SKYLARK ORIGINALS, INC., ET AL.*

Docket 8771. Order, Sept. 25, 1970

Order vacating initial decision, and case remanded to hearing examiner for further proceedings.

Order Vacating Initial Decision and Remanding Proceeding to Hearing Examiner

The complaint in this proceeding, issued November 27, 1968, charged that respondents violated the Federal Trade Commission Act by engaging in false and misleading advertising of their ladies' clothing and wigs by advertising fictitious prices at which their products were claimed to have been sold; falsely advertising that they unconditionally guarantee the return of the purchaser's money on request; falsely advertising that their wigs were available in five styles and ten colors at reduced prices from a limited supply for a limited time; and falsely advertising that their merchandise would be delivered promptly.

On November 26, 1969, the hearing examiner certified to the Commission a motion by respondents requesting that an agreement containing a consent order be accepted. Complaint counsel had joined in respondents' motion and the hearing examiner recommended that it be approved. This motion was denied by the Commission on December 18, 1969 [76 F.T.C. 1091], and a subsequent motion for reconsideration also was denied.

Thereafter, counsel for respondents and counsel supporting the complaint submitted to the hearing examiner a stipulation of facts and an agreed order with the understanding that the facts were stipulated subject to the acceptance by the Commission of the agreed order. On the basis of this stipulation the examiner cancelled hearings which were scheduled to commence March 23, 1970, and entered his initial decision adopting the stipulated facts and the order agreed upon by counsel.

The Commission by order of June 1, 1970, placed this proceeding on its own docket for review to permit a determination of whether the changes in Paragraphs 3, 5, 6 and 9 of the order which accompanied the complaint, particularly the addition of the language "in good faith," was warranted by the facts and whether the revised paragraphs would effectively prevent a resumption of the practices they purported to cover. Pursuant to authorization in said order, counsel supporting the complaint and counsel for respondents have filed briefs on the above issue.

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*Order to cease and desist issued by Commission, March 9, 1972, 80 F.T.C. 337.

Paragraphs 3, 5, 6 and 9 in the notice order would prohibit respondents from failing to make refunds within the time and in the amount represented, failing to perform all of the actual and represented obligations under the terms of their guarantee, advertising merchandise of stated features or characteristics unless such merchandise is on hand and available to fill orders, and failing to make timely delivery of merchandise. According to the briefs submitted by counsel, the words "in good faith" were added to each of these paragraphs for the purpose of affording respondents a defense in the event of a violation which might occur without their knowledge or beyond their control. Counsel contend that such an order would effectively prevent recurrence of the practices found to be unlawful. Counsel further contend (as did the hearing examiner) that the inclusion of the "good faith" provision in the above paragraphs is consistent with the use of the same provision in Paragraphs 1, 7 and 8 of the original order.

With respect to the latter contention, the words "in good faith" as used in Paragraphs 1, 7 and 8 of the notice order do not provide respondents with a defense for practices which would otherwise be proscribed. In fact, the exact opposite is true. The words "in good faith" as used in these three paragraphs have nothing to do with a "defense" or with violations "which might occur without respondents' knowledge or beyond their control." Rather than provide a defense, these words would impose additional restrictions on respondents.[1]

Counsel are also in error in contending that an order which would permit respondents to make claims which may be false because of events or circumstances beyond respondents' control would be effective in preventing recurrence of the violations found by the hearing examiner. Respondents, having chosen to make representations about refunds, guarantees, availability and deliveries, must either perform as advertised or discontinue making these representations. The public is entitled to get what is advertised irrespective of respondents' good intentions or innocent motives. It should be emphasized that it is completely immaterial whether respondents' representations are made in good faith or bad faith. The purpose of the order is to protect the public from false and misleading claims and an order which would permit respondents to make such claims if they are "motivated by honest intentions" as complaint counsel suggests, would not accomplish that end.

For the foregoing reasons, the Commission has determined that the modification of Paragraphs 3, 5, 6 and 9 of the notice order is not

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[1] In Paragraphs 1 and 7 these words would require respondents to use only a *bona fide* offer to sell as a basis for claiming that an offering price is a regular or former price. In Paragraph 8 respondents would be prohibited from representing that an offer is limited unless such limitation is actually imposed and "in good faith" adhered to.

warranted by the facts and that these paragraphs, as modified by the agreed order, will not effectively prevent a resumption of the practices they purport to cover. The agreed order therefore is deemed unacceptable.

The stipulation of facts upon which the initial decision is based was entered into subject to the acceptance by the Commission of the order agreed upon by counsel.

Accordingly, *It is ordered*, That the initial decision of the hearing examiner be, and it hereby is, vacated and set aside.

It is further ordered, That this matter be, and it hereby is, remanded to the hearing examiner for further proceedings.

Commissioner Elman not participating.

CCM: ARTS & CRAFTS, INC., ET AL.

Docket 8817. Order and Opinion, Oct. 15, 1970

Order denying respondents' request for permission to file interlocutory appeal from orders of the hearing examiner striking a portion of respondents' answer to the complaint and denying their motion for discovery of certain Commission documents; and returning the case to hearing examiner for further action.

Opinion and Order Denying Respondents' Requests for Permission to Appeal and Remanding to the Examiner

This matter is before the Commission upon two requests by the respondents both filed September 23, 1970, for permission to file interlocutory appeal. The first seeks to pursue an appeal from the hearing examiner's order dated September 14, 1970, striking a portion of respondents' answer to the complaint. The second is a request for permission to appeal from the examiner's order of September 14, 1970, denying in part their motion for the discovery of certain Commission documents. Complaint counsel on September 30, 1970, filed in separate documents their statements opposing the requests of the respondents.

The examiner's order striking a part of respondents' answer resulted from a motion by complaint counsel requesting the examiner to strike three different portions of such pleading on the grounds that "the cited portion of respondents' answer are immaterial and impertinent, and, even if true, do not establish a legal defense to the charges contained in the complaint." The hearing examiner after receiving respondents' answer to such motion, and without stating his reasons therefor, granted in part complaint counsels' motion and ordered that a portion of Paragraph 4 of the answer be stricken, which portion reads as follows:

* * * which Order has obviously not been the subject of any effective enforcement proceedings, and but for such dereliction the instant proceeding would not have been instituted.[1]

The second request to appeal relates to the order of the hearing examiner denying respondents' motion for the discovery of documents to the extent that they had requested "all Commission memoranda, correspondence and other documents relating to complaints, investigations or enforcement proceedings against Ramonts pursuant to the 1961 Federal Trade Commission Order in Docket 8217." In denying such part of the request the examiner apparently was concurring in the argument of complaint counsel which states in part: "To explore the happenings in the Ramonts matter would obfuscate the question before the examiner and would be of no probative value." and "The steps the Commission took to enforce the order against Ramonts do not bear upon the essential allegations contained in the complaint or provide a defense thereto." (Answer filed September 8, 1970 to respondents' motion for discovery) The hearing examiner in his order denying the stated portion of respondents' request for discovery gave no reasons for his action.

Respondents in their request for permission to appeal consider these two actions by the examiner to be related. They also construe his actions as meaning that he will not permit them to make one of their claimed defenses which is

that their supplier of wood fibre materials was under a Cease and Desist Order prohibiting the sale of untreated materials of this nature and that the failure effectively to enforce such Order was a contributing cause to the allegedly flammable materials being in respondents' hands. (Request to appeal from denial of discovery, pg. 2)

The examiner has the power to strike portions of pleadings and he may strike a claimed defense for the reason, among others, that it is clear under any of the facts to be proved such would not constitute a valid defense to the complaint. Sections 3.42(c), 3.15 and 3.21(a)(2)[2] We are of the view, however, that amending or striking a portion of a pleading so as to deny a party a defense requires in fairness that this action be explicit and unequivocal. In this instance, the examiner has not said that he is denying to respondents one of their defenses, and it is uncertain whether or not he did so even though the parties speculate that this is the effect of his actions. He has said nothing on what the

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[1] Of the three portions of the answer requested stricken by complaint counsel the examiner struck only a part of one. His selective action creates doubt whether such order, by itself, amounts to a rejection of respondents' claimed defense, since other assertions possibly involving this defense including a reference to the Ramonts order were not stricken.

[2] *Cf.* 12(f) of the Federal Rules of Civil Procedure which provides that the court may, upon the motion of a party, order stricken any pleading containing "any insufficient defense or any redundant, immaterial, impertinent or scandalous matter."

orders in question mean. We do not wish to be understood, however, as suggesting that the examiner would be either correct or incorrect here if he acts so as to deny to respondents their claimed defense. We do not pass on that question.

We believe respondents are entitled to a clear statement on the issue raised and if the hearing examiner has, in fact, rejected a defense asserted by them, we believe they are also entitled to the reasons or the basis for such action.

In the circumstances, the matter is not ripe for review. We believe that the issue should be further considered and acted upon by the examiner in the light of our views expressed herein. Accordingly,

It is ordered, That the requests of the respondents filed September 23, 1970, for permission to file interlocutory appeal be, and they hereby are, denied.

It is further ordered, That this matter be, and it hereby is, returned to the hearing examiner for further appropriate consideration and action in the light of the opinion herein.

Commissioner Elman no participating.

UNIVERSE CHEMICALS, INC., ET AL.

Docket 8752. Order, Oct. 22, 1970

Order granting an individual respondent time to perfect an appeal from the initial decision; granting said respondent time to make satisfactory proof of financial inability to retain counsel; and referring the cause to the examiner to make findings of fact respecting said respondent's financial condition.

ORDER

Whereas, the hearing examiner entered an initial decision herein on February 10, 1970, concluding that the respondents had violated Section 5 of the Federal Trade Commission Act, and respondents through their counsel filed due notice of intent to appeal, which was thereafter withdrawn by letter from said counsel dated April 14, 1970;

Whereas, respondent Jordan L. Lichtenstein notified the Commission by letter dated April 24, 1970, that he did not have the funds to pay counsel for the prosecution of an appeal, and requested that the Commission appoint one of its own attorneys to represent him in the conduct of such appeal and judicial review proceedings;

Whereas, the Commission issued an Order dated May 13, 1970, adopting the initial decision of the hearing examiner as the final decision of the Commission except as to respondent Jordan L. Lichtenstein as an individual, and extending the time within which respondent Lichtenstein could perfect an appeal from the initial decision to

fourteen (14) days after said respondent was served with the order dated May 13, 1970;

Whereas, respondent Jordan L. Lichtenstein, within fourteen (14) days after being served with the order of the Commission dated May 13, 1970, notified the Commission by letter dated June 9, 1970, that he still desired to perfect an appeal to the Commission but lacked sufficient resources to retain counsel, and set forth allegations of fact in support of said claim of inability to retain counsel;

Now therefore it is ordered, That the letter of June 9, 1970, from respondent Jordan L. Lichtenstein being treated as a request for further time within which to perfect an appeal to the Commission, such request be, and hereby is, granted as to respondent Jordan L. Lichtenstein as an individual, and that said respondent shall have an additional period of time within which to make satisfactory proof of financial inability to retain counsel, as set forth hereinafter.

