advertised, or otherwise identified as to the name or amount of the constituent fibers contained therein.

Among such misbranded textile fiber products, but not limited thereto, were textile fiber products, namely neckties, which were

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labeled as 65 percent Rayon-35 percent Silk but which contained 100 percent Acetate.

PAR. 4. Certain of said textile fiber products were misbranded by respondents in that they were not stamped, tagged, labeled or otherwise identified as required under the provisions of Section 4(b) of the Textile Fiber Products Identification Act, and in the manner and form prescribed by the rules and regulations promulgated under said Act.

Among such misbranded textile fiber products but not limited thereto, were textile fiber products, namely neckties with labels which failed:

1. To disclose the true generic names of the fibers present; and
2. To disclose the percentage of said fibers.
3. To show the name or other identification issued and registered by the Commission, of one or more persons subject to Section 3 with respect to such product.

PAR. 5. Respondents have furnished false guaranties that certain of their textile fiber products were not misbranded or falsely invoiced in violation of Section 10 of the Textile Fiber Products Identification Act.

PAR. 6. Respondents have failed to maintain proper records showing the fiber content of textile fiber products manufactured by them in violation of Section 6(a) of the Textile Fiber Products Identification Act and Rule 39 of the regulations promulgated thereunder.

PAR. 7. The acts and practices of respondents as set forth above were, and are, in violation of the Textile Fiber Products Identification Act and the rules and regulations promulgated thereunder, and constituted, and now constitute unfair and deceptive acts and practices and unfair methods of competition in commerce, within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Textile Fiber Products Identification Act; and

Respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by

respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Kantor Bros. Neckwear Co., Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its offices and principal place of business located at 2425 Pacific Street, Brooklyn, New York in Kings County, State of New York.

Respondent Cyril Kantor is the president of said corporation. He formulates, directs and controls the acts, practices and policies of said corporation and their principal office and place of business is located at the above stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Kantor Bros. Neckwear Co., Inc., a corporation, its successors and assigns, and its officers, and Cyril Kantor, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the introduction, delivery for introduction, manufacture for introduction, sale, advertising or offering for sale, in commerce, or the transportation or causing to be transported in commerce, or the importation into the United States, of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, of any textile fiber product which has been advertised or offered for sale in commerce or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, after shipment in commerce, of any

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textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from:

A. Misbranding textile fiber products by:

1. Falsely or deceptively stamping, tagging, labeling, invoicing, advertising or otherwise identifying such products as to the name or amount of the constituent fibers contained therein.

2. Failing to affix labels to such textile fiber products showing in a clear, legible and conspicuous manner each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act.

B. Furnishing false guaranties that textile fiber products are not misbranded or falsely invoiced under the provisions of the Textile Fiber Products Identification Act.

C. Failing to maintain records of fiber content of textile fiber products manufactured by them as required by Section 6(a) of the Textile Fiber Products Identification Act and Rule 39 of the regulations thereunder.

It is further ordered. That respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist contained herein.

It is further ordered. That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

IN THE MATTER OF

BUY-RITE FOODS, INC.

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

Docket C-2237. Complaint, June 22, 1972—Decision, June 22, 1972

Consent order requiring a Salem, New Hampshire, wholesale grocery business to cease inducing and/or receiving promotional and advertising allowances or contributions in connection with the construction or operation of any facility of the respondent when known not to be offered to competitors on proportionally equal terms. Respondent is further ordered to refund to each supplier any and all consideration paid to respondent in connection with its new freezer-warehousing unit.

COMPLAINT

The Federal Trade Commission, pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, having reason to believe that Buy-Rite Foods, Inc., a corporation, has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (U.S.C., Title 15, Section 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in respect thereto as follows:

PARAGRAPH 1. Respondent, Buy-Rite Foods, Inc. (Buy-Rite) is a corporation organized and doing business under the laws of the State of New Hampshire, with its principal office and place of business located at 16 Kelly Road, Salem, New Hampshire.

PAR. 2. Respondent, Buy-Rite, is now and has been for many years engaged in the wholesale grocery business, buying and selling a wide variety of grocery products with total sales for 1971 of \$48,527,138.

Buy-Rite services approximately eighty-five (85) retail grocery stores, including approximately seven (7) chain operations and sixty-five (65) supermarkets. Buy-Rite maintains its principal warehouses at its principal place of business in Salem, New Hampshire, and supplies retail grocery stores located in the States of New Hampshire and Massachusetts.

PAR. 3. Respondent, Buy-Rite, purchases its products from suppliers located throughout the United States and causes such products to be transported from various States in the United States to other states for the purpose of reselling said products. Respondents, Buy-Rite, in the course and conduct of its business, has engaged and is presently engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business as herein described, respondent, Buy-Rite, has been for many years, and is now, in substantial competition in the sale and distribution of its products, with other corporations, persons, firms, and partnerships.

PAR. 5. Respondent, Buy-Rite, by August 24, 1971, completed construction of a fifty thousand (50,000) square foot, eight hundred thousand (800,000) cubic foot, freezer unit annexed to its main offices and warehouses located at 16 Kelly Road, Salem, New Hampshire. The cost of construction of said freezer unit was approximately \$1,000,000.

On August 24, 1971, respondent, Buy-Rite, announced the opening of said freezer unit through a letter to each of its suppliers. Said

letter of announcement commenced an advertising campaign which involved the publication of a brochure to be prepared for Buy-Rite by Creative Marketing Services International for the purpose of distribution "to the trade." To defray the cost of publication, to promote the opening of the freezer unit, and to advertise the products of its suppliers Buy-Rite solicited the participation of its suppliers in the advertising program.

Cost of participation in the advertising campaign was quoted by Buy-Rite. The cost of one half of advertising in said promotional brochure was quoted at \$400 and one full page at \$700.

PAR. 6. As a result of said promotional campaign Buy-Rite received payments and allowances from some of its suppliers which exceeded allowances usually provided and which resulted in a disproportionate and discriminatory contribution to Buy-Rite by such suppliers.

Buy-Rite specifically solicited its suppliers for contributions to a unique advertising campaign. This solicitation involved a specified schedule of allowances quoted by Buy-Rite to its suppliers as set out in Paragraph 5.

Buy-Rite received protests and refusals from some of its suppliers in response to its solicitation for participation in said campaign.

PAR. 7. Respondent, Buy-Rite, in inducing, inducing and receiving or receiving the aforesaid payments and allowances from such suppliers, knew or should have known that such suppliers were not making available to their customers competing with respondent in the resale and distribution of such products such payments or allowances on proportionally equal terms.

PAR. 8. The retention of improper and discriminatory payments by respondent, Buy-Rite, constitutes a continuing violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. Section 45).

PAR. 9. The acts and practices of respondent, Buy-Rite, as alleged herein constitute unfair methods of competition in commerce or unfair acts or practices in commerce within the intent and meaning of, and in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45).

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered that matter and having determined that it had reason to believe that the respondent has violated the said Act, and the complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Buy-Rite Foods, Inc., is a corporation organized and doing business under the laws of the State of New Hampshire, with its office and principal place of business located at 16 Kelly Road, Salem, New Hampshire.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Buy-Rite Foods, Inc., a corporation, and its officers, representatives, agents and employees, successors and assigns, directly or indirectly, through any corporate or other device, in or in connection with the purchase or sale in commerce, as "commerce" is defined in the Federal Trade Commission Act, of products for resale by the respondent, Buy-Rite, or in connection with any other transactions between respondent and its various suppliers involving or pertaining to the regular business of the respondent in advertising, purchasing, distributing and selling commodities and products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Inducing, inducing and receiving, or receiving promotional and advertising allowances or contributions of any nature whatsoever furnished by any supplier in connection with the publicizing, operation, or maintenance of any facility of respondent or with the purchase, offering for sale, or sale of any commodity purchased from such supplier when respondent knows or should

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know that such allowance or contribution thereto is not affirmatively offered or otherwise accorded by such supplier on proportionally equal terms to all other purchasers and customers competing with respondent in the sale and distribution of such supplier's products, including other purchasers who resell to customers who compete with respondent in the resale of such supplier's products.

2. Inducing, inducing and receiving, or receiving or contracting for the receipt of anything of value in connection with the construction, development, promotion, or maintenance of any facility of respondent or with the purchase, offering for sale, or sale of any commodity purchased from such supplier when respondent knows or should know that such allowance or contribution thereto is not affirmatively offered and otherwise accorded by such supplier on proportionally equal terms to all other purchasers and customers competing with respondent in the sale and distribution of such supplier's products, including other purchasers who resell to customers who compete with respondent in the resale of such supplier's products.

It is further ordered, That respondent, Buy-Rite Foods, Inc., shall notify all suppliers solicited in the promotional campaign conducted pursuant to the opening of its new fifty thousand (50,000) square foot freezer warehousing unit, located at 16 Kelly Road, Salem, New Hampshire, of this order and shall provide each supplier with the following:

1. a copy of this order; and
2. an accounting of the current disposition of all consideration paid to Buy-Rite Foods, Inc.

It is further ordered, That respondent, Buy-Rite Foods, Inc., refund to each supplier any and all consideration paid to respondent which was improperly received and constitutes a discriminatory payment pursuant to its solicitation in the promotional campaign announcing and facilitating the opening of its said new freezer warehousing unit.

It is further ordered, That respondent, Buy-Rite Foods, Inc., notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of a subsidiary, or any other change in the corporation or corporate status which may affect compliance obligations arising out of this order.

It is further ordered. That respondent, Buy-Rite Foods, Inc., shall, within sixty (60) days after service upon it of this order, file with

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the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

OCEAN SPRAY CRANBERRIES, INC., ET AL.

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

Docket 8840. Complaint, April 22, 1971—Decision, June 23, 1972

Consent order requiring a Hanson, Mass., manufacturer, seller and distributor of a cranberry juice drink and respondent's New York City advertising agency to cease disseminating any advertisement which represents that any product made by respondent contains as many or a greater variety of nutrients than orange or tomato juice or any other beverage, unless it is true; has more "food energy" than any other beverage, unless clear disclosure is made that the term refers to calories only; or that their product is a "juice" unless it consists entirely of natural or reconstituted single strength fruit juice with no water added. Respondent is further ordered, for a period of one year, to devote at least one out of every four advertisements for their product—or, alternatively, 25 percent of media expenditures (excluding production costs)—to a prepared statement clarifying any alleged misleading advertisements.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Ocean Spray Cranberries, Inc., a corporation and Ted Bates & Company, Inc., a corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Ocean Spray Cranberries, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at Hanson, Massachusetts.

PAR. 2. Respondent Ted Bates & Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 666 Fifth Avenue, New York, New York.

PAR. 3. Respondent Ocean Spray Cranberries, Inc., is now, and for some time last past has been, engaged in the manufacture, sale and

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distribution of a juice drink designated "Ocean Spray Cranberry Juice Cocktail" which comes within the classification of a "food," as said term is defined in the Federal Trade Commission Act.

PAR. 4. Respondent Ted Bates & Company, Inc., is now, and for some time last past has been, an advertising agency of Ocean Spray Cranberries, Inc., and now and for some time last past, has prepared and placed for publication and has caused the dissemination of advertising referred to herein, to promote the sale of Ocean Spray Cranberries, Inc.'s "Ocean Spray Cranberry Juice Cocktail" juice drink, which comes within the classification of "food," as said term is defined in the Federal Trade Commission Act.

PAR. 5. Respondent Ocean Spray Cranberries, Inc., causes the said product, when sold, to be transported from its place of business in one State of the United States to purchasers located in various other States of the United States and in the District of Columbia. Respondent Ocean Spray Cranberries, Inc., maintains, and at all times mentioned herein has maintained, a course of trade in said product in commerce as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

PAR. 6. In the course and conduct of their said businesses, respondents have disseminated, and caused the dissemination of certain advertisements concerning the said juice drink by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to, advertisements inserted in magazines and other advertising media, and by means of television broadcasts transmitted by television stations located in various States of the United States, and in the District of Columbia, having sufficient power to carry such broadcasts across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said product; and have disseminated, and caused the dissemination of, advertisements concerning said product by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said juice drink in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 7. Typical of the statements and representations in said advertisements, disseminated as aforesaid, but not all inclusive thereof, are the following:

A) A series of television commercials presents live action dramatizations of people in healthy, wholesome family situations and in

informal get-togethers. They are at the breakfast table, at a winter-time party, watching a football game on television, and on a houseboat. These advertisements are used to demonstrate the versatility of Ocean Spray Cranberry Juice Cocktail. Ocean Spray is represented in both the audio and visual portions of these commercials as "the start of something big." The theme song for this series of commercials is the popular tune "This Could Be The Start of Something Big." A large part of the audio message is sung to that tune. Children and the young married couple play the central roles in these advertisements. Audio and/or video representations of Ocean Spray Cranberry Juice Cocktail as having "more food energy than orange juice" appear in all, but one, of this group of commercials and there are frequent representations of the drink as "good for you" and as a "juice."