It is further ordered, That the cause is hereby referred to the hearing examiner for the purpose of making findings of fact on the issue of whether the respondent Jordan L. Lichtenstein presently possesses sufficient financial resources to retain counsel for prosecuting an appeal to the Commission.

It is further ordered, That the respondent Jordan L. Lichtenstein shall execute under oath the form of affidavit served herewith, and shall return the aforesaid executed affidavit to the Federal Trade Commission at the following address, either in person or by registered mail with return receipt requested, within seven (7) days after being served with this order:

Robert L. Camenisch, Federal Trade Commission
Room 486, U.S. Courthouse & Federal Office Building,
219 South Dearborn Street,
Chicago, Illinois 60604

It is further ordered, That the respondent Jordan L. Lichtenstein shall, on the fourteenth (14) days after being served with this order, be present for a hearing before the hearing examiner at the time and place set forth below, unless advised by the hearing examiner that such appearance is unnecessary, and shall within five (5) days thereafter submit to the hearing examiner such further information or documents relating to the said respondent's financial condition as the examiner may direct.

Time and place for appearance: 10:00 a.m.,
at Room 486 of the United States Courthouse
and Federal Office Building, 219 South
Dearborn Street, Chicago, Illinois. 60604

It is further ordered, That the hearing examiner shall, within five (5) days after receiving all relevant and necessary information from

respondent, or if respondent should fail or refuse to appear or to produce such information, within five (5) days of such failure or refusal, transmit to the Commission findings of fact regarding respondent's financial condition.

AFFIDAVIT OF FINANCIAL STATUS

Notice to Respondent: This form must be filled out under oath, and witnessed by a notary public. Supplying false answers or failing to provide all material facts called for by the questions may subject you to fine or imprisonment, or both, under Federal law.

The above-named respondent, ____
being first duly sworn, deposes and makes under oath the following statement regarding his marital status, residence, employment, and financial status:

I. MARITAL STATUS:

a. Single__ Married__ Separated__ Divorced__

b. Dependents: Wife__ Children, No. __ Others, No. __ and Relationship __________

II. RESIDENCE:

Respondent's address: Street____

City_________________________________ State____________ Phone__________

2. Other property:

a. Automobile: Make________________________________ Model_____________

In whose name registered____

Present value of car______________________________________ $__________

Amount owed____ $__________

Owed to____ $__________

b. Cash on hand____ $__________

Cash in banks and savings & loan associations

____ $__________

Name and addresses of banks and associations:

____

____

3. Obligations:

a. Monthly rental on house or apartment_____________________ $__________

b. Mortgage payments on house (monthly)___________________ $__________

c. Other debts:

To whom owed	Amount
____	$__________
____	$__________
____	$__________
____	$__________
Total monthly payments on debts__________________________	$__________

4. Other information pertinent to Respondent's financial status:

a. List any stocks, bonds, savings bonds, interests in trusts either owned or jointly owned:

____

____

____

b. List any future source of income you might receive such as a pension, social security, or unemployment compensation and the year when such future source of income is anticipated to become due:

Signed____________________
(Respondent)

Subscribed and sworn before me
this _______________ day of ________ 19____.

MAREMONT CORPORATION

Docket 8763. Order and Opinion, Oct. 22, 1970

Order granting respondent's motion for a waiver of page limitation, denying all other motions of the respondent, and returning case to hearing examiner for trial.

Opinion and Order Denying Interlocutory Requests and Remanding to Hearing Examiner

This matter is before the Commission upon respondent's interlocutory appeal and requests for leave to appeal as follows: (1) Respondent's Appeal from Order Denying Applications for Issuance of Subpoenas *Duces Tecum* filed October 27, 1969; (2) Respondent's Request for Leave to File Interlocutory Appeal from Order Denying Discovery Applications filed October 27, 1969; (3) Respondent's Request for Leave to File Interlocutory Appeal from Order Scheduling Hearings filed October 27, 1969; and finally (4) Respondent's Request for Leave to File Interlocutory Appeal from Order Denying Request for Certification to the Commission of "Motion to Dismiss or, in the Alternative, for Plenary Hearing on Commingling of Functions and Ex Parte Communications," filed November 10, 1969.[1] Complaint counsel filed a response to this latter request on November 12, 1969.

On November 3, 1969, subsequent to the filing of its October 1969 interlocutory requests and prior to any Commission action thereon, and prior to the filing of its November 1969 request to appeal,

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[1] Respondent also on October 27, 1969, filed a document entitled "Emergency Motion for Stay of Hearing Examiner's Order of October 16, 1969." This request was mooted by respondent's action to enjoin the Commission and by the Commission's order issued November 6, 1969 [76 F.T.C. 1081] cancelling hearings for the interim. Additionally, respondent on October 27, 1969, moved for a waiver of page limitation so as to permit one extra page for its request to appeal as to the scheduling of hearings which motion will be granted.

respondent filed suit in Federal district court against the Federal Trade Commission and its Commissioners seeking declaratory and injunctive relief, claiming that the Commission was violating its constitutional and statutory rights. On November 4, 1969, the U.S. District Court for the Northern District of Illinois, Eastern Division issued an order restraining the Commission from conducting hearings or otherwise going forward with this proceeding until further order of the Court; *Maremont Corporation* v. *Federal Trade Commission, et al.*, Civil Action No. 69 C 2266. The Commission thereupon on November 6, 1969, issued its order cancelling the hearings then set to begin November 12, 1969, "pending the district court's disposition of the Commission's motion to dismiss * * *, and pending the Commission's decisions on the interlocutory matters in this proceeding which are now before the Commission."

The district court thereafter on January 5, 1970, dismissed the complaint filed by respondent and respondent appealed. Pending appeal, the district court entered an order restraining the Commission from holding any further hearings.

The Circuit Court of Appeals for the Seventh Circuit rendered its decision on such appeal on September 3, 1970, and affirmed the decision of the district court. *Maremont Corporation* v. *Federal Trade Commission, et al.*, 431 F.2nd 124 (7th Cir. 1970); 1970 Trade Cases, ¶73310 [8 S. & D. 1233]. It also ordered on September 22, 1970, that the district court's order of January 16, 1970 restraining the Commission from further proceeding pending the appeal be vacated.

Thus, the Commission is now free to continue with the interrupted proceedings in this matter.

I

Respondent's appeal under Section 3.35(b) of the Commission's rules is from the examiner's order issued October 16, 1969 denying its application for issuance of subpoenas *duces tecum*. This appeal is cross referenced to respondent's other request filed contemporaneously with the appeal which seeks leave to file interlocutory appeal from the same order of the examiner insofar as it denies other discovery motions made by respondent. The other motions denied were (a) respondent's motion for access to special industry survey and (b) its motion for renewed consideration of certain discovery requests.

On the appeal from the order denying subpoenas, respondent generally challenges the appropriateness of the examiner's ruling and contends his action is arbitrary. Similarly as to the requests to appeal involving the special industry survey and other discovery matters discussed below, respondent's challenge is chiefly directed to the ex-

aminer's exercise of his discretion in denying their requests. In connection with the subpoenas the hearing examiner ruled as follows:

> Respondent's third application was made ex parte, for the issuance of discovery subpoenas duces tecum to 13 manufacturers of automotive parts. The specifications for said subpoenas call for a vast array of sales data, broken down by nine customer classifications and multiple geographic areas, and considerable other data and documents, including names of customers and financing of customers. The data requested cover a minimum period of three years and, in some instances, five years. Based on extensive experience in similar cases, the examiner would estimate that it will take over six months to accomplish even minimal compliance with said subpoenas, assuming no motions to quash, limit or for protective orders were filed. Were such motions to be filed, and typical interlocutory appeals taken, a delay of at least one year would ensue. The vast bulk of the data and documents sought by respondent are either plainly irrelevant, or their relevance has not been adequately demonstrated in its application. Considering the lateness of the hour and the dubious relevance of much of what is sought, the examiner is not disposed to issue the requested subpoenas duces tecum, and await the filing of the usual third-party motions. Should the relevance of any of the data be demonstrated after the start of hearings, respondent may renew its application on a more limited basis, and appropriate arrangements can be made to recess the hearings to permit discovery necessarily deferred. (Order Denying Discovery Applications, filed October 16, 1969, Pgs. 4 and 5)

The hearing examiner has broad discretion in the discovery area. There has been no showing here of any abuse of his discretion. Moreover, the examiner has indicated that if the relevance of the data should later be demonstrated, respondent may renew its application, albeit on a more limited basis. We do not believe that this appeal has been justified under the Commission's Rule Section 3.35(b) and it will, accordingly, be denied.

II

The request to appeal from the examiner's order filed October 16, 1969, so far as it denies respondent's other two motions, in effect raises for reconsideration matters previously presented to the Commission. On the "motion for renewed consideration of certain discovery requests," the examiner notes that he previously denied such requested discovery by his order of April 7, 1969; that a request for permission to appeal such order of denial was denied by the Commission; and that respondent has presented no substantial reason for modifying his prior order. The examiner notes that the type of discovery sought would only result in protracted delay and serve no constructive purpose.

The respondent's second motion denied seeks "access to special industry survey." The examiner concluded that this request was actually a motion for reconsideration of his order of April 2, 1969, denying such request, and as to which a request to appeal was also denied. The

examiner states that respondent has advanced no substantial new reason not previously considered by him and that were he to grant the request, it would result in a delay of from six months to a year or more. Finally, the examiner suggested that to the extent any of such material may be relevant for defense purposes, respondent may renew its application at the end of complaint counsel's case-in-chief.

On both these matters involving pretrail discovery, the examiner, as stated, has broad discretion and no showing is made that he abused his discretion. There has been no adequate showing here as required by Commission Rule Section 3.23 to justify an interlocutory appeal. Such requests will therefore be denied.

III

The respondent, in its remaining document filed October 27, 1969, requests leave to file an appeal from the examiner's order scheduling hearings filed October 17, 1969. Respondent raises two main points in this request.

The first relates to the examiner's conclusion that the proceeding is ready for trial. Respondent's argument under this point concerns details of the availability to respondent of complaint counsel's evidence including "basic statistical evidence." A part of respondent's complaint seems to be that there have been delays in the turning over of this material particularly in its final form, and that it therefore needs more time to prepare its defense. This point was, of course, made about one year ago. The intervening period has assuredly given respondent ample time to review the materials and prepare its defense. We recognize that respondent's argument goes somewhat beyond merely seeking additional time, *i.e.*, it seems to be suggesting that it is not receiving the production of certain of the documents to which it is entitled for the purpose of preparing its defense. It claims for instance it has not been furnished "summaries" of the expected testimony of some 40 out of 75 witnesses which complaint counsel has indicated they will call, allegedly in defiance of the hearing examiner's order.

The question on the completeness of the production ordered seems to us to be quite clearly a matter concerning procedure and the conduct of the trial which should be left to the hearing examiner's discretion. We do not believe there has been a showing he has abused his discretion in scheduling the formal hearings to begin especially since as indicated above respondent has now had an additional year for preparation.

The second point respondent raises on this request is the assertion that the examiner erred in selecting Washington, D.C. as the appro-

priate place for trial. On this issue of venue the examiner held as follows: "In the considered judgment of the examiner hearings will proceed with far more expedition, and will cause much less overall inconvenience if they are held in Washington, D.C." He also indicated that should it become necessary to recess at the end of complaint counsel's case-in-chief he would give further consideration to a request from respondent as to the necessity for setting *defense hearings* in Chicago.

We are of the view that the examiner here appropriately exercised his discretion in balancing the various interests on this matter of place of trial. See also the court's discussion of this issue in *Maremont Corporation* v. *Federal Trade Commission*, *supra*. There has been no showing here to justify an appeal under Section 3.23 of the Commission's rules; therefore, respondent's request will be denied.

IV

Finally, respondent on November 10. 1969, subsequent to the day the Commission was restrained in the interim from further proceedings filed a request titled as follows:

> Respondent's Request for Leave to File Interlocutory Appeal from Order Denying Request for Certification to the Commission of "Motion to Dismiss or, in the Alternative, for Plenary Hearing on Commingling of Functions and Ex Parte Communications."

Respondent claims that it was error for the hearing examiner not to certify its motion concerning alleged *ex parte* activities asserting that the motion was addressed to the Commission's administrative discretion. Respondent attached to its request a copy of its motion entitled:

> Motion to Dismiss or, in the Alternative, for Plenary Hearing on Commingling of Functions and Ex Parte Communications.

Since the motion is in fact before us as if it had been certified, we believe it is unnecessary in the circumstances here to consider the assertion of error for failure to certify. We will go immediately to consideration of the motion.

Respondent in its motion, bases its claim of *ex parte* communications on the statements made by complaint counsel relative to the role in this proceeding of Steven Nelson, an economist employed by the Commission. It is averred that complaint counsel stated among other things in their motion filed September 16, 1969, contending for Washington, D.C. as the place of trial that Mr. Nelson "is frequently consulted by the Commission and senior staff members regarding factual background and policy in the automotive parts industry. * * *" It claims that this admission constitutes an acknowledgement of a violation of

the Commission's own rules, the Administrative Procedure Act and the constitutional guarantees of due process.

Complaint counsel in their response filed November 12, 1969, attached their response to the examiner on this issue and an affidavit of Mr. Nelson. In the latter document, Mr. Nelson states, among other things:

Since my participation in helping to prepare the staff recommendation to the Commission that a proposed complaint should issue against Maremont Corporation, I have had no *ex parte* communications of any kind, written or verbal, by way of advice or otherwise, concerning the Maremont complaint (D. 8763) or any aspect thereof with the Hearing Examiner, the Commission, any Commissioner or any member of any Commissioner's personal staff.

The court in *Maremont* v. *Federal Trade Commission*, *supra* in considering this issue held that the facts outlined to them "do not constitute a violation of the doctrine of separation of functions." The Commission concludes on the basis of Mr. Nelson's affidavit and on the basis of the knowledge of the Commissioners that Mr. Nelson since the issuance of the complaint here under Part 3 of the Commission's rules has not engaged in *ex parte* communications concerning the Maremont matter of any kind with the Commission, with any Commissioner or any officer or employee of the Commission connected with the decisional process. Furthermore, there will be no such communications. We believe there has been a complete separation of functions in this matter fully in accord with the letter and the spirit of Sec. 5(c) of the Administrative Procedure Act and the Commission's rules. Respondent's requests in its motion to dismiss or in the alternative for plenary hearing on alleged commingling of functions and *ex parte* communications filed October 23, 1969, will be denied. Accordingly,

It is ordered, That respondent's motion for a waiver of page limitation on its request to appeal as to the scheduling of hearings be, and it hereby is, granted.

It is further ordered, That respondent's appeal filed October 27, 1969, from the order denying applications for the issuance of subpoenas *duces tecum* be, and it hereby is, denied.

It is further ordered, That respondent's request filed October 27, 1969, for leave to file interlocutory appeal from order denying discovery applications be, and it hereby is, denied.

It is further ordered, That respondent's request filed October 27, 1969, for leave to file interlocutory appeal from order scheduling hearings be, and it hereby is, denied.

It is further ordered, That respondent's motion to dismiss or, in the alternative for plenary hearing on commingling of functions and *ex parte* communications filed with the hearing examiner and treated

as having been certified to the Commissioner on November 10, 1969, be, and it hereby is, denied.

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

ASH GROVE CEMENT CO.

Docket 8785. Order and Opinion, Oct. 22, 1970

Order granting appeals of respondent from hearing examiner's order granting motions to quash subpoenas directed to two concrete companies, striking the hearing examiner's orders relative thereto, denying respondent's motion for issuance of subpoena to Acting Director of Bureau of Mines, and returning case to examiner.

Opinion and Order Ruling on Interlocutory Appeals and Motion Certified to the Commission

This matter is before the Commission upon two separate interlocutory appeals filed by the respondent on September 21, 1970, and upon the hearing examiner's certification to the Commission of a motion by respondent for the issuance of a subpoena *duces tecum* to a government official, filed September 25, 1970. Each of the appeals deal with an order of the hearing examiner granting (one conditionally and the other without prejudice) the motion of a third party to quash a subpoena *duces tecum* issued to it at the instance of respondent.

I

The first appeal we will consider is that filed on September 21, 1970, from the hearing examiner's order conditionally granting the motion of Denny Concrete Company (Denny) to quash a subpoena *duces tecum* served upon its president, J. Gilbert Denny, at the instance of respondent. In its motion filed September 3, 1970, Denny states among other things that "the scope of the Subpoena is unreasonable in that much, if not all, of the requested data has no relation to Respondent's business and to require Denny Concrete Company to compile and produce the data would place an onerous burden, physically and economically, on the company."

The hearing examiner conditionally granted Denny's motion in an order filed September 11, 1970. He held that Denny had not carried its burden of showing that its various allegations should be granted, with the apparent exception of that above quoted. Stating that the Commission's rules are silent on the question posed by the claim of onerous burden, the hearing examiner applied Rule 45(b)(2) of the

Federal Rules of Civil Procedure. Rule 45(b) in its entirety reads as follows:

(b) For Production of Documentary Evidence.
A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

Respondent in appealing from such ruling argues principally (1) that Denny did not ask for the relief granted; (2) that a mere claim of economic burden with no specification of expense would not support a motion to quash and (3) that respondent is unaware of any precedent of applying Federal Rule 45(b) (2) in Commission practice.

Commission adjudicative proceedings are not governed by the Federal Rules of Civil Procedure; rather they are conducted under the Commission's own duly promulgated Rules of Practice. We would add however, that while the Federal rules are not applicable, the standards developed by the courts in interpreting such rules are frequently informative and useful in applying the Commission's rules to specific situations. *L. G. Balfour Company*, Docket No. 8435, 62 FTC 1541, 1546, footnote 14 (order on interlocutory appeal issued May 10, 1963).

As to the appeal in issue we hold that, not as a general rule but in a particular instance where justice and fairness so demands, the examiner's powers are sufficiently broad to require the payment by a respondent of appropriate and determinable expenses connected with compliance by a third person with a subpoena issued at the instance of a respondent. Additionally, if fairness so demands, it is further within the examiner's authority to require that such payment be made in advance.[1]

Such relief should not be given automatically on a mere claim of economic burden. Moreover, we believe the expenses claimed should be of an unusual nature, *i.e.*, something more for example than the costs of routinely pulling records from files in the ordinary situation. In this instance, Denny has not specified the expenses which it will allegedly incur. It seems to us therefore that it would be difficult if not impossible at least without negotiations for respondent to tender in advance the cost of the production. Where no specific costs are men-

[1] *Cf. Miller* v. *Sun Chemical Corp.* (D.C. N.J. 1952), 12 F.R.D. 181; *Fox* v. *House*, 29 F. Supp. 673, 677 (D.C.E.D. Okla. 1939); *State Theatre Co.* v. *Tri-State Theatre Corp.* (D.C. Neb. 1951), 11 F.R.D. 381; *Ulrich* v. *Ethyl Gasoline Corp.* (D.C.W.D. Ky. 1942), 2 F.R.D. 357.

tioned, and the examiner nevertheless determines that there are or might be unusual expenses for which compensation should be made by respondent in advance, it seems to us that as a practical matter some determination should be made of the amount of such unusual expenses or at least an approximation thereof so that the tender can be made by the respondent. We leave it to the examiner to work out the best procedure for accomplishing the result we have outlined.

In the circumstances, we will grant the appeal, strike the examiner's order conditionally granting Denny's motion to quash and return the matter to the examiner for further consideration in light of our views expressed herein.

II

The second appeal for our consideration is that filed by respondent September 21, 1970, from the hearing examiner's order granting the motion of Olathe Ready-Mix Co. (Olathe) to quash subpoena *duces tecum*. Olathe moved on August 31, 1970, to quash subpoena *duces tecum* served upon its president, Delton E. Davis, at the instance of respondent. The hearing examiner in his order filed September 11, 1970, granted the motion to quash without prejudice to the reissuance of a new subpoena *duces tecum* subject to its conformity with the legal requirements described in his order. In such order he refers to the Rule 45 (b) and (c) of the Federal Rules of Civil Procedure, and the requirements thereof.