(1) One such television commercial features a sleepy husband served by his wife at the breakfast table. She sings as she serves him the cranberry juice cocktail and praises it as a "great new way" to start the day, instead of orange or tomato juice. As the husband drinks, he awakens and his face lights up. The announcer states: "Cranberry *juice* is good for you. Has even more food energy than orange or tomato juice." The words "more food energy than orange or tomato juice" appear in the video portion. The wife mixes the Ocean Spray Cranberry Juice Cocktail with pineapple juice, saying "Right now I'm mixing cranberry *juice* and pineapple juice." She fixes a drink for her little boy—"Ocean Spray Cranberry *Juice* mixed with ginger ale." The boy and an older woman, presumably his grandmother, drink and smile as a woman sings, ending her song with "Ocean Spray's the start of something big." (Emphasis added)

(2) One such commercial message pictures a winter holiday as guests visit. The hostess cheerfully fixes drinks with Ocean Spray Cranberry Juice Cocktail as voices sing: "You reach for the Ocean Spray. Cranberry *juice* makes the day." As the drinks are served, the announcer speaks of the product's virtues in entertaining, referring to it as "funberry *juice*." The commercial closes with "Ocean Spray's the start of something big." (Emphasis added)

(3) Another such television commercial shows an informal gathering with men watching football on television. After the guests are greeted, the hostess goes to the refrigerator and takes out a bottle of Ocean Spray Cranberry Juice Cocktail, while men and women sing "You reach for the Ocean Spray. Cranberry *juice* makes the day. Ocean Spray's the start of something big," and "the start of something big" appears on the video portion. As the drinks are poured, the announcer refers to this drink twice as "the extra-use

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juice." Audio and video messages stress that this product "has even more food energy than orange or tomato juice." While the guests drink, singing women characterize the juice cocktail as "so-good-for-you *juice* you drink in so many ways." Before the commercial closes with the message "Ocean Spray's the start of something big," the host refers to the drink: "Cranberry *juice* very nice." (Emphasis added)

(4) Yet another commercial message of this series depicts a family on a houseboat sailing down a river. The mother serves Ocean Spray as a snack beverage. As the children drink, the audio message describes the drink as "funberry *juice*," and "good for you," and the video message shows the words "more food energy than orange or tomato juice." Again, this commercial ends with the audio-visual message "Ocean Spray's the start of something big." (Emphasis added)

(5) Also in this series is a television commercial depicting a family musical combo playing together at home. The mother brings the group Ocean Spray and the announcer extols the product as "so good for you" while the message "More food energy than orange juice" appears on the video portion. The commercial ends with the audio message "Ocean Spray's the start of something big."

B) A group of two television commercials is based on the theme "Cranberry *juice* for breakfast." These commercials feature quick scene changes to focus on different situations. Both of these commercials begin with the showing of a man's face having a startled expression with the words "cranberry juice for breakfast" flashing across his face while the announcer's voice echoes that phrase. They each end with the announcer saying "Ocean Spray Cranberry Juice Cocktail, the other breakfast *juice*." Meanwhile, the video portion focuses on an Ocean Spray bottle with the words "the other breakfast *juice*" standing next to the bottle. (Emphasis added)

(1) One such commercial depicts a "cultured" young woman at her breakfast table sipping Ocean Spray, saying "Cranberry *juice*, great for breakfast. Tingly. mmm." Then a man, looking through the sun-roof of a foreign car, states "Cranberry *juice* gives me more food energy than orange juice." A grocery store clerk then relates that his customers "start every day with Ocean Spray." The announcer gives the message "Ocean Spray Cranberry Juice Cocktail has more food energy than orange juice," while a message to that effect is shown. Following this, a woman pours Ocean Spray Cranberry Juice Cocktail for her family, saying "Orange juice? We like cranberry *juice* better. (Emphasis added)

(2) A second such commercial depicts a woman, who says she is tired of orange juice every day, at a grocery checkout counter purchasing Ocean Spray, which, in her words, "tastes better and has more food energy than orange juice." As a mother serves her son and husband, she states: "Jim likes his cranberry *juice* straight. Jimmy mixes his with orange juice." Next the announcer speaks of Ocean Spray as having "more food energy than orange juice" while those words appear on the video portion in a prominent manner. (Emphasis added)

PAR. 8. Through the use of said advertisements and others similar thereto not specifically set out herein, disseminated as aforesaid, respondents have represented and are now representing, directly and by implication, that:

A. Said drink is the beverage that is more nutritious than orange or tomato juices and, thus, should be substituted for those beverages at breakfast.

B. Said drink has more "food energy" than orange or tomato juices and, thus, contains nutrients that are greater in variety and quantity than those nutrients found in orange or tomato juices.

C. Said drink is a juice and, as such, contains cranberry juice entirely.

PAR. 9. In truth and in fact:

A. Said drink is not a beverage that is more nutritious than orange or tomato juices. In fact, orange or tomato juices are nutritionally and economically more suitable for use at breakfast.

B. Said drink does not contain nutrients that are greater in variety and quantity than those found in orange or tomato juice. In fact, it contains a substantially smaller variety and quantity of such nutrients. Said drink, only, has a higher carbohydrate content and hence more calories (food energy measurement) than orange or tomato juice, but it contains a substantially lower vitamin and mineral nutrient content than orange or tomato juices. Each six fluid ounce serving contains 124 calories, primarily derived from sugar and other added sweeteners.

C. Said drink is not a juice and is diluted with water so that the predominant ingredient is added water.

Therefore, the advertisements referred to in Paragraph Seven were and are misleading in material respects and constituted, and now constitute, "false advertisements" as that term is defined in the Federal Trade Commission Act, and the statements and representations set forth in Paragraphs Seven and Eight were, and are, false, misleading and deceptive.

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PAR. 10. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent Ocean Spray Cranberries, Inc., has been, and now is, in substantial competition, in commerce, with corporations, firms and individuals in the sale of food products of the same general kind and nature as that sold by respondents.

PAR. 11. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent Ted Bates & Company, Inc., has been, and now is, in substantial competition in commerce with other advertising agencies.

PAR. 12. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices and the dissemination of the aforesaid "false advertisements" has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent Ocean Spray Cranberries, Inc.'s product, which is more expensive than equivalent amounts of orange or tomato juice, by reason of said erroneous and mistaken belief.

PAR. 13. The aforesaid acts and practices of respondents including the dissemination of "false advertisements," as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices in commerce and unfair methods of competition in commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act.

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The Commission having issued its complaint on April 22, 1971, charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and respondents having been served with a copy of that complaint; and

The Commission having duly determined upon motion duly certified to the Commission that, in the circumstances presented, the public interest would be served by waiver here of the provisions of Section 2.34(d) of its rules, that the consent order procedure shall not be available after issuance of complaint; and

Respondents and counsel for the complaint having thereafter executed an agreement containing a consent order, an admission by respondent of all jurisdictional facts set forth in Paragraph Six of the complaint, a statement that the signing of the agreement by

respondents is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission having considered the aforesaid agreement and having determined that it provides an adequate basis for appropriate disposition of this proceeding, and having thereupon placed such agreement on the public record for a period of thirty (30) days, and having duly considered the comments filed thereafter, now, in further conformity with the procedure prescribed in its rules, the agreement is hereby accepted, the following jurisdictional findings are made, and the following order is entered;

1. Respondent Ocean Spray Cranberries, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its general office and place of business located at Hanson, Massachusetts.

2. Respondent Ted Bates & Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 1515 Broadway, New York, New York.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Ocean Spray Cranberries, Inc., a corporation, and respondent Ted Bates & Company, Inc., a corporation, and their officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of any beverage product of Ocean Spray Cranberries, Inc., or any beverage product which is represented in advertising as a product made with cranberries, forthwith cease and desist from:

1. Disseminating, or causing the dissemination of, any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which represents, directly or by implication, that:

(a) Any such product contains nutrients of equivalent or greater variety or in greater quantity than those nutrients found in orange juice, tomato juice or any other beverage, unless such product does in fact contain such an equivalence or excess of variety or quantity of such nutrients; *Provided, however*, That nothing contained herein shall be deemed to

prohibit representations which merely propose using any such product in place of orange juice, tomato juice or any other beverage without assigning any nutritional reason therefor.

(b) Any such product has more "food energy" than orange juice, tomato juice or any other beverage unless it is clearly and conspicuously disclosed, and in close connection with said term, that "food energy" is a reference to calories.

(c) Any such product is a "juice," unless it consists of not less than 100 percent natural or reconstituted single strength fruit juice with no additional water added thereto; *Provided, however*, nothing contained herein shall prohibit the addition of any ingredient to sweeten, flavor, preserve, fortify with vitamins, minerals or other nutrients, or color, or the like, such fruit juice; and *Further provided, however*, nothing contained herein shall prohibit respondents from designating or describing any such product as "juice cocktail," "juice drink" or by any other name connoting a diluted or modified single strength juice; or by any name approved by any federal agency having appropriate jurisdiction.

2. Disseminating, or causing the dissemination of, any advertisement by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of any such product, in commerce, as "commerce" is defined in the Federal Trade Commission Act, which contains any of the representations, acts or practices prohibited in subparagraph 1 above.

It is further ordered, That respondent Ocean Spray Cranberries, Inc., shall forthwith cease and desist for a period of one (1) year, commencing no later than the date this order becomes final, from disseminating or causing the dissemination of any advertisement by means of the United States mails or by any other means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for its product Ocean Spray Cranberry Juice Cocktail, unless at least one (1) out of every four (4) advertisements of equal time or space for each medium in each market, or, in the alternative, not less than twenty-five percent (25%) of the media expenditures (excluding production costs) for each medium in each market, be devoted to advertising as set forth in Exhibit A annexed hereto. In the case of radio and television advertising, such advertising is to be disseminated in the same time periods and during the same seasonal periods

as other advertising of Ocean Spray Cranberry Juice Cocktail; in the case of print advertising, such advertising is to be disseminated in the same print media as other advertising of Ocean Spray Cranberry Juice Cocktail.

It is further ordered, That the respondent corporations shall forthwith distribute a copy of this order to each of their operating divisions.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with this order.

EXHIBIT A

If you've wondered what some of our earlier advertising meant when we said Ocean Spray Cranberry Juice Cocktail has more food energy than orange juice or tomato juice, let us make it clear: we didn't mean vitamins and minerals. Food energy means calories. Nothing more.

Food energy is important at breakfast since many of us may not get enough calories, or food energy, to get off to a good start. Ocean Spray Cranberry Juice Cocktail helps because it contains more food energy than most other breakfast drinks.

And Ocean Spray Cranberry Juice Cocktail gives you and your family Vitamin C plus a great wake-up taste. It's * * * the other breakfast drink.

(If this text is used for a broadcast advertisement, such advertisement will be prepared in a manner consistent with normal technical and artistic standards of production.)

INTERLOCUTORY, VACATING AND
MISCELLANEOUS ORDERS

GENERAL MILLS, INC.

Docket 8836. Order, January 6, 1972

Order denying complaint counsel's request for permission to appeal hearing examiner's order denying request for permission to oppose respondent's application for some 190 subpoenas *duces tecum*, and other relief.

ORDER DENYING COMPLAINT COUNSEL'S REQUEST FOR PERMISSION TO
APPEAL AND OTHER RELIEF

This matter is before the Commission upon the request by complaint counsel, filed December 2, 1971, for permission to appeal from the examiner's order denying their request for permission to oppose respondent's application for some 190 subpoenas *duces tecum*; upon their further request for permission to move to quash such subpoenas; and, finally, upon their motion to quash subpoenas *duces tecum*. Respondent, on December 22, 1971, filed a memorandum in opposition thereto.

Complaint counsel concede that the issuance of the subpoenas is an *ex parte* action. Nevertheless, complaint counsel seek to oppose such issuance on the ground that respondent has failed to make a showing of good cause and on the further ground that the issuance of the subpoenas will have a dilatory effect upon the hearing.

We do not believe it is necessary to decide whether or not complaint counsel has a right, in the circumstances presented, to a review of the hearing examiner's action. As a general rule, matters of discovery such as this are left to the discretion of the hearing examiner. On the record before us there is no basis for a determination that the hearing examiner has abused his discretion in issuing such subpoenas. Accordingly,

It is ordered, That complaint counsel's request for permission to appeal from the hearing examiner's order of November 22, 1971 and for other relief be, and it hereby is, denied.

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,
ET AL.

Docket 8866. Order, January 6, 1972

Order compelling, with the written approval of the Attorney General of the United States, witness Joseph F. Malone to give testimony and such other information as required by the hearing examiner.

ORDER COMPELLING TESTIMONY

This matter having come before the Commission upon the hearing examiner's certification of complaint counsel's request for an appropriate ruling on the refusal of Joseph F. Malone to testify in response to a subpoena (in connection with the taking of a deposition) on the basis of a claimed privilege against self-incrimination under the Fifth Amendment of the United States Constitution; and

The Commission having determined that in its judgment (1) testimony or other information from Joseph F. Malone may be necessary to the public interest and (2) such individual has refused to testify on the basis of his privilege against self-incrimination; and, further, that in the circumstances of this case it would be appropriate for the Commission to issue an order requiring the testimony of such individual:

It is ordered, That pursuant to the provisions of Title 18 U.S.C. 6001, *et seq.*, Joseph F. Malone is hereby ordered, with the written approval of the Attorney General of the United States (Commission Exhibit for Identification 165), to give testimony and provide such other information as may be specified by the hearing examiner, this order to become effective as provided in Title 18 U.S.C. 6002.

GENERAL MILLS, INC.

Docket 8836. Order and Opinion, February 10, 1972

Order denying third party appeals, motions to quash or limit subpoenas *duces tecum* and request for oral argument.

ORDER AND OPINION DENYING THIRD PARTY APPEALS

This matter is before the Commission upon third party appeals from the hearing examiner's rulings on the record on January 3, 1972, denying motions to quash and to quash or limit subpoenas *duces tecum*. The various appeals are as follows: Mrs. Paul's Kitchens, Inc., (Mrs. Paul's) filed January 13, 1972; Coldwater Seafood Corporation, (Coldwater) filed January 17, 1972; and the jointly sub-

mitted appeals of O'Donnell-Usen Fisheries Corp., Seafood Kitchens, Inc., Maine Fisheries Corp., and Rubenstein Foods, Inc., filed January 14, 1972. Respondent, General Mills, Inc., on January 25, 1972, filed its brief in opposition to the appeals.

The subpoenas here in question are part of a group of some 185 or 190 which respondent caused to be issued in connection with its discovery.¹ This group included some 157 "short form" subpoenas which were largely devoted to obtaining data with respect to market definition and market shares. Additionally, some 28 so-called "long form" subpoenas were served on firms assertedly in the retail and institutional markets. These seek the same market share data as contained in the short form subpoenas and in addition certain other information such as advertising data and financial data.²

Motions to quash were filed with the hearing examiner by 10 recipients of these subpoenas. Oral argument was heard before the examiner January 3, 1972. Certain of the movants withdrew their motions at this hearing; the motions of the remaining movants were denied. It is from these rulings of the hearing examiner that the appellant third parties herein are making their appeals.

One of the appealing parties is Mrs. Paul's. This appellant has withdrawn its objections to a number of the specifications and appeals only from the hearing examiner's denial of its motion to quash with respect to specification items 2, 4, 10, 11, and 12. Mrs. Paul's describes items 2, 4, and 11 as being directed to the production of information relative to the operation and profitability of Mrs. Paul's. It contends that this information is irrelevant to the issues raised in the complaint and further that respondent has the data that it needs from such other sources as a Section 6(b) survey conducted by the Commission and stated government statistical surveys. Mrs. Paul's also contends that item 10, seeking information as to costs, and item 12, seeking information as to future plans, are irrelevant. As to all items, Mrs. Paul's makes a claim of confidentiality and asserts that possible disclosure will harm it competitively.

Another appellant is Coldwater which asserts that the information sought has not been shown to be material and relevant for the preparation of respondent's defense. Its argument seems to be that respondent has already received information from over 96 percent of

¹ Complaint counsel generally opposed the issuance of these subpoenas, but upon such counsel's request to appeal on the subject, the Commission, in an order issued January 6, 1972, held there was no basis for determining that the hearing examiner had abused his discretion in the matter and denied the request.

² Although the record does not expressly show which of the forms the various appellants received, it is assumed that such were the long forms. In at least one instance the subpoena including specifications is attached to the motion to quash. (See motion filed by Rubenstein Foods Inc., December 12 1971.)

the industry and that additional data from Coldwater would be superfluous. It also asserts that the protective order of the hearing examiner would be inadequate to prevent the disclosure of this material to its competitors.

The final appeals are those of O'Donnell-Usen Fisheries Corp., Seafood Kitchens, Inc., Maine Industries Corp., and Rubenstein Foods, Inc.³ These appellants, through their counsel, have emphasized the confidential nature of the material requested. They assert that the material, or some of it, would not be relevant to the allegations in the complaint and to probable defenses. They also argue that in spite of the protective order they would be harmed by what they believe would be the disclosure of confidential information to their competitors.

The main thread running through all of the appeals is an objection to furnishing assertedly confidential information which it is feared may fall into the hands of competitors to the injury of the appellants. The hearing examiner was fully aware of this concern. On December 16, 1971, he issued an order granting confidential treatment to the subpoenas *duces tecum* which he later modified by an order issued January 6, 1972. The modified order was issued following the hearing on the objections to the subpoenas on January 3, 1972. The amended order specifies that only outside counsel and named independent economic experts retained as advisers or expert witnesses are permitted to view the responses. Respondent's internal counsel, Richard A. Soloman, Esq., is authorized to review only summaries prepared by the experts. To additionally protect the confidentiality of the information on certain forms the data is to be submitted under code number, the key to which will be revealed only to outside counsel, complaint counsel, and the hearing examiner. Other procedures provided in the protective order assure a reasonable safeguarding of the confidentiality of the responses.

The examiner here has made the determination in effect that the information sought by the subpoenas is relevant and that respondent is entitled to this discovery. He has issued a highly restrictive protective order which will provide, so far as it is practical, protection against disclosure of the subpoenaed data to competitors. This is a discovery area in which the hearing examiner is given a large amount of discretion. There has been no showing that the interests of justice would require that his rulings on these subpoenas be reversed. Accordingly,

³ Respondent asserts in a footnote on page 6 of its Brief in Opposition to Appeals that Rubenstein Foods, Inc., has filed a satisfactory response to the subpoena.

It is ordered, That the third party appeals from the examiner's rulings of January 3, 1972, denying motions to quash and to quash or limit subpoenas *duces tecum* be, and they hereby are, denied.

It is further ordered, That the request of appellants O'Donnell-Usen Fisheries Corp., Seafood Kitchens, Inc., Maine Fisheries Corp., and Rubenstein Foods, Inc., for oral argument on their appeals be, and it hereby is, denied.

OCEAN SPRAY CRANBERRIES, INC., ET AL.

Docket 8840. Order and Opinion, February 10, 1972

Order denying respondents' motions to remove case from litigation pending Commission's decision on another case. The matter is remanded to the hearing examiner for further proceedings.

ORDER AND OPINION DENYING MOTIONS TO REMOVE CASE FROM LITIGATION

This matter is before the Commission upon two separate certifications of the hearing examiner both filed on January 26, 1972, the one certifying to the Commission a motion of respondent Ocean Spray Cranberries, Inc., to remove the case from adjudication and the other certifying the motion of respondent Ted Bates & Company, Inc., making the same request. Complaint counsel opposed Ocean Spray's request before the examiner. The hearing examiner recommended the motions be denied on the grounds stated by respondents but further suggested "that the Commission consider withdrawal of the case from adjudication for the purpose of permitting direct negotiations with the Commission for settlement by consent order."

Ocean Spray's motion, which is joined in by Ted Bates, requests removal of this matter from litigation pending the Commission's decision in *Firestone Tire & Rubber Company*, Docket No. 8818, a case which is before the Commission for decision on the merits. Respondents state that the only question of substance upon which the parties do not agree is "a limited area in the content of the 'corrective' advertisement" which respondents would disseminate upon a settlement of the proceeding. Respondents argue that the Commission's decision in *Firestone* will be extremely helpful in reaching a settlement by enunciating guidelines as to the criteria "for when corrective advertising is and is not warranted, and what is to be disclosed in such advertisements. * * *"

In the Commission's view it would be inappropriate to stay the proceeding in this case pending the outcome of the *Firestone* matter.

Respondents do not contend even that the cases are factually similar; only that an issue as to a so-called "corrective" type order is involved in both. The possibility of "guidelines" seems to us to be a connection too remote to justify the delay which would follow if this case were to be stayed pending the outcome of the other. Cf. *Philip Morris, Incorporated*, Docket No. 8838, Order and Opinion issued December 6, 1971 [79 F.T.C. 1023]. We agree with the hearing examiner's recommendation on this point and will deny the requests to remove this case from adjudication.

The hearing examiner alternatively suggested withdrawal of the case from adjudication for the purpose of negotiating a consent settlement. While the Commission endorses and follows a policy of disposing of matters by agreement wherever possible, it does not appear that this proceeding has reached the stage where withdrawal from adjudication would be justified. Respondents assert only a single issue separates the parties from agreement but complaint counsel has indicated in their answer to Ocean Spray's motion that respondents' proposals are inadequate as a basis for settlement (footnote 1, page 1, complaint counsel's answer, filed January 20, 1972). Since there is no indication that the matter is ripe for a negotiated settlement, it seems that withdrawal would result only in delay in the trial of this proceeding. Withdrawal for the purpose of negotiating a consent settlement will not be granted. Accordingly,

It is ordered, That the motion of respondent Ocean Spray Cranberries, Inc., filed January 17, 1972, and the motion of respondent Ted Bates & Company, Inc., filed January 25, 1972, requesting that this case be removed from litigation pending the Commission's decision in the *Firestone Tire & Rubber Company* Docket No. 8818, be, and they hereby are, denied.

It is further ordered, That this matter be returned to the hearing examiner for further proceedings in accordance with the Commission's Rules of Practice.

AMERICAN GENERAL INSURANCE COMPANY

Docket 8847. Order and Dissenting Statement, February 11, 1972

Order dismissing complaint counsel's interlocutory appeal from the hearing examiner's order authorizing the Fidelity and Deposit Company of Maryland to intervene in this proceeding, because of failure to meet requirements of the Commission's Rules of Practice.

DISSENT BY JONES, *Commissioner*:

The Commission has dismissed complaint counsel's appeal in this matter as "improvidently granted," thus sustaining the hearing examiner's order permitting Fidelity and Deposit Company of Maryland (hereinafter F & D) to intervene in this proceeding challenging

its acquisition by its parent respondent. American General Insurance Company.

The Commission has not seen fit to accompany its order with an opinion. We are left, therefore, wholly in the dark as to the rationale for its decision except for a single recital in the order referencing Section 3.23 of the Commission's Rules of Practice respecting the review of interlocutory rulings.¹ By this reference the Commission is apparently stating that the addition of a party to a complaint by a hearing examiner is simply a procedural ruling merely affecting the conduct of the trial which should not be disturbed unless clearly erroneous.²

This casual approach to a request to intervene in a Commission proceeding is in striking contrast to the full Commission's opinion in *Firestone* where the Commission took careful note of the "importance" of intervention issues to the "effective functioning of the Commission's adjudicatory process." *Firestone Tire & Rubber Company*, FTC Docket No. 8818, Opinion and Order Granting Limited Intervention (October 23, 1970) [77 F.T.C. 1666]. In *Firestone*, the Commission referred to its decision in this intervention area as the beginning of "a delicate experiment, one requiring caution and close observation." The Commission laid down two tests which should be considered in ruling on intervention requests: (1) the issues of fact or law raised by intervenors must be substantial and ones which will not otherwise be raised or argued, and (2) the substantiality of these issues must be of such "importance and immediacy to warrant an additional expenditure of the Commission's limited resources on a necessarily longer and more complicated proceeding in that case when considered in light of other important matters pending before the Commission." The Commission pointed out that resolution of this second factor will require a determination by the Commission "that such additional expenditure is fully consistent with the Commission's

¹ Section 3.23 provides that interlocutory rulings will not be reviewed except upon a showing that the ruling complained of involves "substantial rights and will materially affect the final decision and that a determination of its correctness before conclusion of the hearing is essential to serve the interests of justice."

² Neither the statute governing intervention in FTC cases nor the FTC's own Rules of Practice imply in any way that this issue is simply a matter of housekeeping affecting the conduct of the trial. Section 11(b) of the Clayton Act provides, in this proceeding:

The Attorney General shall have the right to intervene and appear in said proceeding and any person may make application, and upon good cause shown may be allowed by the Commission or Board, to intervene and appear in said proceeding by counsel or in person.

Section 3.14 of the Commission's Rules of Practice provides:

The hearing examiner or the Commission may by order permit the intervention to such extent and upon such terms as are provided by law or as otherwise may be deemed proper.

own assessment of overall priorities governing the allocation of its own resources.”

It is obvious that the factors enumerated in the Commission's *Firestone* opinion are not ones for determination by its hearing examiners and quite clearly do not simply involve housekeeping matters associated with the conduct of the hearings. The addition of a party is and always has been regarded as an issue on which only the Commission can finally rule. Moreover, so long as rulings on intervention embrace in some significant respect issues of resource allocation and delicate weighing of priorities and long range benefits to the public interest, the Commission cannot duck responsibility for the ultimate decision by hiding behind its examiner's ruling as it has tried to do in the instant case.

In the particular ruling made by the examiner the intervention request was granted and hence essential rights of parties are probably not foreclosed. Nevertheless, the effect of the ruling is to add a second party to the complaint with all of the consequences of a necessarily longer and more complex proceeding and the commitment by the Commission of additional resources to this case—factors which the Commission in its *Firestone* opinion pointed out must be weighed in determining the propriety of the requested intervention. This was not done. Moreover, the Commission's instant order is not limited to instances where intervention is granted by its examiners. Rather the Commission order speaks in generalities as if it is to be equally applicable to rulings by examiners denying intervention. Yet when intervention is denied substantial rights of parties may be involved. In these instances, it is obvious that a determination of the correctness of such rulings before conclusion of the hearings is essential to serve the interests of justice. Finally, the Commission's order here seems to reflect the majority's view that questions of intervention involve issues solely committed to the discretion of the examiner. The court decisions make this view of intervention clearly erroneous and it is time that this Commission faces up to this reality. Intervention issues involve both questions of law and questions of policy. This Commission majority cannot continue to avoid this issue by some automatic recantation of principles about leaving hearing examiners' rulings undisturbed. Nor can and should these Commissioners further obscure the intervention issue by automatically supporting the examiner's ruling granting intervention, thereby ensuring no appeal. It is as important for this Commission to *deny* intervention requests where they are improperly grounded as it is to grant them where proper legal and factual basis has been demonstrated.

In the instant case, the Commission's majority is in error not only in the standards which it applies to its own role and that of the examiner with respect to intervention requests, it is equally in error in permitting the examiner's ruling to stand. A review of the law and the facts involved in this application as they are detailed in the papers clearly demonstrate that in fact and in law F & D's petition to intervene was improperly granted by the examiner.

F & D argues that it should be permitted to intervene because, *if* liability is found *and* if divestiture is ordered, the interests of its policy holders and bond obligees *might* be adversely affected and the rights of its agents and employees *might* be ignored.³

Petitioner indicates that these groups have an interest in the "preservation of F & D as a going enterprise with a successful and respected identity in the property-liability insurance business." (Statement by F & D in Opposition to Request to File Interloc. App. at 2). It also asserts that "crucial facts concerning F & D, its competitive position before and after the acquisition and its prospect for future competitive viability are all matters as to which F & D alone has first-hand knowledge." (Interloc. App. Ans. of F & D at 4.)

These arguments of F & D are supported neither by the facts in movant's papers nor by the law applicable to requests of this nature.

F & D is a wholly-owned subsidiary of respondent, not an independent third party over which respondent lacks control. American General and F & D have a complete identity of interest on the question of the legality of the merger, and it has not been demonstrated here why crucial facts in the possession of a wholly-owned subsidiary corporation would be unavailable to or would not be presented by the parent corporation in the preparation of the parent corporation's defense in this case. It is inconceivable that the crucial facts to which F & D alone has first-hand knowledge are unavailable to or, if relevant, will not be argued—first hand or second hand—by American General in these proceedings.