Olathe, in its motion to quash, claimed that the specifications of the subpoena 1 through 10 would require it to transport virtually every corporate record that it has maintained for the years specified, which it asserts "would be unduly burdensome, oppressive and unreasonable." Olathe further asserts that respondent has not tendered to it "the necessary witness fees nor the necessary costs of transporting the records requested in the specifications to Washington, D.C."

The examiner in his order granting Olathe's motion states as he did in the Denny matter that the Commission's rules are silent on the questions posed thereby and that therefore he would resort to Rule 45 of the Federal Rules of Civil Procedure. While he states that the subpoena is subject to Rule 45(b)(2) of the Federal rules, he apparently specifically applied Rule 45(c), the relevant part of which states as follows:

> Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to him the fees for one day's attendance and the mileage allowed by law.

Respondent argues in this connection among other things (a) that Rule 45(c) is inapplicable to Commission proceedings, (b) that the question is in fact covered by Commission Rule 4.5 (a) and (c), (c)

that Olathe's motion does not ask for the relief granted and (d) that if Rule 45(b)(2) governs, it was improperly applied.

We have previously stated that the Federal Rules of Civil Procedure do not govern Federal Trade Commission adjudicative proceedings. The Commission's rules on the payment of fees and mileage provide that: "Any person compelled to appear in person in response to subpoena shall be paid the same fees and mileage as are paid witnesses in the courts of the United States." (Section 4.5(a)) and that "The fees and mileage referred to in this section shall be paid by the party at whose instance deponents or witnesses appear." (Section 4.5(c)) Such provisions, as we construe them, are not explicit on the question of advance payments. Normally, in Commission proceedings, fees and mileage are paid at the time the witness actually appears. However, the examiner has discretion in such matters and he has sufficient authority in particular circumstances where justice and fairness so require to direct that the payment of such fees and costs be made in advance. On the question of transportation costs, if these are found to be unusually burdensome and fairness requires that a respondent at whose instance the material is being transported pay such costs, the examiner in such circumstances also has the authority to require the payments be made in advance. However, as in the Denny matter above, a determination should be made on the amount of such costs so that an advance tender can as a practical matter be provided. To the extent that the examiner is requiring in this instance advance payment for other production costs, whatever they may be, the same considerations apply here as in the Denny matter for a determination of such costs.

Accordingly, we will grant the appeal as to the Olathe matter, strike the hearing examiner's order quashing the subpoena directed to Olathe and return the matter to the hearing examiner for his further consideration in light of the views expressed herein.

III

The final issue before us in this proceeding concerns the certification to the Commission by the examiner on September 25, 1970, of the motion by respondent for the issuance of a subpoena *duces tecum* to a government official with the examiner's recommendation of denial. Respondent on September 8, 1970, moved pursuant to Rules 3.37 and 3.22(a) of the Commission's Rules of Practice for the issuance of a subpoena *duces tecum* to Dr. Earl T. Hayes, Acting Director of the Bureau of Mines, United States Department of Interior. The specification for the requested subpoena was attached to the application. The subpoena seeks the production of source material from which the

statistical tables and summaries from Bureau of Mines publications specified were prepared. The tables in issue, were offered and received in evidence as Commission Exhibits 49 through 55 and 68 and 69. Respondent claims that it has been denied the chance to inspect the basic data from which the tables were drawn and that it has been denied the opportunity for cross-examination of complaint counsel's evidence due to the fact that complaint counsel assertedly did not call a witness familiar with the data. It asserts that the information it seeks is necessary in order to afford it the right of cross-examination regarding the referred to exhibits.

Complaint counsel answered on September 18, 1970, contending that respondent has not shown the necessity for and the relevancy of the specified material as required by 3.37(b) of the Commission's rules. Further, complaint counsel state they do not intend to ask Dr. Hayes or any other official of the Bureau of Mines to testify concerning the exhibits. They assert the exhibits were offered pursuant to 28 U.S.C. 1733, which they argue exists to prevent officials of the government from frequent appearances to testify about official documents.

The hearing examiner in recommending that the motion be denied observes that among other things the request would appear to require a lengthy and burdensome production task not necessary to any appropriate discovery purpose in the case and would lead in his opinion to delay in the trial of the matter on the merits.

It appears that the issue here relating to the receiving into the record of the Bureau of Mines statistical tables and the purpose for which such were received has been previously considered in some form by the hearing examiner and the Commission on two occasions. The first was in connection with the examiner's order of June 15, 1970, denying respondent's application for a subpoena to produce documents from the Commission's files. An appeal from that order was denied by the Commission by its order issued July 15, 1970, upon the ground, among others, that no showing had been made that the hearing examiner had abused his discretion. The second occasion was that of the hearing examiner's order of August 19, 1970 in which he denied some of the specifications of subpoenas including those which called for the underlying statistical information submitted to the Bureau of Mines by the ten companies to whom the subpoenas were directed. The Commission in its order and opinion of September 18, 1970, denied respondent's appeal from that order.

In the last referred to Commission order and opinion we stated that the record shows the hearing examiner has considered the substance of respondent's request, heard substantial arguments thereon in pretrial proceedings and that his order suggests a careful weighing of

the interests in the matter. We refrained however from deciding the correctness of his order one way or another. We ruled only that he did not abuse his discretion and that the merits of the issue would not be reviewed by the Commission at such stage of the proceeding.

It seems to us that what is involved here on the merits as suggested above is a question which again concerns the correctness of the hearing examiner's rulings respecting the receipt of and the purpose of the offering of the Bureau of Mines tables. He in effect has held that respondent's inquiry into the source material is unnecessary because the exhibits were offered only for a limited purpose and that "no proof would be offered or findings of fact proposed as to the competitive effect of the challenged Kansas City vertical mergers as respects the alternative relevant geographic market alleged in the complaint as being the United States as a whole." (Hearing examiner's order filed June 16, 1970, Pgs. 7 and 8)

It is clear that the examiner holds to the same view since in his certification he states that the purpose of respondent's request in various different forms has been previously presented to the examiner and rejected by him and he recommends the denial of the certification for the reasons so stated as well as the other grounds referred to.

The Commission held in the prior orders mentioned that this is a discovery area in which the hearing examiner has broad discretion. To allow the subpoena here sought would have a direct bearing on the examiner's prior rulings and his control of discovery and conduct of the proceedings. We do not reach the question therefore as to whether or not respondent has shown "necessity" and "relevancy" as required by Section 3.37. We hold merely that this matter concerns the hearing examiner's discretion in the discovery area, and that no showing has been made to justify overruling him in effect in his rulings on the question. We do not address ourselves to the correctness of his rulings; we hold only that he has not abused his discretion. Respondent's motion will therefore be denied. Accordingly,

It is ordered, That the respective appeals from the hearing examiner's order conditionally granting the motion of Denny Concrete Company to quash subpoena *duces tecum* and the hearing examiner's order granting the motion of Olathe Ready-Mix Co. to quash subpoena *duces tecum* be, and they hereby are, granted.

It is further ordered, That the respective orders of the hearing examiner filed September 11, 1970, conditionally granting the motion of Denny Concrete Company to quash subpoena *duces tecum* and the motion of Olathe Ready-Mix Co. to quash subpoena *duces tecum* be, and they hereby are, stricken.

It is further ordered, That respondent's motion filed September 8, 1970, for the issuance of a subpoena *duces tecum* to Dr. Earl T. Hayes,

Acting Director of the Bureau of Mines, United States Department of Interior be, and it hereby is, denied.

It is further ordered, That this matter be returned to the hearing examiner for further proceedings in accordance with the Commission's rules and consistent with the Commission's views expressed herein.

FIRESTONE TIRE & RUBBER COMPANY

Docket 8818. Order and Opinion, Oct. 23, 1970

Order granting SOUP, Inc., leave to intervene in case for the limited purposes of 1) presenting evidence of public interest, 2) presenting briefs and oral argument, and 3) exercising certain discovery rights.

Regarding Request of SOUP, Inc., for Leave To File an Interlocutory Appeal From an Order of the Hearing Examiner Denying Its Amended Motion To Intervene

Statement by MacIntyre, *Commissioner:*

A few law students have formed a corporation styled Students Opposing Unfair Practices, Inc. (hereinafter referred to as "SOUP").

SOUP, on September 1, 1970, filed with the hearing examiner in this matter a motion to intervene in this proceeding. The hearing examiner by order dated September 18, 1970, denied SOUP's amended motion on the ground that it had "failed to show good cause" as required by Section 5(b) of the Federal Trade Commission Act. That provision of law provides that "Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene" in a proceeding by counsel or in person. Thereafter, on September 25, 1970, SOUP filed with the Commission its request for leave to file an interlocutory appeal from the hearing examiner's denial of its amended motion to intervene. Answers were filed by counsel for respondents and counsel in support of the complaint in opposition to that request. Thus was put in issue the validity of the hearing examiner's order denying the motion of SOUP to intervene as a full party with all the rights of parties in this proceeding.

I fully agree with the stated view of the majority that where substantial issues of law or fact appear to be involved in the request of persons wishing to present them to the Commission in a proceeding those persons should be heard and allowed to present the information they say they have about the issues. Likewise, I agree with the majority that in considering a request from persons to present information to the Commission we should weigh the additional factors involving the

expenditure of the Commission's limited resources and the prospects for a longer and more complicated proceeding. With these problems in focus I have proposed to the Commission that it grant SOUP, Inc., the privilege of a hearing to the extent that the hearing examiner be instructed to permit SOUP to participate in this proceeding for the limited purpose of presenting the evidence specified in its amended motion to intervene, filed September 1, 1970, at the conclusion of the complaint counsel's case-in-chief and that he be further instructed to reconsider SOUP's requests for disclosure and for leave to file *in forma pauperis*. Moreover, it has been my position that the Commission should not only thus hear SOUP, Inc., but should provide an opportunity for SOUP, Inc., to present briefs and argument to both the hearing examiner and the Commission if necessary to fully inform the Commission regarding any information it has bearing on the issues here and its views about such information and the issues. The majority of the Commission has not seen fit to adopt the proposal I made. Instead, the Commission ordered and directed the hearing examiner "to permit SOUP to intervene for the limited purposes" of presenting certain evidence and in filing certain briefs and argument and in exercising certain discovery rights which would be available to a party litigating the issues in question. I did not concur in the decision of the Commission to issue that order because I am convinced that the Commission will not be able because of that action to adjudicate and conclude this matter within a reasonable period of time. It does not require imagination or speculation to determine why that is so, neither does it require imagination nor speculation for us to know that when justice is delayed it may by that fact be denied.