³ F & D states that the importance to it of intervening arises from the demand in the complaint that F & D be divested by American General and its desire to "be certain that its separate interests are fully protected." F & D argues that if divestiture were ordered, it would:

expose F & D to acquisition under circumstances which could be highly detrimental to the interests of its policyholders and bond obligees. * * * To seek to identify, as complaint counsel does, F & D, the obligor on these contracts, with its stockholder, American General, is to ignore the obvious fact that the policyholders and bond obligees depend upon solvency of the insurance company here involved and cannot look beyond to the stockholder, American General. Also ignored are the rights of thousands of F & D agents and employees. Indeed it is the preservation of F & D as a going enterprise with a successful and respected identity in the property-liability insurance business that the Complaint seeks to preserve by challenging its affiliation with American General and demanding divestiture of ownership with the latter. (Statement by F & D in Opposition to Request to File Interloc. App. at 2.)

F & D has admitted that on the critical issue of liability its interests are identical to these of its parent American General. It has made no showing—and indeed made no effort to show—that its participation is necessary or that American General will not adequately protect those interests of F & D which they have in common. Nor has it sought to come to grips with the obvious question of how a wholly-owned subsidiary would be permitted by its parent to adopt a position in a lawsuit which differed in any way from that being taken by the parent whose entire interest in this pending matter is to defend the legality of the acquisition of the very party seeking intervention. Finally, it has failed to set forth how these interests may diverge from the respondent's interests, how they might be adversely affected by the type of relief ordered in this case if liability is established or in what way at this stage in the proceedings applicant's interests will not be adequately argued and protected by counsel supporting the complaint.

Administrative agencies and courts have consistently excluded petitioners from proceedings where, as in this case, they have found an identity of interests between petitioners and parties to the proceeding and where they have found that those same interests will be adequately protected by the current parties.⁴ This solid line of cases reflected in the Commission's own *Firestone* opinion has been wholly ignored by the Commission and by the hearing examiner.

It is alleged in the complaint that prior to their merger, F & D and American General were direct competitors in the business of underwriting fidelity and surety bonds, and that the merger substantially lessened competition in this market. Whatever relief may be ordered in this case, therefore, will have a single objective and justification—to restore competition. Certainly, there is no basis for assuming that F & D could or would be adversely affected by whatever remedies might be ordered here in order to achieve this objective.⁵

⁴ *Statesville v. AEC*, 441 F.2d 962, 977 (D.C. Cir. 1969) (intervention denied to Piedmont Cities, a power supply company, on the grounds that its interests in the AEC proceeding were identical to and would be adequately represented by the municipalities permitted to intervene); *City of San Antonio v. CAB*, 20 AD. L. 308, 317 (2d ser.) (Decisions) 6a.4(2) (D.C. Cir. 1967) (intervention denied two cities in route hearing in view of the large number of parties in the proceeding, the cities had been granted some participation, and "[t]he relevant needs of the geographic areas represented by petitioners * * * will be fully represented by the parties already participating"); *American Telephone and Telegraph Corp.*, 20 AD. L. 78 (2d ser.) (Decisions) 6a.4(1) (FCC 1966) (shareholders of respondent denied intervention in rate making proceeding on the ground *inter alia* that they failed to show that they had independent interests which corporate management would not adequately represent). See also, *New York-Florida Renewal Case*, 14 AD. L. 474 (2d ser.) (Decisions) 6a.4 (CAB 1963); *Semi-Steel Casting Co. v. NLRB*, 160 F.2d 388, 393 (8th Cir.), *cert. denied*, 332 U.S. 758 (1947).

⁵ Moreover in order to postulate differences in the interests in relief held by F & D and American General, it is necessary to assume that respondent in arguing remedy will be seeking to prevent re-establishment of F & D as a viable and strong competitor in this market.

Indeed, presumably F & D will be the principal beneficiary of the ruling ordered. In any event, at this point, we have absolutely no basis, nor has F & D provided any, for any assumption as to how and if F & D will be affected, adversely or otherwise, by this ruling. Perhaps more to the point is the fact that if this stage in the proceeding is reached and issues of relief then become central, the interests of F & D in being recreated as a viable healthy company will be identical to those of counsel supporting the complaint.

Finally, it has to be recognized that even at the relief stage in this case, F & D will still be a wholly-owned and controlled subsidiary of the respondent. As such, it is difficult to conceive that it would be permitted by respondent to represent any interests adverse to its parent corporation.

Petitioner has not only failed to indicate any *substantial* issues which it alone will raise, but it has failed to indicate that it has or could have any views at all to present in this hearing which will differ from those of its corporate parent.

Since F & D's petition has failed to make out any case entitling it to intervene as a matter of right, the question arises as to whether there is any reason grounded in considerations of equity or policy requiring the granting of its request as a matter of sound administrative discretion.

Here again the answer must be in the negative. The Commission's careful discussion of this issue in its *Firestone* opinion is directly applicable. It is obvious that if the Commission proceedings are to be conducted expeditiously, the Commission must do everything in its power, consistent with the rights of the parties, to ensure that no extraneous issues are introduced into its proceedings, that no discovery which is not absolutely essential to the issues is allowed and that no undue delays are permitted. The mere addition of extra counsel calls for another counsel making objections, conducting cross-examination, arguing in favor or against some requested ruling, another counsel filing proposed findings of fact or conclusions of law and another counsel filing briefs, and participating in the appeal. None of these factors is of importance if the intervenor has made out a case for his intervention as a matter of right. They become crucially important if his request is addressed simply to the discretion of the Commission. Where no affirmative benefit to the public interest can be shown to attach to the intervention, then the added inputs of extra parties and extra counsel become needlessly cumulative and duplicative.

In the instant case, the applicant here is in fact the respondent and in no sense an independent party capable of offering any different

proof or of taking any position different from that of respondent. No showing has been made that any interests which it has in the processing of this case either at the liability stage or at the relief stage are in any way different from those which are already represented by the two parties already named in this proceeding. The addition of another party to this complaint can only have the effect of complicating and protracting the proceedings.

Intervention, therefore, is wholly improper both as a matter of fact, as a matter of law and as a matter of sound policy. The addition of F & D to this case as a full party creates a precedent for intervention in the future which this Commission can only rue. I dissent.

ORDER DISMISSING APPEAL

By order of November 22, 1971, the Commission granted complaint counsel's request for permission to file an interlocutory appeal from an order of the hearing examiner authorizing the Fidelity and Deposit Company of Maryland to intervene in this proceeding.

Section 3.23 of the Commission's Rules of Practice provides that the Commission will not review interlocutory rulings of a hearing examiner except upon a showing "that the ruling complained of involves substantial rights and will materially affect the final decision, and that a determination of its correctness before conclusion of the hearing is essential to serve the interests of justice."

The Commission, having considered the briefs filed by the parties, has concluded that the requirements of Rule 3.23 have not been met and that permission to file interlocutory appeal was improvidently granted by our order of November 22, 1971. Accordingly,

It is ordered, That complaint counsel's interlocutory appeal in this matter be, and it hereby is, dismissed.

Chairman Kirkpatrick not participating, and Commissioner Jones dissenting and filing a dissenting statement.

MISSOURI PORTLAND CEMENT COMPANY

Docket 8783. Order, February 18, 1972

Order denying respondent's interlocutory appeal from hearing examiner's protective order in which he ordered production of and granted protective treatment to material sought under a specification of respondent's subpoenas *duces tecum* directed to seven third-party competitors.

ORDER DENYING INTERLOCUTORY APPEAL

This matter having come before the Commission upon respondent's appeal filed January 17, 1972, from the hearing examiner's protective

order dated January 6, 1972, in which the examiner ordered the production of and granted protective treatment to material sought under specification 6 of respondent's subpoenas *duces tecum* directed to seven third-party competitors of respondent and upon answers in opposition filed by complaint counsel and by certain third parties on January 24, 1972; and

It appearing that respondent has not made the requisite showing under Section 3.35(b) of the Commission's Rules of Practice that the ruling complained of involves substantial rights and will materially affect the final decision, and that a determination of its correctness before conclusion of the hearing is essential to serve the interests of justice; and

The Commission having therefore determined that the appeal should be denied:

It is ordered, That respondent's appeal from the hearing examiner's order dated January 6, 1972, be, and it hereby is, denied.

Commissioner MacIntyre abstaining from the action herein.

COWLES COMMUNICATIONS, INC., ET AL.

Docket 8831. Order and Opinion, March 1, 1972

Order denying respondent's motion to file an interlocutory appeal from the hearing examiner's denial of respondent's motion to dismiss complaint on the grounds that Commission violated its own Procedures and Rules of Practice and that complaint counsel will be relying on illegally obtained evidence.

OPINION OF THE COMMISSION

Respondents filed a motion with the hearing examiner seeking a dismissal of this complaint. The hearing examiner denied the motion and respondents requested permission to file an interlocutory appeal. For the reasons hereinafter stated, the request is denied.

The grounds urged by respondents in support of their motion are essentially two: (1) that the Commission in issuing its complaint violated its own Procedures and Rules of Practice and (2) that counsel supporting the complaint will be relying on illegally obtained evidence in the proof of the instant adjudicative proceeding and hence will be violating respondents' Fourth Amendment rights. (Motion, p. 2.)

The basis for both of these contentions by respondents rests on the circumstances surrounding the Commission's issuance of Advisory Opinion No. 128.¹ This Advisory Opinion was issued on May 22,

¹The Advisory Opinion was conveyed to respondents' counsel in a letter from the Secretary of the Commission. Under then existing rules, the text of this letter was held confidential. A "digest" or paraphrase of the substance of the opinion was issued in a press release May 23, 1967.

1967, at the request of these respondents and other members of the magazine subscription sales industry. It advised that the Commission found no illegality under the antitrust laws of the industry's proposed self-regulatory program designed to eliminate abuses in the sales practices of this industry.

Respondents argue that this opinion: (1) approved practices alleged as illegal in the instant complaint served on respondents on January 21, 1971; (2) committed the Commission not to institute adjudicative proceedings against these respondents while the Advisory opinion was in effect; and (3) bound the Commission not to use any information received during the course of investigations in connection with the Advisory Opinion in any subsequent adjudicative proceedings brought against them. We will deal with these various contentions in the course of our consideration of respondents' two principal grounds for their appeal.

Respondents' Contentions that Issuance of the Complaint Violates Commission Procedures and Rules of Practice

Respondents contend that the Commission's issuance of this complaint violated its own Section 1.3(b) of the Commission's Procedures and Rules of Practice and that, therefore, it must be dismissed in its entirety.

Section 1.3(b) of the Commission's Procedures and Rules of Practice provides that following issuance of an advisory opinion the Commission will not:

* * * proceed against the requesting party with respect to any action taken in good faith reliance upon the Commission's advice under this section, where all relevant facts were fully, completely, and accurately presented to the Commission and where such action was promptly discontinued upon notification of rescission or revocation of the Commission's approval.

Respondents argue that all of the sales practices challenged in the instant complaint were either approved or permitted by the Commission's Advisory Opinion or were prohibited by their own industry self-regulatory Code which was approved by the Advisory Opinion. They argue further that in issuing its Advisory Opinion, the Commission expressly committed itself not to sue the respondents or other industry members subject to the Code for any of the practices which they claim were prohibited or permitted while the Code was in effect, and that, therefore, all of their activities were undertaken in reliance on this commitment and could not be challenged, until the Advisory Opinion was rescinded.

The answer to all of respondents' assertions, understandings and beliefs concerning the Advisory Opinion must be found squarely

within the four corners of the industry request for a Commission Advisory Opinion and the text of the Commission's response. It is necessary, therefore, to examine this opinion in order to deal fully with respondents' contentions.

The Commission's opinion and the industry's original request show clearly that the magazine subscription sales industry came to the Commission for the express purpose of receiving an *antitrust* clearance for a self-regulatory program which the industry desired to institute in order to clean up its own sales practices in the solicitation and sale of magazine subscriptions.²

The Commission's Advisory Opinion stated unequivocally that with the modifications contained therein, the Commission believed the antitrust obstacles to the Code could be overcome and the Code approved so as to enable the industry to carry out its self-regulatory program. The Commission's opinion makes clear its almost total preoccupation with the antitrust problems which were raised by the industry's proposals to levy sanctions against Code violators.³ Thus, the Commission's Advisory Opinion pointed out:

The Commission has given this matter very careful consideration in view of the magnitude of the problems which confront the industry and the obvious sincerity of the [PDS Agency] Committee in attempting to devise ways to cope with those problems. Even taking all these factors into consideration, however, the Commission is unable to give its approval to those sections of the Code which apply to the salesman as those sections are now written. While the Code now provides that the action to be taken with respect to the salesman found to be in violation would be on the basis of a recommendation by the Administrator rather than by agreement among the signatory agencies, the Commission believes the probable result of that recommendation would be to substantially interfere with those individuals' right of employment and their right to have their fate decided by their individual employers uninfluenced by virtually mandatory recommendations from the Administrator. However, the Commission does not believe that this would call for outright rejection of the Code, since it *is believed the Code can be amended so as to achieve the legitimate objectives of the Committee without running afoul of the antitrust laws.*

* * * * *

The Commission is further of the opinion, now that greater participation of the independent agencies has been insured, *that it is possible to apply the Code as now written to the publishers and agencies in such a manner as not to*

²The industry's preoccupation with the antitrust implications of its self-regulatory program is borne out by the fact that originally it had gone to the Antitrust Division of the Department of Justice for a railroad release and had been referred by the division to the Federal Trade Commission. (See letter, Zimmerman to Kintner, August 24, 1966.)

³Indeed it was this precise issue of private police power which gave rise to Commissioner Elman's dissent. However, there is no doubt that even Commissioner Elman had no concept that in approving the self-regulatory program, the Commission was abdicating its own law enforcement responsibilities to the industry. See, for example, Chairman Weinberger's opening statement at the Commission's 1970 hearing concerning the operations of the PDS Code and Commissioner Elman's interchange with industry counsel on this precise point. See note 7 *infra* for citations.

do violence to the antitrust laws, particularly if the element of coercion can be truly eliminated insofar as the independent agencies are concerned when they are arriving at their decision as to whether to join or whether to remain under the Code after having joined. It should be made clear, however, that this conclusion is a tentative one since there is little recorded experience upon which to predicate such a judgment. Therefore, this opinion is based on the understanding that there will be no coercion of any agency to subscribe to the plan, no coercion of any agency to remain in it after it has subscribed and no retaliation of any kind against any agency which does not choose to join or which subsequently elects to leave after having joined. (Emphasis added.)