Opinion and Order Granting Limited Intervention

This matter concerns a question of vital importance to the effective functioning of the Commission's adjudicatory process: the scope of the privilege of intervention and participation in Commission adjudications by responsible representatives of the consumer interest. In passing upon the motion now before us, the Commission is afforded an opportunity to clarify its previous position on this question in *In re Campbell Soup Co.*, Docket 1741, May 25, 1970 [77 F.T.C. 664].

The complaint in this proceeding, issued June 29, 1970, charges respondent with false and deceptive advertising with respect to the price and safety of its tires. On July 29, 1970, Students Opposing Unfair Practices, Inc. (hereinafter SOUP) filed a motion to intervene, for leave to proceed *in forma pauperis*, and for disclosure. The motion was opposed by both respondent and complaint counsel. By order issued August 21, 1970, the hearing examiner denied the motion

on the ground that no good cause for intervention had been established. Thereafter, on September 1, 1970, SOUP filed an amended motion to intervene, for leave to proceed *in forma pauperis*, and for disclosure, this time explaining in some detail the reasons for its belief that good cause exists for intervention in this case. The reasons were as follows: consumers are within the zone of interests sought to be protected by the FTC Act; SOUP is recognized as a responsible representative of the consumer's interests; members of SOUP have a personal stake in the outcome of the proceeding; this is an aggravated case, directly involving the health and safety of the public; the proposed order is inadequate to protect the public interest because it contains no provision for restitution and no affirmative disclosure provision to counteract the residual effects of respondent's deceptions; and SOUP desires to introduce factual and expert evidence on the residual effects of respondent's advertisements to prove the need for an affirmative disclosure provision in the final order. Respondent and complaint counsel again opposed the motion.

By order of September 18, 1970, the hearing examiner denied SOUP's amended motion on the ground that SOUP "has again failed to show good cause to support the motion." On September 25, 1970, SOUP filed with the Commission a request for leave to file an interlocutory appeal from the denial of its amended motion to intervene. The Commission has determined that SOUP's request should be granted, and that it should be allowed to intervene in this proceeding, with all of the rights of a party, for the limited purpose of presenting evidence and argument on the issue of the proper remedy and scope of the final order in this case.

Section 5(b) of the Federal Trade Commission Act provides that "Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by Counsel or in person." Section 3.14 of the Commission's Rules of Practice provides that "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." These provisions clearly reflect the fact that intervention in Commission adjudications is a matter of privilege, and that its grant or denial is a discretionary matter, to be decided on the basis of the particular facts and circumstances involved in each case in which intervention is sought.

In re Campbell Soup Co., Docket 1741, May 25, 1970, suggests the type of considerations that properly influence the grant or denial of a motion for intervention in a particular matter. Although that case

concerned a motion for intervention in consent order proceedings, which are not proceedings governed by Section 5(b) of the Act or Section 3.14 of the rules, the principles announced therein are generally applicable to the question of intervention in adjudication. The thrust of our opinion in *Campbell Soup* is that before the Commission will allow intervention into its proceedings, it must be demonstrated that (1) the persons seeking such intervention desire to raise *substantial* issues of law or fact which would not otherwise be properly raised or argued, and (2) the issues thus raised are of sufficient 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. This second factor means a determination that such additional expenditure is fully consistent with the Commission's own assessment of overall priorities governing the allocation of its own resources. A finding of this nature should be one prerequisite to an ultimate judgment that "good cause" exists to permit intervention in a particular case.

But we wish to emphasize that satisfaction of the above standard, or of any other test or formula, will not automatically result in a right of intervention. As stated previously, the exercise of discretion on a question of intervention depends on an assessment of all of the facts and circumstances of a particular case, and each grant or denial will have minimal, if not non-existent, precedential value. But as further guidance for future applicants, we would suggest the following additional factors which will generally be considered: the applicant's ability to contribute to the case; the Commission's need for expedition in the handling of the case; and the possible prejudice to the rights of original parties if intervention is allowed.

The Commission applauds the efforts and enthusiasm of groups such as SOUP to fight for the public interest by means of participation in the work of federal agencies serving the same public interest. We are also very cognizant of the potentially great contribution to the work of such agencies, including our own. *Cf. Office of Communications of the United Church of Christ* v. *FCC*, 359 F. 2d 994 (D.C. Cir. 1966). But there are important countervailing considerations which must be weighed in the balance: the need to maintain an orderly and efficient adjudicative procedure and the need to control resource allocation on the basis of a system of established priorities. The public would be ill-served by an agency whose proceedings were vulnerable to disruption and agonizing delay by means of the proliferation of

parties and other participants. Furthermore, the need for public interest intervenors in FTC proceedings is substantially less than the need for such intervention in the proceedings of other agencies. Unlike some other agencies, the FTC has a built-in public interest prosecutor in all of its proceedings; our adjudications are truly adversarial, without intervention of any kind. Therefore, it is reasonable to require a substantial showing of special circumstances justifying intervention in a particular case.

In allowing intervention in the present case, we are beginning a delicate experiment, one requiring caution and close observation. Nothing in this opinion should be construed as a permanent or irreversible policy decision; we have many apprehensions concerning this step, and we find a need for a period of probation.

It now remains to explain why, in this particular case, the Commission has determined that SOUP has made a sufficient showing of "good cause" to justify allowance of intervention, consistent with the views expressed in this opinion. SOUP has raised the issue of the necessity for affirmative disclosure relief in a case that involves a public safety danger, a category of cases in which such relief may be especially appropriate. See *Campbell Soup, supra*, at 21,423. Furthermore, this issue and this type of case is high on the list of our own priorities. The Commission believes that intervention in this case may contribute to a fuller appreciation of the need for stronger remedies generally in Commission cases. We do not believe that in this particular case the grant of intervention will unduly lengthen or complicate the case, or that it will prejudice the rights of the respondent.

Having considered all of the views and arguments contained in all of the briefs submitted by SOUP, by respondent, and by complaint counsel in connection with this matter.

It is ordered, That SOUP's request for leave to file an interlocutory appeal from the hearing examiner's order denying its motion to participate as a party in these proceedings be, and it hereby is, granted.

It is further ordered, That the examiner be, and hereby is, directed to permit SOUP to intervene for the limited purposes of:

(1) presenting, at the conclusion of complaint counsel's case-in-chief, relevant, material, and noncumulative evidence on the issue of whether the proposed order to cease and desist adequately protects the public interest;

(2) presenting, with respect to said issue, briefs and oral argument in such manner and to such an extent as the examiner may deem reasonable; and

(3) exercising, with respect to said issue, such discovery rights as the examiner shall deem reasonable and necessary.

Commissioner MacIntyre filed a separate statement.

ASH GROVE CEMENT CO.

Docket 8785. Order and Opinion, Nov. 19, 1970

Order granting appeal of two third parties from denial by hearing examiner that certain parts of material subpoenaed be treated as confidential and remanding case to hearing examiner.

ORDER AND OPINION RULING ON A JOINT APPEAL FROM HEARING EXAMINER'S ORDER DENYING CONFIDENTIAL TREATMENT

This matter is before the Commission upon the joint appeal filed October 23, 1970, by Missouri Portland Cement Company (Missouri Portland) and Botsford Ready Mix Company (Botsford), third parties in this proceeding, from the examiner's order filed October 15, 1970, denying their motions to quash certain specifications in the subpoenas served upon them at the instance of respondent or, in the alternative, to grant confidential treatment.

The hearing examiner, in the appealed from order, held in part that to apply the so-called *Mississippi River* [1] confidential treatment as requested would unduly and unreasonably restrict and impair the preparation of respondent's intended defense and its rights of cross-examination. He further held that the circumstances present appeared to allow a departure from *Mississippi River* treatment; however he failed to detail these circumstances. The hearing examiner in a footnote suggests there is support for his position in the "full discussion and legal precedents cited in respondent's answer in opposition to the instant motion filed September 30, 1970." Such answer, however, insofar as we can determine contains no factual recitation distinguishing this case from *Mississippi River*.

Missouri Portland and Botsford in their appeal argue primarily that they should be granted confidential treatment like that awarded in *Mississippi River* because they allege the data is highly confidential business information and disclosure thereof to competitors and potential competitors would assertedly injure their competitive viability.

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[1] In the Matter of *Mississippi River Fuel Corporation*, Docket No. 8657, the Commission in an interlocutory order issued June 8, 1966 [69 F.T.C. 1186], directed that materials submitted in response to the subpoenas there in question "should be submitted to a reputable and disinterested accounting firm, to be selected by the hearing examiner in consultation with the parties, which shall compile and present the material to respondent's counsel in such a manner that no individual company's confidential arrangements or data will be revealed." This action is generally referred to herein as the *Mississippi River* treatment. The *Mississippi River* case is now on appeal in the United States Court of Appeals for the Eighth Circuit [454 F.2d 1083]. See also, the Commission's "Order after Remand" in *Lehigh Portland Cement Company*, Docket No. 8680 issued July 31, 1970, [p. 1642 herein] in which *Mississippi River* treatment was granted but with the right to counsel to obtain full disclosure during the hearing if they could show the need therefor.

Respondent answered October 29, 1970, arguing that *Mississippi River* confidential treatment is not required by statute or Commission rule; that such treatment has never been applied to other than quasi-merger information; that the application of such treatment would be a denial of due process to the respondent; and finally that the appellants have assertedly made no showing that any confidential treatment is here required.

Respondent is seeking information here apparently much like that sought in *Mississippi River Fuel Corporation*, Docket No. 8657 [75 F.T.C. 813], the case in which the *Mississippi* formula was originally applied. As to this precedent, the United States Court of Appeals for the District of Columbia in *Crowther* (*Lehigh*)[2] held in effect that where the facts have the degree of parallelism indicated between that case and *Mississippi River*, any difference in treatment should be explained. In other words, the Commission must articulate its reasons why a different approach is to be followed: The court stated in part:

> What remains essentially unexplained is why the *Mississippi* approach, with its certain protection against individual attribution, is now thought by the Commission to be inadequate or contrary to the public interest. We do not intimate that the Commission could under no circumstances properly arrive at such a conclusion in the course of a balancing process, but it is not enough to explain the Commission's changed feeling by merely asserting that it has struck a new balance. (*Supra*, ¶73,238 at page 88895.)

In light of the court's opinion we believe that the circumstances referred to by the examiner as not requiring the *Mississippi River* treatment in this situation should be clearly and explicitly set forth. The examiner has failed to do so and we therefore are unable to determine whether he ruled correctly or not. There might reasonably be grounds for not applying the *Mississippi River* treatment in this instance, *e.g.*, the apparent lack of any indication here, as in *Mississippi*, that respondent's real purpose is to gather the data for competitive reasons. However, we believe it is the initial responsibility of the hearing examiner to determine and articulate these grounds. If there are no adequate distinguishing features, the *Mississippi River* formula should be used.

On the other hand, it should be clearly recognized that *Mississippi River* treatment is not the only possible means of protecting confidential material. Nothing in this opinion should be construed to restrict the examiner's discretion in reaching a proper balance between the conflicting interests involved in this issue, *i.e.*, the interest of re-

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[2] *Federal Trade Commission* v. *Crowther*, 430 Fed.2d 510 (D.C. Cir. 1970); Trade Reg. Rep. [1970 Trade Cases] ¶73,238.

spondent in adequate discovery and the interest of third parties in protection of allegedly confidential information. If the examiner believes that the circumstances of this case are distinguishable from the circumstances in *Mississippi River*, but that Missouri Portland and Botsford should, nevertheless, receive some form of limited protection, then he should issue an appropriate protective order, one that may be less "restrictive" upon respondent's access than the *Mississippi River* form of protection. But, as noted above, any departure from Mississippi River treatment should be clearly explained. Accordingly,

It is ordered, That the joint appeal of Missouri Portland Cement Company and Botsford Ready Mix Company be, and it hereby is, granted.

It is further ordered, That the hearing examiner's order denying the motions of Missouri Portland Cement Company and Botsford Ready Mix Company be, and it hereby is, vacated.

It is further ordered, That this matter be, and it hereby is, remanded to the hearing examiner for further proceedings and action on the requests herein considered in accordance with the views outlined in this order and opinion.

UNIVERSE CHEMICALS, INC., ET AL.

Docket 8752. Order, Dec. 8, 1970

Order granting leave to individual respondent to proceed *in forma pauperis;* granting individual respondent's request for counsel; referring the matter to the Committee on the Federal Trade Commission of the Antitrust Section of the American Bar Association for the designation of counsel to assist individual respondent in prosecuting his appeal; and fixing time within which to perfect the appeal.

ORDER

Whereas, the Commission, by order issued October 22, 1970 [p. 1651 herein], referred this matter to the hearing examiner for the purpose of making findings of fact on the issue of whether the individual respondent Jordan L. Lichtenstein possessed sufficient financial resources to retain counsel for the purpose of prosecuting an appeal to the Commission from the Initial Decision entered herein on February 19, 1970;

Whereas, the hearing examiner, in findings filed on November 16, 1970, has found that the individual respondent Jordan L. Lichtenstein lacks sufficient financial resources to retain counsel for the purpose of prosecuting an appeal to the Commission, and the Commission has found no reason to doubt the correctness of that finding;

Now, therefore, it is ordered, That the respondent Jordan L. Lichtenstein is entitled to counsel, and is hereby granted leave to proceed *in forma pauperis*.

It is further ordered, That respondent's request for counsel be, and it hereby is, granted and the matter is hereby referred to the Committee on the Federal Trade Commission of the Antitrust Section of the American Bar Association for the designation of counsel to assist respondent Jordan L. Lichtenstein in prosecuting his appeal.

It is further ordered, That said respondent's time for perfecting an appeal to the Commission shall expire on January 31, 1971.

NATIONAL BISCUIT COMPANY

Docket 5013. Order, Dec. 18, 1970

Order denying complaint counsel's appeal from the examiner's ruling denying a motion to quash a subpoena *duces tecum* requiring the production of documents from Commission's files in four other cases.

ORDER DENYING APPEAL FROM RULING OF HEARING EXAMINER

Counsel for the Commission has filed an appeal from the hearing examiner's ruling denying a motion to quash a subpoena *duces tecum* requiring the production of documents from the Commission's files in the matters of National Tea Company, Docket 5648, Manhattan Brewing Company, Docket 4572, United Buyers Corporation, Docket 3211, and National Biscuit Company, Docket 5013.

The proceeding before the examiner is being held under the mandate of the Court of Appeals for the 5th Circuit for the purpose of determining whether the Commission employed an informal consent settlement procedure in entering an order to cease and desist against respondent herein in 1944. In granting the motion for issuance of the subpoena *duces tecum*, the examiner held that inspection of the documents called for by the subpoena would be one of the most reliable means of determining whether it was the practice of the Commission in 1944 to permit informal consent procedures and that to deny respondent reasonable access to such records would be "to deny respondent key corroborating evidence of its alleged version of the practice followed in this matter."

Commission counsel opposes the subpoena on the ground that it requires the production of documents which reflect the private deliberation and thought processes of the Commission and which are therefore privileged. He concedes, however, that there are serious countervailing policy considerations militating toward granting re-

lease of the documents. These considerations are that the documents may be the best evidence now available as to the procedures employed by the Commission in 1944 and that the court has ordered the Commission to determine for the court's purposes the nature of the 1944 order.

In view of the unusual circumstances involved in this case, particularly the fact that the court has directed that a resolution of the consent order issue be made, the Commission is of the opinion that it must deny complaint counsel's appeal and permit release of the documents called for by the subpoena:

It is ordered, That the appeal of counsel for the Commission from the hearing examiner's ruling denying the motion to quash the subpoena *duces tecum* be, and it hereby is, denied.

Commissioner MacIntyre not participating.

KOPPERS COMPANY, INC.

Docket 8755. Order and Opinion, Dec. 18, 1970

Order vacating initial decision and remanding case to hearing examiner for *de novo* trial.

Opinion of the Commission

This is an appeal by complaint counsel from a hearing examiner's initial decision dismissing the complaint.

I

COMPLAINT, ANSWER, AND PROCEEDINGS BELOW

The complaint issued on January 12, 1968, and states that Koppers Company, Inc., (hereinafter "Koppers") is engaged in the manufacture and sale of resorcinol, an organic chemical which is important in the manufacture of rubber tires and other products. The complaint charges that respondent has monopolized, attempted to monopolize, and has lessened or hindered competition in the production of this chemical, and that Koppers would now be in substantial competition with others if it were not for certain unfair methods of competition and certain unfair acts and practices of respondent which have been used for the purpose of promoting and maintaining a monopoly. Specifically, respondent is charged with the use of persuasion, intimidation, threats, coercion, price cuts, and long term requirements contracts for the purpose of maintaining a monopoly. It is alleged that the effects of respondent's acts and practices have been to discourage or foreclose the entry of actual or potential rival producers in the

resorcinol market, including U.S. Pipe and Foundry Company, hereinafter "U.S. Pipe"). According to the complaint, the alleged acts and practices constitute unfair methods of competition and unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45).

Respondent's answer admits certain jurisdictional facts and also admits that it is engaged in the manufacture and sale of resorcinol. The answer denies all of the other allegations of the complaint.

After extensive pretrial hearings on discovery, the formal hearings began on January 12, 1970. The hearings were recessed on two occasions to allow for additional discovery and preparation for cross-examination. Complaint counsel rested on February 5, 1970, and respondent moved to dismiss the complaint. This motion was denied by the hearing examiner, and respondent was ordered to proceed with its defense. Respondent elected not to put on a defense and the record was closed.

II

THE INITIAL DECISION

In an initial decision filed April 30, 1970, the hearing examiner determined that respondent's motion to dismiss the complaint should be granted because the public interest at this time does not require the issuance of a cease and desist order. The hearing examiner also found that respondent was denied due process in the preparation of its defense.

The hearing examiner said that Koppers' actions in 1964, 1965, and 1966 with respect to prices and contracts as well as actions specifically aimed at U.S. Pipe were inhibiting and not commendable, but unsuccessful; and that the improper acts and practices alleged in the complaint were, to a degree, true.[1] According to the hearing examiner, Koppers' market position was the result of "economic factors" and not any wrongful conduct.[2] He found that the acts and practices had been stopped and entry into the resorcinol market by U.S. Pipe was an accomplished fact. The initial decision says that the record shows three crucial facts: (1) the total requirements contracts, one of the alleged illegal practices, were abandoned a year after being signed—before U.S. Pipe commenced production and two years before the complaint issued; (2) no effort has been made by Koppers to reinstitute any of the alleged illegal practices; and (3) competition has been solidly entrenched by the entry of U.S. Pipe.[3] The examiner concluded, therefore, that the practices alleged in the complaint had been aban-

[1] Findings 44, 46.
[2] Finding 41.
[3] Finding 74.

doned and that the public interest did not require the issuance of a cease and desist order. He also held that the complaint must be dismissed because Koppers was denied due process by reason of the Commission order of January 9, 1970, which, it is claimed, forced Koppers to go to trial without adequate discovery.

In this appeal, complaint counsel has alleged numerous errors, both in the hearing examiner's findings of fact and in his conclusions. In view of our decision on the procedural issue, it will not be necessary to treat complaint counsel's contentions concerning the errors made by the examiner in making certain factual findings which were the basis of the decision on the merits.

III

THE DISCOVERY ISSUE

In preparation for the evidentiary hearings, Koppers applied for and obtained a subpoena from the hearing examiner calling for the production of records and documents pertaining to U.S. Pipe's production of resorcinol, including documents showing prices, sales, production costs, and profit or loss.[4] U.S. Pipe resisted production of documents covered by this subpoena to the point where the Commission was required, on June 4, 1969, to file a petition in the United States District Court for the District of Columbia for an order requiring U.S. Pipe to produce documentary evidence called for by the Commission's subpoena. While the discovery proceeding was pending in the District Court, the Commission issued an order on June 13 directing that evidentiary hearings were to commence no later than ten days after the hearing examiner had decided, on the basis of the disposition of the District Court petition, that Koppers' discovery needs have been met.