Indeed the Commission was so concerned with the antitrust implications of the industry's assertion of sanction power over its members that it was reluctant to make its approval unconditional. Therefore, it advised the industry that its approval was limited to a trial period of three years and that during this period the industry was to provide it with detailed reports on the operations of the Code so that the Commission could observe for itself the way in which the Code enforcement provisions were actually implemented.

There is not the slightest indication either in the opinion or in the record before us on this motion that the Commission in approving the organization and enforcement machinery of the Code from an antitrust viewpoint also granted clearance for any proposed types of selling practices or in any way surrendered any right or power to proceed against unfair or deceptive acts and practices engaged in by members of this industry. The industry's request clearly shows that no immunity from prosecution for selling practices was sought. Although the Commission's opinion noted that the proposed Code contained substantive provisions setting out the practices prohibited by the Code, the Commission observed that in its view these provisions merely attempted to restate the substantive law respecting practices in the selling of magazine subscriptions and as such it had no objection to them.⁴ This clearly affords no basis for the contention that the Commission thereby "approved" any or all selling practices not specifically prohibited by the Code.⁵

Nor is there anything in the Commission opinion or the papers before us which indicates an intention on the part of the Commission to delegate exclusive policing authority to the industry. Not only

⁴The sentences containing this observation in the Advisory Opinion read as follows:

It is noted that the Code incorporates a number of provisions which attempt to restate the substantive law applicable to this method of field selling of magazine subscriptions. The Commission herewith advises you that it sees no objection to these provisions as presently worded.

⁵Respondents argue that Paragraphs 5(a), 6(a), 7(a), 7(c), and 8 of the complaint challenge practices which were permitted under the Code and that the Commission therefore approved of those practices. Aside from the fact that the Commission did not "approve" any selling practices, we have examined the Code and fail to find any indication that such practices are permitted. Indeed, the Code appears to prohibit the practices alleged in Paragraphs 5(a), 6(a), and 7(a).

1 did the Commission not surrender any such rights, it could not have done so legally. The Commission has no power to delegate even temporarily to private parties its statutory duties to enforce the law. It did not do so in this case.

Respondents suggest in their papers that their alleged understanding of the immunity purportedly granted to them by the Advisory Opinion was supported by statements made by members of the Commission and by its staff. We have no indication of what these statements might be, but in any event respondents' assertions on this point are legally and factually irrelevant.⁶ The Commission is a collegial body and can act officially only in its collegial form. No individual expressions on the part of Commissioners or staff can change one iota of the Commission's official actions as they are reflected by its response to this industry's request for an Advisory Opinion.⁷

⁶ Commissioner Elman in his dissent from the Commission's decision to issue the Advisory Opinion deplored the fact that the Commission's Opinion permitted the industry to exercise what he termed the regulatory powers of government. But nothing in his statement can possibly be interpreted or implied to be a representation that in his view the Commission's opinion was allowing the industry to exercise any powers to the exclusion of the Commission's right and duty to do so. Again, there is simply nothing in this statement which could form any reasonable basis for respondents' present claims in this regard. See also Commissioner Elman's interchange with counsel for the industry during the public hearing on the operations of the PDS Code. *Infra* note 8.

The only other "statement" under consideration, by a Commissioner or Commission staff members, is an oblique reference in a letter by The Hearst Corporation's counsel (Docket No. 8832) to the Special PDS Agency Committee which requested the Advisory Opinion about a meeting he had had with then Commission Chairman Dixon in which counsel reported that Chairman Dixon intimated that complaints would issue against industry leaders unless the Code "developed" into operation. (Letter, Kintner to Campbell, February 21, 1967.) Whatever encouragement the Chairman reportedly gave to the industry to go forward with their own efforts to clean up abuses in their industry can hardly be translated by hindsight into a commitment or understanding given to respondents that approval of their self-regulatory program constituted a formal Commission commitment not to proceed adjudicatively against industry members prior to revocation or expiration of the Advisory Opinion.

⁷ While we do not believe that statements made outside the text of the Advisory Opinion can in any way change the plain meaning of the opinion itself, it is of some relevance to respondents' assertions about statements of individual Commissioners, to note the statement of Chairman Weinberger made on behalf of the full Commission in the course of his opening statement in the public hearing which the Commission held at the request of these respondents and other industry members to consider the operations of the PDS Code.

[I]t is the Commission's view that industry efforts to[wards] self-regulation should in no way affect or limit the Commission's responsibility under Section V of the Federal Trade Commission Act to eliminate any deceptive or unfair practices that may exist in the industry, nor is it the purpose of this hearing to hear arguments on how the Commission can or should act to exercise its responsibility to protect the public interests. (Special Public Hearing In The Activities Of Door-To-Door Magazine Subscription Sales Industry, March 10, 1971, p. 3.)

During the hearings, Commissioner Elman asked counsel for the industry association whether the PDS Code "repealed" any aspect of the Federal Trade Commission Act. (*Id.*, p. 51) Counsel for the association, who initiated the request for Advisory Opinion No. 128, responded in the negative. He characterized the relationship between the Commission and the industry as "a joint cooperative effort." (*Id.*, p. 52.)

It would be anomalous for a Commission, empowered and directed by Congress to initiate enforcement actions against unfair and deceptive acts and practices, to be stopped from such actions by the private expressions of staff members or even of individual Commissioners. This is not the law. Courts will not apply the principles of estoppel against government actions taken to protect the public interest. *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384 (1947); *Utah Power and Light Co. v. United States*, 243 U.S. 389, 408-409 (1917); *Nichols and Co. v. Secretary of Agriculture*, 131 F.2d 651, 658-659 (1st Cir. 1942); *SEC v. Torr*, 22 F. Supp. 602, 611-612 (S.D. N.Y. 1938); *L. B. Samford, Inc. v. United States*, 410 F.2d 782, 788 (Ct. Cl. 1969); *Bornstein v. United States*, 345 F.2d 558, 562, (Ct. Cl. 1965).

Our examination of the record presented on this motion has failed to indicate any factual or legal basis for respondents' contentions. Quite apart from the legality of any such grant of power as is claimed by respondents, if any such sweeping commitment to confer on an industry a blanket immunity from prosecution was to have been granted, it would surely have been stated quite expressly and not be embodied in a respondent's "understanding" of what on its face was a very carefully worded Advisory Opinion discussing in painstaking detail the Commission's reactions to the industry proposal. It is inconceivable that, if the Commission was in fact granting the industry the type of power which these respondents now claim, that not a single word about it was included in the Commission's lengthy discussion of the legality of the industry proposal. We, therefore, conclude that respondents have failed to sustain their argument that the Commission's Advisory Opinion expressly or implicitly contained a commitment that industry members would be immune from prosecution under Section 5 of the Federal Trade Commission Act while the Advisory Opinion was in effect.⁸

Respondents' Contention that their Fourth Amendment Rights have been Violated

Respondents' second argument in support of their motion to dismiss the instant complaint is also without factual or legal support.

⁸ In view of our conclusion on this point, it is unnecessary for us to deal with the question of the date when the Advisory Opinion expired or with the argument of complaint counsel, accepted by the examiner, that whatever respondents' understanding as to commitments which might or might not have been given, the complaint filed against these respondents was served after the expiration of the Advisory Opinion by its own terms and hence respondents' argument must fall on this ground alone. We have no quarrel with the examiner's conclusion on this point but we have elected to treat the more fundamental issue raised by respondents because of its significance both to this part of respondents' motion to dismiss as well as to the second part of its motion to which we now turn.

It, too, rests essentially on respondents' basic contentions with respect to the meaning of Advisory Opinion No. 128 and the commitments which they argue were given in connection with it.

Respondents state that part of the information complaint counsel will rely on to prove the allegations of the instant complaint was in fact provided voluntarily by respondents in response to Commission investigations of the administration of the PDS Code. Respondents contend that these documents were furnished to the Commission only pursuant to their agreement to do so under Advisory Opinion No. 128 and assert that they would not have cooperated in these investigations and would not have submitted this information had they been aware that the information would be used against them in an adjudicative proceeding (Respondents' Motion for Order Dismissing Complaint, p. 20) (hereinafter cited as RM). From this they argue that the use of any documents obtained by the Commission in connection with the PDS Code "constitutes the practical equivalent of using information obtained through a warrantless search and thereby a violation of the Fourth Amendment."

The hearing examiner found "no indication" in the record before him that an illegal search had taken place. He noted that the Advisory Opinion notified the industry that it would be subject to careful Commission scrutiny. He noted that the Commission had not relinquished any of its powers to investigate the practices of the PDS Industry stating: "The Commission had the right and authority under the Advisory Opinion and the mandate of the Congress under the Federal Trade Commission Act to investigate these [PDS] complaints. The Commission so informed the respondents." (Hearing Examiner's Order Denying Motion to Dismiss Complaint, *In the Matter of Hearst Corporation et al.*, Docket No. 8832, p.6, referred to in Order Denying Motion to Dismiss Complaint in the present matter.) We agree with the examiner's conclusion.

Respondents do not deny that under Advisory Opinion No. 128 they were required and agreed to provide the Commission with documentation as to the administration of their self-regulatory Code.⁹ Essentially respondents are arguing first that the Commission misled

⁹ The Advisory Opinion made the following provision with respect to the furnishing of information to the Commission:

[T]he Administrator or the Committee must submit reports to the Commission of each complaint which was received, considered or investigated and of each action taken by the Administrator. Further, the opinion is being rendered with instructions to the staff of the Commission to initiate periodic inquiries after the plan has been put into effect to determine and report to the Commission as to how it is actually working.

After this opinion was issued, the PDS Code Administrator made periodic submissions of documents to the Commission. The Commission staff initiated several investigations of PDS Code signatories and received from them various documents pertinent to their business operations.

them into agreeing to provide this documentation concerning the administration of their self-regulatory Code and, second, that they were also misled into believing that the documentation which they supplied would not be used in any adjudicative proceeding.

Respondents acknowledge that the Commission investigators stated to them that they were requesting access to respondents' files in connection with investigations of the PDS Code. (Respondents' Reply to Complaint Counsel's "Answer to Respondents' Motion for Order Dismissing Complaint," p. 3, Ex. A; respondents' Reply To Answer To Request For Permission To File An Interlocutory Appeal From Order Denying Motion To Dismiss Complaint, pp. 3-5, and Exs. A and B attached thereto.) No misrepresentation, therefore, was made by these investigators as to the information they were seeking or the purpose of their requests. Since, as noted above, we have concluded that the Commission made no commitment to refrain from prosecuting industry members cooperating in the PDS self-regulatory program, we do not find that respondents were misled into agreeing to provide the Commission with documentation concerning the implementation of this program. Therefore, we do not find any wrongful or improper action on the part of the Commission in seeking respondents' disclosure of documents to the Commission.

We find equally unpersuasive the second prong of respondents' search and seizure argument that the Commission in some way committed itself not to use the documents received in the course of its monitoring of the PDS self-regulatory Code in any adjudicative proceeding.

Respondents were on notice of the fact that documents and information obtained by the Commission under any of its powers could be used against them in any adjudicative proceedings. Section 3.43(c) of our Procedure and Rules of Practice states:

Any documents, papers, books, physical exhibits, or other materials or information obtained by the Commission under any of its powers may be disclosed by counsel representing the Commission when necessary in connection with adjudicative proceedings and may be offered in evidence by counsel representing the Commission in any such proceeding.

Thus, respondents were fully aware at all times that materials secured in investigations of the PDS Code could be used in adjudicative proceedings. If they had desired or received some contrary commitment with respect to these so-called PDS generated documents, it is quite evident that such a commitment would have had to be express and explicit. No such commitment is pointed to by respondents.

Respondents, therefore, have not made out even a colorable claim that their Fourth Amendment rights will in any way be infringed

by the Commission in the course of the instant adjudicative proceeding through use by counsel supporting the complaint of documents secured in the course of investigations of the PDS Code or submitted to the Commission by respondents in connection with the operations of that Code.

For the reasons stated above we deny the respondents' appeal from the hearing examiner's denial of their motion to dismiss the complaint.

ORDER DENYING MOTION TO FILE INTERLOCUTORY APPEAL FROM
DENIAL OF MOTION TO DISMISS COMPLAINT

Respondent Cowles Communications, Inc., having requested permission to file an interlocutory appeal from the hearing examiner's November 8, 1971, Order Denying Motion to Dismiss Complaint; and

The Commission having considered said request and having determined, in accordance with the views expressed in the accompanying opinion, that respondents' request should be denied:

It is ordered, That respondent's motion for permission to file an interlocutory appeal from the hearing examiner's November 8, 1971, order denying its motion to dismiss the complaint in this matter be, and the same hereby is, denied.

Chairman Kirkpatrick and Commissioner MacIntyre not participating.

EATON YALE & TOWNE, INC.

Docket 8826. Order, March 2, 1972

Order denying respondent's motion for a stay of hearings and appeal from hearing examiner's denial of application for subpoena *duces tecum* directed to Federal Trade Commission.

ORDER DENYING RESPONDENT'S MOTION FOR STAY OF HEARINGS
AND DENYING APPEAL

This matter is before the Commission upon respondent's motion for a stay of hearings and its appeal from the hearing examiner's denial of application for subpoena *duces tecum* to the Federal Trade Commission, filed February 16, 1972; and the answer of complaint counsel in opposition thereto filed February 24, 1972.