On October 2, 1969 [304 F. Supp. 1254], the District Court entered an order directing compliance with the subpoena subject to certain conditions and with instructions on the issuance of protective orders. On October 14, 1969, the hearing examiner held a prehearing confer-

[4] The subpoena was issued on November 20, 1968, and as later modified by the examiner on December 3, 1968, called for the production of records and documents covering the period from April 1, 1965, to March 12, 1968 (except for Items 5 and 6 for which the time period is January 1, 1962, to March 12, 1968), and pertaining to U.S. Pipe's production of resorcinol, including documents showing prices, sales, production costs, profit or loss, and documents concerning these estimates and past estimates or forecasts. On November 12, 1969, the hearing examiner issued an "updating" subpoena. As indicated later in the opinion, the scope of discovery is usually left to the discretion of the examiner and we will not overrule his decision in this case to issue a subpoena. However, as a matter of law, we do not interpret the decision in *FTC* v. *Columbia Broadcasting System Co.*, 5 CCH Trade Reg. Rep., Para. 72,835 (7th Cir. 1969 [414 F.2d 974]), as authority for the proposition that respondent may make initial requests for a subpoena and while that request is pending to seek still another "updating" subpoena. *Columbia Broadcasting* will be confined to its special facts, and only in the most compelling circumstances are respondents or innocent third parties to be subjected to multiple subpoenas.

ence for the purpose of accepting return by U.S. Pipe of documents called for by the subpoena and ordered to be produced by the District Court. Documents were produced by U.S. Pipe, but the examiner failed to rule, as the Commission had ordered on June 13, on the adequacy of this return.

Although the examiner had not ruled on the completeness of U.S. Pipe's return, respondent requested that the Commission set the opening date of hearings for January 12, 1970.[5] Respondent's motion was accompanied by an affidavit by its counsel which raised no question about unresolved discovery issues. On the contrary, the motion and affidavit could be read as a representation that respondent's discovery needs had been met and it would be ready for trial on January 12. Relying upon respondent's arguments and sworn statements, the Commission issued an order on November 19, 1969, granting respondent's request to set the hearing date for January 12, 1970. A subsequent joint motion by complaint counsel and respondent to withdraw from adjudication for the purpose of negotiating a consent settlement was rejected by the Commission and on January 9, 1970, the Commission issued an order confirming the January 12 hearing date previously requested by respondent. Although the issue of the completeness of the discovery return had not been raised by respondent in its motion or affidavit requesting the January 12 hearing date, the Commission nevertheless specifically made allowance for additional discovery. The Commission's January 9 order said:

> To the extent that any issues relating to the adequacy of compliance with subpoenas may be outstanding, the hearing examiner will make the necessary disposition with respect thereto at the hearings beginning January 12, 1970.

Respondent's argument that the January 9 order was "in effect, a direction to the examiner to deny any further production of documents" [6] is contrary to the letter and spirit of our order. The Commission had no such intention. On the contrary, it was the Commission's intention that respondent be given all the discovery to which it is entitled.

While respondent is in error about the Commission's intention respecting the January 9 order, this does not dispose of its contentions about the effects of that order as interpreted by the examiner. Respondent charges that as a result of the January 9 order, it has been denied adequate discovery. Respondent argues: (1) that many documents called for by the subpoena were not produced before the start of the trial on January 12, 1970, and although they were produced at various times during the trial (January 27, February 3, and Febru-

[5] Koppers' Motion to Reset Opening Date of Hearings to January 12, 1970 (11/12/69).
[6] Respondent's Brief, p. 22.

ary 5), they were not available for use in the cross-examination of some of complaint counsel's witnesses immediately after direct examination; and (2) other documents called for by the subpoenas have never been produced. Respondent also argues that all documents produced before the start of the trial were of limited usefulness because of unduly restrictive protective orders that were thought to be necessary to protect U.S. Pipe's trade secrets and other confidential information.

V

REASON FOR REMAND

Although we believe that the examiner misinterpreted our order of January 9, 1970, and that he was under no compulsion to begin the taking of testimony before satisfaction of all discovery needs, the facts remain that he began the trial, the witnesses were called, and Koppers was required to begin cross-examination before there was any ruling by the examiner on the adequacy of the subpoena return.[7] Apparently, complaint counsel would have the Commission dispose of the discovery issue and go to the merits by reviewing all exhibits and testimony to determine the actual extent of discovery and the degree of compliance with outstanding subpoenas. We reject this argument for in order for the Commission to determine the adequacy of discovery as of the start of the trial, or the extent of prejudice resulting from whatever inadequacy may have existed, we would need the answers to the following questions:

1. Which documents called for by subpoenas were actually submitted in response thereto as of January 12, 1970?

2. To what extent did Koppers already possess the information contained in the U.S. Pipe documents when other documents were requested? To what extent had U.S. Pipe physically made available documents which had not been marked or introduced, but were later cited by respondent as not having been produced? In this connection, were the market survey, plant expansion report, sales report, and cost reports not produced as alleged by respondent (Respondent's Brief, p. 32) or were these documents either not in existence or already produced by U.S. Pipe and in the possession of respondent as alleged by complaint counsel (Complaint Counsel's Reply Brief, p. 19)? Was

[7] The hearing examiner's rulings on the completeness of the discovery return are ambivalent at best. The initial decision says that the return ordered by the Commission and the Court has not been completed (Findings 51, 56). But, earlier the examiner had ruled:

* * * respondent received all the necessary documentary and oral evidence necessary to show that U.S. Pipe was not only able to enter the resorcinol market, but was able to sell all of its production as rapidly as it was produced (Hearing Examiner's Memorandum to Commission, March 18, 1970).

the pilot plant study made available to respondent as alleged by complaint counsel (Complaint Counsel's Reply Brief, p. 18) or had it not been produced as charged by respondent (Respondent's Brief, p. 32)? Were the written notes of Dr. Lofton made available to respondent in the hearing room and through lapse of respondent's counsel not examined (Complaint Counsel's Reply Brief, p. 19) or, again, were they not produced as alleged by respondent (Respondent's Brief, p. 32)? Only a hearing examiner present when the production of documents is made could resolve this kind of discrepancy. Obviously it is impossible for the Commission to resolve conflicting claims about what was produced and what was not produced when complaint counsel's own version of the facts is that the documents *were* produced, but were not *used* and, therefore, are not even shown in the record.

3. To what extent was information contained in the documents, which presumably were not produced, material and relevant to issues in the case, or to what extent would such information be helpful in cross-examining complaint counsel's witnesses?

4. Were documents that (a) contained needed information and (b) were submitted after January 12, 1970, and before the close of the trial, obtained by Koppers early enough to avoid any prejudice from precious unavailability?

5. With respect to the protective orders in force in the pre-trial period: (a) were these orders actually necessary to protect legitimate interests of U.S. Pipe? (b) to what extent did they inhibit counsel's preparation for trial, by preventing a full understanding of the documents obtained from U.S. Pipe? (c) to what extent was any possible prejudice from inadequate understanding of the protected documents (and thus inadequate preparation for trial) cured by virtue of the permitted consultation with Koppers personnel during the trial?

6. To what extent was the participation of Koppers' general counsel in the discovery process, and his consultation with "outside" counsel actually necessary to preparation for trial?

These questions indicate that a determination concerning the adequacy of discovery depends upon much more than a numerical count of the number of documents produced. They require a careful assessment of the good faith of the party making the return and the validity of the objections to the return. These are matters peculiarly within the competence of our hearing examiners.

Federal Trade Commission hearing examiners are charged with the responsibility of conducting the proceeding from the time the complaint issues for adjudication until an initial decision on the merits is filed. They are specifically charged with supervising discovery proceedings, issuing discovery orders and subpoenas, and determining the adequacy of the subpoena return. Clearly the hearing examiner

is in the best position to determine if the subpoena return is made in good faith and to evaluate the completeness or adequacy of the return.

Subject to our review for abuse of discretion, it is the function of the hearing examiner to determine when subpoenas have been complied with in good faith, and when objections to a subpoena return are frivolous. He is to determine the degree of protection to be afforded documents produced, in light of the public's interest in disclosure and with due regard for legitimate business interests, particularly those of innocent third parties. He is to determine when requests for subpoenas are meant for no other purpose than to harass third parties and to frustrate the Commission's adjudicative procedure; and he is to draw the line between adequate discovery for the purpose of conducting a defense and perversion of the discovery process for the purpose of delay.[8] In carrying out these responsibilities, examiners must make detailed findings on the discovery matters in issue. This the examiner has failed to do here. Our policy of examiner control over the discovery process and intrusion by the Commission only when absolutely necessary to ensure fairness and due process would be completely subverted if the Commission undertook to solve the complex discovery issues which are still unresolved in this record.

In view of the policy outlined above, it was error for the examiner to so interpret our order of January 9, 1970, as to render himself disabled from ruling on the adequacy of discovery before witnesses were called. That respondent's counsel must share the blame for this misinterpretation because he asked the Commission for no clarification prior to January 12, and therefore the Commission had every reason to believe that a hearing date specifically requested by respondent would be satisfactory is of no moment. The issue here is fairness and not parceling out blame. Respondent's rights should not be abridged because of the examiner's misinterpretation of the Commission's January 9 order or because counsel for respondent filed motions and affidavits requesting that evidentiary hearings begin before discovery was completed.

The examiner has said in his initial decision that in this case he interprets our orders as saying that discovery should have been completed in this case before the taking of any evidence. This is stretching what the Commission actually said,[9] but, in any event, we believe the

[8] See Commission Rules of Practice, 16 C.F.R. Sec. 3.42(c) (1970).

[9] In our orders of November 1, 1968 [74 F.T.C. 1621], and January 30, 1969 [75 F.T.C. 1050], we said it is our policy to encourage full discovery in advance of hearings and deviations should be permitted only in rare and unusual circumstances (order of November 1, 1968, Denying Interlocutory Appeals and Requests for Permission to File Interlocutory Appeals and order of January 30, 1969, Denying Application for Leave to File Interlocutory Appeals). This does not mean that examiners may not defer ruling on discovery requests when in the prehearing stage the relevance of particular documents have not been demonstrated. If relevancy is later demonstrated, the examiner may then allow recall of witnesses, deferred cross-examination or any other reasonable procedure to assure that the right to complete cross-examination upon the basis of discoverable documents is not abridged.

examiner had full authority to order full discovery before hearings if he believed, as apparently he did, that fairness required full prehearing discovery in this case.[10]

While we do not accept the proposition that the failure to give complete discovery prior to hearings necessarily raises a due process question, we have no basis for disturbing a denial of due process ruling, based on the timeliness of production where the examiner was presumably familiar with complaint counsel's order of presenting witnesses and could gauge, far better than the Commission, the degree of prejudice which would result if discovery of U.S. Pipe were not completed before the hearings began.