The hearing examiner on February 14, 1972, in a pretrial hearing, considered respondent's application for a subpoena to the Federal Trade Commission (a copy of which is attached to the appeal and identified as Exhibit A), and the question of a stay in the beginning

of the trial, scheduled for March 6, 1972. The examiner denied the application and he also refused to consider a stay (Tr. 246-47; 264-65). The record shows that he carefully weighed the issues presented. Upon hearing argument he expressed the view that it was not necessary for respondent to possess the additional data sought in order to cross-examine witnesses during the case-in-chief (Tr. 245-46; 251). He held, however, that if it was later demonstrated the respondent would be prejudiced by his ruling he would grant a recess to permit the production of such data and the recalling and re-examination of witnesses if necessary.¹ As to at least some of the information sought the examiner expressed his belief that it didn't appear to be material or relevant (Tr. 249). The hearing examiner additionally offered to sign subpoenas to enable respondent to obtain directly from witnesses certain, if not all, of the information in question (Tr. 255-56; 259).

Under Section 3.36 of the Commission's Rules of Practice, a respondent seeking access to information in the confidential records of the Commission must demonstrate not only general relevancy and the reasonableness of the scope of the request but also "a showing that such * * * information * * * is not available from other sources by voluntary methods or through other provisions of the rules in this chapter." Respondent has not demonstrated that it has satisfied this provision of the Commission's rules.

In any event, the issues here presented, both as to the stay and the issuance of the subpoena, are matters which the Commission ordinarily leaves to the sound discretion of the hearing examiner. On the matter of discovery the Commission has stated on a number of occasions that it will not overrule the hearing examiner's decision except where there has been a showing of an abuse of discretion or other unusual circumstances. See, for example, *Maremont Corporation*, Docket No. 8763 (July 28, 1969) [76 F.T.C. 1061]. No such showing has been made here. In the circumstances, both the request for the stay and the appeal from the examiner's denial of respondent's application for subpoena *duces tecum* will be denied. Accordingly,

It is ordered, That respondent's motion for a stay of hearings in this matter, scheduled to commence March 6, 1972, be, and it hereby is, denied.

¹He summarized his view at page 271 of the record in part as follows:

"I may reiterate that in denying respondent's motion I resummariize what I said before and that is that if any prejudice is shown during the course, any prejudice to respondents, the case will be recessed until that can be adjusted and respondents have an opportunity for further discovery, if necessary and if prejudice is shown. If certain witnesses can be recalled, he will be recalled."

He stated at pages 250-51 in part:

"* * * if the respondent can show me that at that point he would be prejudiced with regard to cross-examination, of which I don't believe is so here presently, but I may think it is so later on, I will require that any witnesses be recalled to relieve that situation. You may assume the same thing. * * *"

It is further ordered, That respondent's appeal from the hearing examiner's denial on February 14, 1972 of its application for a subpoena *duces tecum* to the Federal Trade Commission be, and it hereby is, denied.

COWLES COMMUNICATIONS, INC., ET AL.

Docket 8831. Order and Opinion, March 2, 1972

Order denying respondent's appeal from the hearing examiner's order requiring respondents to comply with subpoenas *duces tecum* obtained by complaint counsel.

OPINION OF THE COMMISSION

This matter is before the Commission on the interlocutory appeal of respondents from the hearing examiner's order of November 5, 1971, requiring respondents to comply, in substantial part, with subpoenas *duces tecum* obtained by complaint counsel.

Claiming abuse of discretion, respondents base their appeal on two main arguments: (1) that the subpoenas should not have been issued upon the *ex parte* application of complaint counsel; and (2) that the subpoenas are a belated attempt to engage in post-complaint investigation. We will consider these arguments seriatim.

I Complaint counsel's *ex parte* application for the subpoenas

Respondents object to the alleged procedural injustice resulting from the ability of complaint counsel to obtain subpoenas directed at them by *ex parte* application under Sections 3.35 and 3.34 of the Commission's Rules of Practice, whereas respondents are required to make a formal motion—which is subject to answer by complaint counsel—in order to obtain a subpoena for discovery of Commission files under Rule 3.36. The effect of this, according to respondents, is that complaint counsel is favored by not being required to make a showing on the record of the specificity of designation, relevancy and reasonableness in scope of the information sought by the subpoenas. Respondents claim that this circumstance violates the Administrative Procedure Act, 5 U.S.C. §599 (“* * * requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons”), and the due process clause of the Fifth Amendment.

Rule 3.36 requires that an application for issuance of a subpoena requiring the production of confidential files of the Commission shall be in the form of a motion filed in accordance with the provisions of Rule 3.22(a). A motion filed under Rule 3.22(a) is subject to answer by the opposing party under Rule 3.22(c). Thus, if a respondent attempts to obtain a subpoena for discovery of confidential Commis-

sion files, the request for the subpoena will be subject to an answer by counsel supporting the complaint.

The need for this rule is clear. Commission files often contain documents and information of a highly confidential nature, including trade secrets, names of complainants, and data supplied by competitors of a respondent. Congress has recognized the confidentiality of this information. Section 10 of the Federal Trade Commission Act makes it a criminal offense for Commission employees to make public any information obtained by the Commission without first obtaining its permission. The Commission restricts access to confidential information in its files by allowing its release only upon good cause shown pursuant to Rule 4.11. Another method of insuring the safety of the Commission's confidential files is the procedure required by Rule 3.36.

The reasonableness of Rule 3.36 may be seen by examining what would happen without it. If a respondent could obtain a subpoena under Rule 3.34 for discovery of the Commission's confidential files, there is nothing in the rules which would provide complaint counsel with the opportunity of submitting an answer. What rule would complaint counsel rely on to file a motion to quash a subpoena issued on application of a respondent and directed to the Secretary of the Commission? There is none. Without an adversarial response from complaint counsel, the Commission would be at a disadvantage in attempting to weigh the specificity, relevancy and reasonableness of the subpoena. For this reason, Rule 3.36 provides an opportunity for complaint counsel to respond to an attempt by respondent to obtain a subpoena to discover the confidential files of the Commission.

Respondents argue that this procedure would require them to state on the record the specificity, relevancy and reasonableness of the subpoena, whereas, under Rule 3.34 complaint counsel may obtain a subpoena directed at respondents' files by an *ex parte* application. This ignores the fact that the Commission cannot itself enforce the subpoenas. If respondents doubt the specificity, relevancy and reasonableness of the subpoenas, they can refuse to comply, which will require the Commission to allege and prove these factors in a United States district court on an enforcement action filed under Section 9 of the Federal Trade Commission Act (15 U.S.C. §49). *Adams v. Federal Trade Commission*, 296 F.2d 861, 866 (8th Cir. 1961), *cert. denied*, 369 U.S. 864 (1962).

Respondents' argument is that the granting of an *ex parte* subpoena is discriminatory and that both parties should have equivalent discovery rights. This same argument has been rejected by the courts.

In *The Sperry and Hutchinson Company v. Federal Trade Commission*, 256 F. Supp. 136 (S.D.N.Y. 1966), a respondent in a Com-

mission administrative action filed a complaint for declaratory judgment and relief in the nature of mandamus against the Commission, alleging that its discovery rights under Commission rules were not equivalent to the discovery rights of the Commission. Sperry sought discovery and inspection of a mass of statements and documents accumulated by the Commission during the investigation. The court denied Sperry's motion for a preliminary injunction. Sperry had relied on Section 12 of the Administrative Procedure Act (now codified as 5 U.S.C. §559), on which respondents also rely. The court held, regarding the rights of a respondent in a Commission adjudicative proceeding:

Section 12 adds little to Sperry's argument. This provision states that "*except as otherwise required by law*, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons." By no means can it be said that the Commission has flouted this open-ended legislative direction.

Such "equal" rights of access to evidence as Sperry may have under this provision are by no means unqualified. As the statute indicates these rights are plainly subject to the protections against disclosure of confidential information required by the Commission's rules. It was primarily for this reason that the Commission denied Sperry's motion. 256 F. Supp. at 143.

The court recognized that the Commission had facilities for inspection not available to a private litigant, but held that this did not violate the Administrative Procedure Act or the due process clause.

Similarly, the courts have denied injunctions to respondents claiming a violation of the Administrative Procedure Act and the due process clause because only complaint counsel can obtain special reports under Section 6(b) of the Federal Trade Commission Act, 15 U.S.C. §46(b), whereas respondents cannot use that means for obtaining information and evidence. *Papercraft Corp. v. Federal Trade Commission*, 307 F. Supp. 1401 (W.D. Pa. 1970); *Union Bag-Camp Paper Corp. v. Federal Trade Commission*, 233 F. Supp. 660 (S.D. N.Y. 1964).

These cases show that neither the due process clause nor the Administrative Procedure Act requires the Commission to make available to respondents exactly the same procedures for obtaining information and evidence as those afforded complaint counsel. We find, therefore, that the examiner did not err in issuing the subpoenas on the basis of complaint counsel's *ex parte* application.

II Complaint counsel's post-complaint discovery

Respondents argue that complaint counsel are belatedly attempting to engage in post-complaint investigation in violation of the Commission's Rules of Practice.

The Commission has stated its policy with respect to post-complaint discovery by complaint counsel, holding that "complaint counsel may properly find, particularly after the issues are refined in a prehearing conference, that some additional documentation may be required to *round out, extend, or supply further details* for the particular transactions to be pursued. * * * The rules are not intended to provide for comprehensive post-complaint investigation, but only post-complaint discovery." *All-State Industries of North Carolina, Inc., et al.*, Docket 8738, Order Granting Interlocutory Appeal, November 13, 1967, p. 6 [72 F.T.C. 1020]. The Commission has clarified that statement by making it clear that the policy of requiring complaint counsel to have evidence sufficient to support a *prima facie* case before issuance of the complaint is merely an internal "housekeeping" matter. *Lehigh Portland Cement Company*, Docket 8680, Order Denying Interlocutory Appeal, August 9, 1968 [74 F.T.C. 1589]. The Commission has also made clear that these internal administrative guidelines do not confer upon a respondent a legal right to object to a post-complaint subpoena on the grounds that the material sought should have been in hand at the time of the issuance of the complaint, and that the Rules of Practice establish the standards for dealing with discovery matters in the light of the issues raised by the complaint. *All-State Industries of North Carolina, Inc., et al.*, Docket 8738, Supplemental Clarifying Opinion by the Commission, August 9, 1968 [74 F.T.C. 1591]. The United States Court of Appeals for the District of Columbia upheld this policy statement in the *Lehigh* case, *supra, sub nom., Federal Trade Commission v. Browning*, 435 F.2d 96, 102-03 (D.C. Cir. 1970).

Respondents' argument that the subpoenas are improper post-complaint discovery is, therefore, without merit.*

III Other issues raised by respondents

Respondents also raise—but do not argue—two other issues on appeal (Memorandum in Support of Interlocutory Appeal, p. 9):

The subpoenas are so unreasonable in scope and so burdensome that they should be quashed; in the alternative, respondents should be awarded its cost of production under applicable rules.

The subpoenas were the subject of two prehearing conferences as well as other informal conferences between complaint counsel and counsel for respondents (Complaint Counsel's Answer in Opposition

* *Federal Trade Commission v. Crowther*, 430 F.2d 510 (D.C. Cir. 1970), cited by respondents, merely holds that the Commission must identify and articulate the reasons for declining to follow a stated policy. Since the Commission has not declined to follow its stated policy, *Crowther* is inapplicable.

to Respondents' Appeal, p. 8). As a result, respondents agreed to produce some of the subpoenaed information, and the hearing examiner narrowed the scope of the remaining specifications. The hearing examiner reasonably exercised—rather than abused—his wide discretion in ordering compliance with the subpoenas.

Respondents also request that they be awarded the cost of producing the documents. The Commission's rules make no provision for such a procedure, nor do we believe it is necessary here. If respondents wish to relieve themselves of the burdensome costs which they assert will be involved in complying with these subpoenas, they can do so by permitting Commission counsel access to the subpoenaed files to do the work of selecting the documents to be produced. This was the effect of a court order issued in *FTC v. Emanuel Gladstone*, Civil No. 13,903 (N.D. Ga.), Order issued August 25, 1970 (Tr. pp. 3-4), and a similar procedure appears appropriate here if respondents so choose.

In this matter Chairman Kirkpatrick did not participate, and Commissioner MacIntyre abstained from voting.

ORDER DENYING INTERLOCUTORY APPEAL

Respondents having filed an interlocutory appeal from the hearing examiner's November 5, 1971 Order Ruling on Motion to Quash Subpoenas Duces Tecum; and

The Commission having considered said appeal and the answer of counsel supporting the complaint in opposition thereto, and having determined, in accordance with the views appeal should be denied;

It is ordered, That respondents' appeal from the hearing examiner's November 5, 1971 order be, and it hereby is, denied.

Chairman Kirkpatrick not participating, and Commissioner MacIntyre abstaining.

THE HEARST CORPORATION, ET AL.

Docket 8832. Order and Opinion, March 9, 1972

Order denying respondent's interlocutory appeal from hearing examiner's ruling denying a Motion to Dismiss and/or for Summary Decision.

OPINION OF THE COMMISSION

This matter is before the Commission on the request of International Magazine Service of the Mid-Atlantic, Inc. (IMS) to file an interlocutory appeal from the hearing examiner's denial of a Motion to Dismiss and/or for Summary Decision. For reasons set forth

below, we find that respondent's request fails to make the necessary showing required by Section 3.23 of the Commission's Rules of Practice to justify permitting the interlocutory appeal.¹

IMS' Motion to Dismiss and/or for Summary Decision sought dismissal of five allegations in the complaint, Paragraphs 4(e) and 5(e), 4(f) and 5(f), 6(a), 6(c), and 7, on the ground they failed to state a cause of action. Respondent claims the examiner erred in failing to dismiss these paragraphs, citing four examples of error. First, respondent argues that Paragraph 6(c) fails to allege a violation because it relates to the collection of money owed IMS and not to practices inducing members of the public to sign subscription contracts. Second, IMS challenges Paragraph 4(f) and 5(f), which allege that it gives a false reason when declining to cancel a subscription, on the ground that such action is not illegal where IMS is under no obligation to cancel. Third, Paragraph 6(a) (which alleges IMS stated subscription costs as "50 cents per week" over a period of 60 months) is challenged on the ground that it does not allege any misrepresentation. Fourth, Paragraph 7 is challenged on the ground that it does not allege specific circumstances under which IMS' alleged refusal to extend a 72-hour cancellation privilege is a violation of law.

Respondent also sought summary decision on the allegations contained in complaint Paragraphs 4(c)-5(c), 4(d)-5(d), 4(e)-5(e), 4(f)-5(f), 6(c)(1), 6(e) and 7(b) and supported this portion of the motion with the sworn affidavits of its president. Complaint counsel did not file opposing affidavits, but did file an unsworn answer to the motion stating that they would produce witnesses and documents at trial to contradict the alleged facts contained in respondent's affidavits. Respondent argues that complaint counsel were required to answer with sworn affidavits under Section 3.24 of the Commission's Rules of Practice and that complaint counsel's unsworn statements failed to raise an issue of fact, thereby warranting summary decision.

In requesting permission to file an interlocutory appeal in this matter, respondent argues that its motion involves approximately half the allegations in the complaint and that the trial would be much shorter if the motion had been granted. It contends that the correctness of the examiner's ruling should thus be determined before the hearings commence. We do not agree that these circumstances necessitate an interlocutory appeal. The same circumstances arise when any motion to dismiss or for summary decision is denied. While

¹ Section 3.23 provides that permission to file an interlocutory appeal will not be granted:

except upon a showing that the ruling complained of involves substantial rights and will materially affect the final decision, and that a determination of its correctness before conclusion of the hearing is essential to serve the interests of justice.

the examiner's ruling may affect the final decision, it is not essential that its correctness be determined before the hearing. Further, the ruling does not involve substantial rights of respondent. The only possible prejudice to respondent is having to go to trial on the complaint allegations it is challenging here. If complaint counsel prove their case, respondent will have ample opportunity after an initial decision is rendered to reassert its challenge to the examiner's ruling.

Nevertheless, while denying this appeal we recognize that respondent's request to appeal arose in part due to the Commission's new summary decision rule. Therefore, in order to prevent a recurrence of this problem, we wish to indicate the procedures to be followed in the future under this rule.²

Rule 3.24 provides in relevant part:

(1) Any party to an adjudicatory proceeding may move with or without supporting affidavits for a summary decision in his favor upon all or any part of the issues being adjudicated. * * *

(2) Any other party may, within ten (10) days after service of the motion, file opposing affidavits. * * *

(3) Affidavits shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matter stated therein. The hearing examiner may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. *When a motion for summary decision is made and supported as provided in this rule, a party opposing the motion may not rest upon the mere allegations or denials of his pleading; his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue of fact for trial. If no such response is filed, summary decision, if appropriate, shall be rendered.*

(4) Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the hearing examiner may refuse the application for summary decision or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or make such other order as is appropriate and a determination to the effect shall be made a matter of record. (Emphasis added.)

We will consider the following questions which are raised by the provisions of this rule: (1) under what circumstances are affidavits

² Our ruling today is made without prejudice to respondent's right to file with the hearing examiner a motion for reconsideration of his denial of summary decision in light of this opinion. In entertaining such a motion the hearing examiner should exercise his discretion to permit complaint counsel to file opposing affidavits, should they choose to do so, despite the fact that the time for filing opposing affidavits has passed. We believe continuance may be justifiable in this case if complaint counsel's failure to file was based on an excusable misinterpretation of the new rule.

or other evidentiary material required to meet a motion for summary decision; and (2) are counsel affidavits sufficient to oppose a summary decision motion.

Requirement of Opposing Affidavits

In our view, the rule must be read to require opposing affidavits or other evidentiary-type material so long as the affidavits and material filed in support of the motion for summary decision demonstrate that the moving party is entitled to judgment as a matter of law. Any other interpretation of this rule could defeat its purpose of eliminating delays in adjudication arising from mere assertions of factual issues which are not well grounded. To allow sworn affidavits to be opposed by unsworn assertions of counsel could very well frustrate the rule's utility. We note also that Rule 3.24 closely follows the provisions of Federal Rule 56, and the controlling Federal cases are unanimous in holding that counter-affidavits are required to avoid summary judgment where the movant's affidavits are sufficient.³

Failure of an opposing party to file counteraffidavits, however, does not automatically entitle the moving party to summary decision. Summary decision under Rule 3.24 would be improper where the movant's affidavits are insufficient.⁴ The movant has the burden of establishing the nonexistence of any genuine issue of material fact, and all doubts are resolved against him.⁵

In *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159-60 (1970), the Supreme Court held that if the moving party fails to shoulder his burden, his motion should be denied even though the opposing party has presented no evidentiary materials in opposition.⁶ Also, the courts have emphasized that summary judgment is improper where credibility is crucial or where various inferences can be drawn, even where no adequate counteraffidavits are filed.⁷

³ *E.g.*, *Grimm v. Westinghouse Electric Corp.*, 300 F. Supp. 984, 991 (N.D. Calif. 1969); *General Teamsters Union Local 249 v. Motor Freight Express, Inc.*, 48 F.R.D. 294, 295 (W.D. Pa. 1969); *Dawkins v. Green*, 285 F. Supp. 772, 774 (N.D. Fla. 1968), *rev'd on other grounds*, 412 F.2d 644 (5th Cir. 1969); *H. Daroff & Sons, Inc. v. Strickland Transp. Co.*, 284 F. Supp. 510, 511-13 (E.D. Pa. 1968); *Hartford Accident & Indemnity Co. v. Lloyd*, 713 F. Supp. 7 (W.D. Ark. 1959); *cf. Lundeen v. Cordner*, 354 F.2d 401, 406-07 (8th Cir. 1966), *motion to amend judgment denied*, 356 F.2d 1969 (8th Cir. 1966); *Lewis v. Quality Coal Corp.*, 243 F.2d 769 (7th Cir.), *cert. denied*, 355 U.S. 882 (1957).

⁴ *United Fruit Co.*, Dkt. 8795 (hearing examiner's order dated March 8, 1971).

⁵ *Sprague v. Vogt*, 150 F.2d 795, 800 (8th Cir. 1945).

⁶ *Accord, Dawkins v. Green*, 412 F.2d 644 (5th Cir. 1969); *Peckham v. Ronrico Corp.*, 171 F.2d 653 (1st Cir. 1948).

⁷ *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 628 (1944); *United States v. DeWitt*, 265 F.2d 393, 400 (5th Cir.), *cert. denied*, 361 U.S. 866 (1959); *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946).

Counsel Affidavits

The language of Rule 3.24(a)(3) and cases interpreting Federal Rule 56 indicate that counsel affidavits (*e.g.*, stating that certain witnesses will be called and relating to their expected testimony) would not be sufficient to prove or disprove the existence of a genuine issue of material fact.⁸ Counsel affidavits generally would not satisfy the requirements of Rule 3.24(a)(3), since affidavits reciting what counsel expected to prove at trial would be hearsay when offered to prove or disprove the existence of any factual issue. Consequently, they would not be admissible in evidence, nor would the affiant counsel be competent to testify to the matters stated therein at trial.

Counsel affidavits would not be subject to these objections, however, where used under Rule 3.24(a)(4) to show why sufficient opposing affidavits could not be presented. If such opposing affidavits cannot be produced, Paragraph (4) gives the hearing examiner discretion to refuse the application for summary decision or to order a continuance to allow evidentiary materials to be obtained. If, however, the effort required to produce affidavits would result in undue burden or undue delay in trial, it would be within the examiner's discretion to deny summary decision.

Rule 3.24(a)(4) tracks Federal Rule 56(f), and the courts have held that summary judgment should be denied on the basis of Rule 56(f) where knowledge of the controlling facts is exclusively or largely under the control of the moving party.⁹ The same procedure should apply under Rule 3.24 as well.

Thus, counsel affidavits generally will not satisfy the requirements of Rule 3.24 except when used to show (1) that opposing affidavits cannot be produced, (2) that the facts in issue are in the control of the moving party, or (3) that the effort required to obtain affidavits or other evidentiary material would unduly delay trial.

Other Evidentiary Materials

Rule 3.24 refers to several types of evidentiary material which may be employed by counsel in connection with a motion for summary decision, such as answers to interrogatories, admissions on file, affidavits, pleadings, and depositions.¹⁰ Although not specifically mentioned in

⁸ *E.g.*, *Bumgarner v. Joe Brown Co.*, 376 F.2d 749 (10th Cir.), *cert. denied*, 389 U.S. 831 (1967).

⁹ *United States ex. rel. Kolton v. Halpern*, 260 F.2d 590, 591 (3rd Cir. 1958) (*dicta*); *Dombrowski v. Esperdy*, 185 F. Supp. 478, 484 (S.D.N.Y. 1960), *aff'd*, 321 F.2d 463 (2d Cir. 1963).

¹⁰ It should be noted that the use of depositions under Rule 3.24 is not limited by the provisions of Rule 3.33 which prohibit taking depositions of persons expected to testify at trial. For purposes of meeting a motion for summary decision, such depositions would be appropriate so long as the trial would not be unduly delayed thereby.

the rule, transcripts resulting from an investigational hearing also constitute appropriate evidentiary material to support or oppose a summary decision motion. The thrust of Rule 3.24 is to permit the use of material which has been obtained under oath and which is reliable data. Clearly transcripts from investigational hearings fall into this category of material and should be permitted under the rule. In so interpreting Rule 3.24 we merely implement the purpose of the rule which is to prevent the creation of issues that are not well grounded or pertinent to resolution of the proceeding.

ORDER DENYING INTERLOCUTORY APPEAL

Respondent International Magazine Service of the Mid-Atlantic, Inc. (IMS) having filed an interlocutory appeal from the hearing examiner's ruling of October 27, 1971, denying IMS' Motion to Dismiss And/Or For Summary Decision; and

The Commission having considered said appeal and the answer of complaint counsel in opposition thereto, and having determined, in accordance with the views expressed in the accompanying opinion that IMS' appeal should be denied;

It is ordered, That respondent IMS' appeal from the hearing examiner's October 27, 1971 ruling be, and it hereby is, denied.

Chairman Kirkpatrick not participating, and Commissioner MacIntyre abstaining.

J. J. NEWBERRY CO.

Docket 8849. Order and Opinion, March 15, 1972

Order granting complaint counsel's appeal from the hearing examiner's decision denying a motion to quash a subpoena *duces tecum* issued to Charles A. Tobin, Commission Secretary. The order further denies respondent's appeal from the hearing examiner's order denying application for a subpoena *duces tecum*. The subpoena on the Commission Secretary was quashed and the case was remanded to the hearing examiner for further proceedings.

ORDER AND OPINION GRANTING COMPLAINT COUNSEL'S APPEAL AND DENYING RESPONDENT'S APPEAL

This matter is before the Commission upon (1) the appeal of complaint counsel, filed January 20, 1972, from the order of the hearing examiner denying a motion to quash subpoena *duces tecum*; and (2) the appeal of respondent, filed January 12, 1972, from the hearing examiner's denial of an application for subpoena *duces tecum*. Both parties have filed respective answers, and, in the case of respondent's appeal, a reply to complaint counsel's answer has been filed by respondent.

Both of the appeals deal with the issue of the production of certain information from the Commission's files relating to affirmative defenses of the respondent. Among these defenses is respondent's fourth affirmative defense, which is to the effect that it has been improperly singled out for an adjudicative proceeding as among all other retailers, including those who purchased the fabrics involved in this proceeding, and that by virtue of such Commission actions this proceeding assertedly is "arbitrary, capricious and outside the perimeter of Commission discretion."

I

The appeal by complaint counsel is from the hearing examiner's ruling on the record January 6, 1972, denying their motion to quash a subpoena *duces tecum* issued to Charles A. Tobin, Secretary of the Commission. There is only one specification in this subpoena, remaining after others were withdrawn, and it reads as follows:

Records, documents or memoranda reflecting the percentage or amount of textile product recall or return achieved by those retailers, other than J. J. Newberry, who have been investigated by the Federal Trade Commission and who have been identified in Federal Trade Commission press releases during the period January 1, 1970 to July 14, 1971 as having purchased and/or sold, but not having directly imported, dangerously flammable articles of wearing apparel or fabric for use in wearing apparel, and the dates and amounts of the relevant purchases; or a summary thereof. (Hearing examiner's order amending subpoena *duces tecum*, January 6, 1972.)

Complaint counsel, in their appeal, make basically two points: (1) that the request comes within the principles of the *Moog* case¹ to the effect that the Commission is empowered to develop the enforcement policy best calculated to achieve the ends contemplated by Congress, and (2) that the information is not readily available and that it would be a burdensome task to produce it.

The hearing examiner in issuing this subpoena and denying a motion to quash apparently did so on the basis that the information was related to respondent's affirmative defenses and that the issue presented was whether or not it is in the public interest to issue an order to cease and desist.²

¹ *Moog Industries v. F.T.C.*, 355 U.S. 411 (1958).

² The following is part of the examiner's statement on the record:

"The question is, as the Examiner sees it, whether the facts and circumstances, proposed to be adduced, the objective facts and circumstances, proposed to be adduced, may raise a question about the issuance of a cease and desist order in this case.

"I think it is part of the public interest concept, that is developed in second and third affirmative defenses.

"I think the fourth affirmative defense, really gets into that same area, where it is in the public interest now in the light of these facts, to issue an order to cease and desist, against this particular Respondent." (Tr. 230-231.)

Respondent is seeking this information as a matter of discovery.³ It should be noted that respondent already has a substantial amount of information in the general area of discovery it is pursuing. It has all the information previously sought in specifications withdrawn because the information was voluntarily supplied by complaint counsel. Respondent additionally has the press releases containing the names and other information of concerns involved in flammable fabrics matters in the period it has designated.

We believe the request of respondent in this first subpoena comes squarely under the rule set out in *Coro, Inc. v. Federal Trade Commission*, 338 F.2d 149 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965). The court therein articulated the issue, which appears to be remarkably similar to that raised here, as follows:

The long and short of petitioners' argument is that having given up their business with catalog houses without any intention of resuming it, they should have been allowed on the basis of prior decisions of the Commission in other cases to close this case by stipulation and hence could only have been denied the privilege of stipulation by the arbitrary, capricious, etc. fiat of the Commission *which could only be discovered by a general exploration of the Commission's action in other cases. Id.* at 152. (Emphasis supplied.)

The court decided the issue in the following language:

The petitioners cite no authority in support of this argument and we have not found any. Nor have they pointed out any specific action by the Commission in other practically identical cases on which to base a belief that the Commission's denial of the privilege of stipulation might have been arbitrary or capricious. All they have shown is a bare suspicion which if well founded might support their assertion of error. *But subpoenas are not issued on bare suspicion.* They are not licenses for extended fishing expeditions in waters of unknown productivity in the vague hope of "catching the odd one". *Id.* at 152-153.⁴ (Emphasis supplied.)

Respondent here has made no showing of other "practically identical cases" on which to base its claim that the Commission might have been arbitrary or capricious. Nor has it shown any other sufficient circumstance to support such position. Its assertions are based on suspicion only, which will not justify general access into Commission confidential files under Rule 3.36 of the Commission's rules. Accordingly, it was error for the hearing examiner to grant the

³ The following is a part of a statement by respondent's counsel in the record:

"We would want to see how many of them purchased wearing apparel, or fabric, which clearly was purchased for us in wearing apparel, because as part of our fourth affirmative defense we want to show as the Universal-Rundle situation seemed to involve, that Newberry, if it violated less than anybody else, therefore, should be the last person to be sued, not the first * * *." (Tr. 170)

⁴ See also *R. H. Macy & Co., Inc.*, Docket 8650, 68 F.T.C. 1179 (1965); *Sterling Drug, Inc. v. F.T.C.*, 450 F.2d 698, 705 (D.C.Cir. 1971). Cf. *Moog Industries v. F.T.C.*, 355 U.S. 411 (1958); *United Biscuit Co. of America v. F.T.C.*, 350 F.2d 615, 623-624 (7th Cir. 1965).

respondent's request for a subpoena requiring production of such Commission documents. Complaint counsel's appeal will be granted.⁵

II

Respondent's appeal is from the hearing examiner's order filed January 5, 1972, denying application for subpoena *duces tecum* addressed to the Secretary of the Commission.⁶ It contains four remaining specifications, 5-8 (the first four having been withdrawn during the pretrial conference), which are as follows:

5. All documents or memoranda prepared or issued by the Commission as a whole that relate to the Commission's determination to formally proceed against J. J. Newberry in this proceeding.

6. That portion or portions of documents or memoranda prepared by individual Commissioners or Commission Staff which were mentioned or reflected in the documents or memoranda identified in Item No. 5 above.

7. All documents or memoranda prepared or issued by the Commission as a whole that relate to the Commission's determination not to formally proceed against those retailers identified in Item Nos. 1 and 3 above [those retailers other than respondent who were identified in Commission press releases during 1/1/70 to 7/14/71 as having purchased dangerously flammable textile products from domestic suppliers].

8. That portion or portions of documents or memoranda prepared by individual Commissioners or Commission Staff which were mentioned or reflected in the documents or memoranda identified in Item No. 7 above.

Respondent, in its appeal, argues that the hearing examiner erred in applying a "good cause" standard and that respondent in any event had met all of the requirements of the Commission's rules for the issuance of the subpoena namely, relevancy, reasonableness of scope and unavailability from other sources. Respondent further argues that it has defined its requests so that it is seeking only those kinds of documents which the court held in *Sterling Drug*⁷ to be available under the Freedom of Information Act, 5 U.S.C. § 552, and that in denying the application the hearing examiner violated the requirements of that Act.

The hearing examiner, in his order denying the application, stated that his denial was for reasons on the record at the prehearing con-

⁵ This is not a ruling on the merits of respondent's affirmative defenses, and respondent is not by this order foreclosed from presenting such defenses.

It is further noted respondent has not sought, at least expressly, to obtain these documents alternatively under the Freedom of Information Act as in the case of the other subpoena, herein considered. (See discussion under part III, *infra*, for correct procedure for applications under such Act.)

⁶ Respondent makes its appeal pursuant to Section 3.36(d), which provides for appeals only from "rulings on motions to limit or quash subpoenas," neither of which motions were filed by complaint counsel. The hearing examiner considered the matter to be in a posture somewhat as if such a motion had been filed. In the circumstances, although respondent claims it also has satisfied Section 3.35(b), we will review the matter under the provisions of Section 3.36(d).

⁷ *Sterling Drug, Inc. v. F.T.C.*, 450 F.2d 698 (D.C.Cir. 1971).

ference held December 22, 1971, and he refers to a substantial number of pages in the record. The respondent, in its appeal brief, has characterized the hearing examiner's reasons as follows: "* * * he ruled that respondent had not made a proper showing of 'good cause' necessary to obtain what he characterized as confidential documents involving the 'mental processes of the Commissioners'" (page 4); and "* * * [he] further stated that respondent had not made a necessary showing of bias or prejudice on the part of the Commission to obtain the requested documents" (page 5).

Respondent relies primarily for its request in this second subpoena on the court's decision in *Sterling Drug, Inc., supra*. In that case the court, to the extent it required the disclosure of certain documents in the Commission's records, ruled in part as follows:

Thus, to prevent the development of secret law within the Commission, we must require it to disclose orders and interpretations which it actually applies in cases before it. *See generally* Davis, *supra*, at 797. *Id.* at 708.

The *Sterling* decision concerns the Freedom of Information Act. So far as the court discusses discovery, that is, where it construes the phrase "not * * * available by law to a party other than an agency" contained in Section 552(b)(5) of the Act, it clearly holds that discovery of such documents as here sought will not be granted, at least routinely. The court states in part:

The question for decision is thus whether "a private party—not necessarily the applicant—would routinely be entitled to [the Commission memoranda] through discovery." *Davis, supra*, 796. The clear answer is that he would not be so entitled. While some cases suggest that government memoranda containing legal analyses and recommendations may in some circumstances be subject to discovery, it is beyond question that granting discovery of such documents is a very extraordinary step, not a routine one. Accordingly, we conclude that the Commission memoranda in question here are the type which should be exempt under § 552(b)(5). (Footnote omitted.) *Id.* at 705.

In this case no showing has been made which would justify the granting of general access to internal, confidential memoranda and documents of the Commission under Commission Rule 3.36. See also the *Coro, Inc.* case, *supra*. In the circumstances the Commission will deny respondent's appeal.

III

Respondent, in its reply brief, requests that the Commission consider the issue involved in respondent's appeal alternatively as a petition directly to the Commission and addressed to the Secretary under the Freedom of Information Act. The Commission's long-standing policy has been to consider Freedom of Information Act petitions separate and apart from adjudicative cases. See *The Seeburg*

Corporation, Docket 8682 (October 25, 1966) [70 F.T.C. 1818]; *Ash Grove Cement Co.*, Docket 8785 (July 15, 1970); and *The Hearst Corporation, et al.*, Docket 8832 (December 6, 1971) [79 F.T.C. 1020, 1021-2]. We noted in the latter proceeding in part as follows:

The Information Act was intended to enlarge and to clarify the right of access by the public to documents in administrative files. It is not concerned with discovery procedures applicable to adjudicative proceedings, and does not authorize the issuance of subpoenas. * * *

While respondents in Commission proceedings are members of the public and consequently may request access to Commission records under the Information Act like any other member of the public, such requests should not be confused with subpoenas for Commission records under § 3.36 of the rules. As the Commission has previously noted, 'requests for documents and information under the Freedom of Information Act are inappropriate when made within the framework of an adjudicative proceeding.' Thus a respondent's request for access under the Information Act should not take the form of a motion to the examiner. The application should be made * * * directly to the Commission, addressed to the Secretary. (Footnotes omitted.)

In light of this policy the request made under the Freedom of Information Act to the hearing examiner, even though made in the alternative, is inappropriate. Nevertheless, to avoid the possibility of delay if the request is not processed expeditiously, the Secretary of the Commission is directed, in accordance with the provisions of Section 4.8 of the Commission's Rules of Practice, treating the subpoena as a request made under the Freedom of Information Act, to make available to the respondent all documents called for in the four specifications of the subpoena *duces tecum* here under consideration, which come within the criteria for making documents available set out in the *Sterling* decision to the extent any such may exist which are not already public documents. A request under the Freedom of Information Act is no ground for postponement in the adjudicative proceeding. Thus, the hearing examiner, upon the service of this order, should reschedule hearings as quickly as possible. Accordingly,

It is ordered, That the appeal of complaint counsel, filed January 20, 1972, from the decision of the hearing examiner denying a motion to quash a subpoena *duces tecum* be, and it hereby is, granted.

It is further ordered, That the subpoena *duces tecum* issued by the hearing examiner on December 27, 1971, directed to Charles A. Tobin and subsequently amended by order of January 7, 1972, be, and it hereby is, quashed.

It is further ordered, That the respondent's appeal from the hearing examiner's order filed January 5, 1972, denying respondent's application for subpoena *duces tecum* be, and it hereby is, denied.

It is further ordered, That the matter be returned to the hearing examiner for further proceedings and that he reschedule hearings forthwith.

CHARMCRAFT PUBLISHERS, INC., ET AL.

Docket C-2089. Order, March 15, 1972

Order denying petition to modify final order by setting aside the order to cease and desist as to Ira Rubin in his individual capacity.

ORDER DENYING PETITION TO MODIFY FINAL ORDER

This matter is before the Commission on the petition of respondents Charmcraft Publishers, Inc., and Ira F. Rubin, filed February 15, 1972, requesting that this proceeding be reopened for the purpose of setting aside the consent order to cease and desist issued November 12, 1971, as to Ira F. Rubin as an individually-named respondent. To support this request, petitioners have alleged that on February 1, 1971, at a time between the execution of the consent order, on October 28, 1969, and the date that the order was issued, November 12, 1971, Ira Rubin resigned his position as president of corporate respondent, and he has not been an officer of corporate respondent since that time. Petitioners further allege that, while Rubin continued to own approximately 16 percent of corporate respondent's outstanding common stock, and to act as a director of corporate respondent, he no longer controls the policy of the corporate respondent. To the contrary, it is alleged that he frequently takes a minority position relative to the decisions of corporate respondent.

Counsel supporting the complaint has filed an answer to the petition, opposing the modification. Counsel contends that because the individually-named respondent is no longer an officer of corporate respondent is not a reason for modification. Counsel argues that, as a result of the change in his status since the consent order was executed, Ira Rubin is in a better position to evade, perhaps through another entity, the provisions of the order. Therefore, counsel argues that it was proper to name Ira Rubin as an individually-named respondent at the time the order was issued.

The purpose of naming a person as a respondent in an order is to prevent that person, in his individual capacity, from engaging in the future in the practices prohibited by the order. The fact that an individual respondent is no longer an officer of the corporate respondent and may not at the present time formulate, direct and control the

policies, acts and practices of that corporation is not sufficient grounds for concluding that it is no longer necessary to hold him as a respondent in order to serve this purpose.

Petitioners having failed to show that changed conditions of fact or law require that the order be set aside as to respondent Ira Rubin, or that the public interest so requires, as provided by Section 3.72(b) (2) of the Rules of Practice:

It is ordered, That petitioners' request that the order to cease and desist be set aside as to Ira Rubin in his individual capacity be, and it hereby is, denied.

CRUSH INTERNATIONAL LIMITED, ET AL. DOCKET 8853
DR. PEPPER COMPANY DOCKET 8854
THE COCA-COLA COMPANY, ET AL. DOCKET 8855
PEPSICO, INC. DOCKET 8856
THE SEVEN-UP COMPANY DOCKET 8857
NATIONAL INDUSTRIES INC., ET AL. DOCKET 8859

Order, March 23, 1972

Order denying respondents' motions to dismiss complaints for failure to join respondents' bottlers as indispensable parties.

ORDER RULING ON MOTIONS TO DISMISS FOR FAILURE
TO JOIN INDISPENSABLE PARTIES

This matter is before the Commission upon requests for permission to file interlocutory appeals by the respondents in Docket Nos. 8853-8857 and Docket No. 8859, upon complaint counsel's response thereto, filed February 17, 1972, and upon respondent Dr. Pepper Company's response to complaint counsel's reply, filed February 29, 1972.¹ Al-

¹The motions are as follows: Crush International Limited, Docket No. 8853—application for leave to file an interlocutory appeal or to treat motions as certified filed February 4, 1972; Dr. Pepper Company, Docket No. 8854—request for permission to file an interlocutory appeal from the order of the hearing examiner denying respondent's motion to dismiss the complaint for failure to join indispensable parties and for a stay of proceedings, and request for permission to file an interlocutory appeal from the order of the hearing examiner denying respondent's motion to amend the complaint to join the Dr. Pepper Company bottlers as co-respondents filed February 4, 1972. The Coca-Cola Company, Docket No. 8855—application (I) for leave to file interlocutory appeals and (II) to treat motions to dismiss as certified filed January 18, 1972; Pepsico, Inc., Docket No. 8856—application for leave to file interlocutory appeal or to treat motions as certified filed January 31, 1972; The Seven-Up Company, Docket No. 8857—application for permission to file (1) appeal for de novo consideration of respondent's motion to dismiss, or (2) interlocutory appeal filed January 31, 1972; National Industries, Inc., Docket No. 8859—respondents' request for permission to file interlocutory appeal from the hearing examiner's order denying motion to dismiss the complaint for failure to join indispensable parties filed February 3, 1972.