Respondent argues that the failure to complete discovery before the evidentiary hearings began resulted in the development of testimony on direct examination which is tainted because impeaching evidence was unavailable during cross-examination. According to respondent, "witnesses were able to respond to questions with the confidence that their testimony was not then subject to impeachment."[11] Respondent argues, and the examiner agrees, that additional cross-examination, which was allowed after certain documents were produced, did not cure these defects.

As we indicated earlier, arguments about the timeliness of discovery are peculiarly within the competence of the examiner, and his decision that a record is completely tainted by procedural defects is entitled to great weight. Where it appears that the record may be so tainted, we have no alternative other than to remand for the purpose of curing these procedural defects.

The record as presently constituted consists of evidence adduced by complaint counsel with the exception of those facts which were developed on cross-examination. Respondent will not be unduly prejudiced by our remanding the case since it has not put on any defense, and, in fact, it even refused to produce witnesses subpoenaed during the case-in-chief.[12]

Accordingly, in the interest of protecting the respondent's rights to a fair hearing, the evidentiary hearings will be *de novo*. We will not rely on any of the prior hearings for the purpose of resolving substantive issues, but these hearings may be considered by the examiner for the purpose of deciding the adequacy of the U.S. Pipe subpoena return and the scope of protective orders. Obviously, it would be wasteful to start the discovery process all over, and the prior hearings may be considered in the nature of prehearing conferences on discovery. The right of the hearing examiner to call such additional prehearing con-

[10] Tr. 742–43.
[11] Respondent's Brief, p. 31.
[12] Tr. 1909.

ferences is specifically reserved to the discretion of the hearing examiner. The examiner is specifically directed to reconsider, consistent with the decision in *Federal Trade Commission* v. *United States Pipe and Foundry Co.*, 304 F. Supp. 1254 (D.D.C. 1969), the scope and need for protective orders.

VI

THE EXAMINER'S ALTERNATIVE GROUNDS FOR DISMISSAL

We do not agree with the hearing examiner that even if there were no due process issue, on the present state of the record, the complaint should be dismissed. The hearing examiner's own factual findings argue against such a result. As we have indicated earlier, on the one hand, he found that Koppers' market condition was the result of "economic factors" and not improper actions. On the other hand, he found that respondent's practices with respect to prices and certain requirements contracts were "inhibiting" [13] in terms of potential entry and that the improper acts and practices alleged in the complaint "to a degree * * * are true" (Finding 46).

Such ambiguous (and contradictory) statements are of no assistance in the resolution of the substantive issues raised in this case. Moreover, the examiner did not give adequate consideration to the legal implications of other facts which he specifically found. For example, he found that from 1951 to 1967, Koppers was the sole domestic producer of resorcinol; [14] that there was no known chemical competitive with resorcinol *per se;* [15] and that in mid-1965, about the time when U.S. Pipe made a public announcement that it was going into the resorcinol business, Koppers began the use of total requirements contracts in an effort (in the examiner's words) "to retain all the business they [sic] had." [16] In addition, the initial decision does not contain a thorough enough analysis of the significance of Koppers' price reduction which occurred in 1965 when U.S. Pipe appeared on the scene and after an extensive period of relatively inflexible pricing from 1951 through at least 1961.[17]

The examiner is specifically directed to reconsider all the facts developed in the new record in the light of the Supreme Court's definition of the offense of monopolization as including two elements: (1) the possession of monopoly power, and (2) the "willful acquisition or maintenance" of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident. *United States* v. *Grinnell Corp.*, 384. U.S. 563 (1966).

[13] Finding 44.
[14] Finding 14.
[15] Finding 31.
[16] Finding 42.
[17] Finding 17.

The element of "willful maintenance" may properly be inferred from the use of requirements contracts. Although requirements contracts are not *per se* illegal, they are subject to careful scrutiny because of their potential market foreclosure effect, *Standard Stations* v. *United States*, 337 U.S. 293 (1949), and we believe that they are particularly suspect when used by a monopolist. Thus, a monopolist should bear the burden of proving a very strong justification for use of such contracts; especially so where acceptance by customers is induced by a special incentive, such as the substantially lower prices which apparently occurred in this case.[18]

This is not to say that monopolists may never use requirements contracts, and we certainly do not mean that monopolists may never reduce prices. But the combination of these factors may be sufficient to raise a presumption of monopolization. Koppers, of course, may attempt to rebut any facts showing monopolization by proof that the requirements contracts and price reduction (a) were motivated by business necessity or by other factors which are inconsistent with the view that they are evidence of the willful maintenance of monopoly power; or (b) had no significant causal relationship to Koppers' market position or the exclusion of potential entrants. Moreover, any facts which may not have been disputed on this appeal may be disputed (and fully discredited) in a new trial.

Still another ground for the hearing examiner's dismissal was his conclusion that there is no public interest in pursuing this complaint because (1) U.S. Pipe has become "firmly entrenched" in the market; and (2) respondent abandoned its improper conduct four years ago, when it modified its full requirements contracts after the Commission's investigation was initiated. On the basis of the record now before us, we cannot agree: U.S. Pipe has been consistently losing money, which is hard to reconcile with a finding of its being "firmly entrenched;" respondent continues to use partial requirements contracts, which facts may or may not be consistent with the finding of abandonment of improper conduct, depending on what a new record (unblemished by procedural defects) reveals concerning the effect, necessity, and legitimacy of these continuing practices. But even if the examiner were completely correct in these findings, he is in error in his conclusion that these facts demonstrate a lack of public interest in pursuing this complaint. The fact that past unlawful practices have ceased or been suspended is no assurance that they will not be resumed at some time in the future, absent the deterrent effect of a Commission order with the possibility of heavy civil penalties for violation; and the fact that such practices may have been unsuccess-

[18] *Cf. FTC* v. *Brown Shoe Co.*, 384 U.S. 316 (1966) (special services used as inducement to full supply contracts).

ful in the past (*e.g.*, because in the hearing examiner's view U.S. Pipe has become "firmly entrenched") is no assurance that they will not be successful in the future. Moreover, even if U.S. Pipe has been able to enter the market, this does not prove that but for respondent's alleged practices there may have been even more competition. The complaint is not confined to the foreclosure of U.S. Pipe.[19]

In short, neither discontinuance nor lack of success of unlawful practices bars a determination that the public interest requires Commission action.[20] Furthermore, as matter of law, if the record showed the offense of *attempting* to monopolize, the fact that the attempt was unsuccessful would be no defense. *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 153 (1951). And, finally, if the record supports a conclusion of monopolization, or attempt to monopolize, or a finding of practices which tend to lessen competition, it may not be enough that the *precise* practices found to be illegal may have been stopped. An order restoring the competition which has been eliminated is required and such an order may properly go beyond merely enjoining past illegality. In this connection, we believe the examiner has been unnecessarily restrictive in disallowing evidence of the existence and use of Koppers' patents and know-how, since these may play an important factor as to any question of relief.[21]

We will not, however, determine whether the allegation of attempt to monopolize or any of the other charges in the complaint have been proven or whether the case is moot or no longer in the public interest on the basis of documents and testimony which respondent has not had a fair opportunity to meet. The case must be remanded for new hearings.

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[19] Complaint, Paragraph 8, charges foreclosure of the resorcinol market to "actual or potential *competitors*."

[20] See *Libbey-Owens-Ford Glass Co.* v. *FTC*, 352 F.2d 415 (6th Cir. 1965) ; *Giant Food, Inc.* v. *FTC*, 322 F.2d 977 (D.C. Cir. 1963), *cert. denied*, 376 U.S. 967 (1964) ; *Standard Distributors, Inc.* v. *FTC*, 211 F.2d 7 (2d Cir. 1954).

[21] See *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954), where compulsory licensing of patents as proper remedy for monopolization was ordered although no prior patent abuse was found. In a subsequent Supreme Court review of the *United Shoe Machinery* order, even the more drastic relief of divestiture was considered:

> It is of course established that, in a Sec. 2 case, upon appropriate findings of violation, it is the duty of the court to prescribe relief which will terminate the illegal monopoly, ***deny to the defendant the fruits of its statutory violation,*** and ensure that there remain no practices likely to result in monopolization in the future. See, *e.g.*, *United States* v. *Grinnell Corp.*, 384 U.S. 563, 577 (1966) ; *Schine Theatres* v. *United States*, 334 U.S. 110, 128–29 (1948). * * *
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> * * * If the decree has not, after 10 years, achieved its "principal objects," namely, "to extirpate practices that have caused or may hereafter cause monopolization, ***and to restore workable competition in the market***"—the time has come to prescribe other, and if necessary more definitive, means to achieve the result.

United States v. *United Shoe Machinery Corp.*, 391 U.S. 244, 250, 251, 252 (1968) (emphasis added).

ORDER REMANDING PROCEEDINGS TO HEARING EXAMINER

This matter having been heard by the Commission upon complaint counsel's appeal from the hearing examiner's initial decision and upon briefs and oral argument in support of and in opposition to said appeal; and

The Commission having determined that the issues involved in this case cannot be decided on the merits because of the manner in which the hearings herein were conducted;

It is ordered, That the initial decision be, and it hereby is, vacated and set aside.

It is further ordered, That this proceeding be, and it hereby is, remanded to the hearing examiner for a trial *de novo* in conformity with views expressed in the accompanying opinion of the Commission.

AVNET, INC.

Docket 8775. Order and Opinion, Dec. 18, 1970

Order returning respondent's request for issuance of subpoena directed to Maurice H. Stans, Secretary of Commerce, to the hearing examiner for further proceedings.

ORDER AND OPINION RULING ON CERTIFICATION OF REQUEST FOR SUBPOENA TO GOVERNMENT OFFICIAL

This matter is before the Commission upon the hearing examiner's certification filed November 18, 1970 of respondent's motion for issuance of a subpoena *duces tecum* addressed to Honorable Maurice H. Stans, Secretary, United States Department of Commerce, which motion and certification is made pursuant to Section 3.37 of the Commission's Rules of Practice. The information which respondent seeks to have the Secretary produce consists of a list of the names and addresses of "respondents" from whom the Bureau of Census requested information compiled in certain product codes in the 1967 Census of Manufacturers, with an indication of those who in fact furnished the information compiled in the report thereon. [1]

The examiner in his certification recommended that the request be denied on the ground that the Census Bureau cannot release the requested information under the law, *i.e.*, the provisions of Title 13 U.S.C. § 9, and therefore no useful purpose would be served by the

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[1] On November 20, 1970, respondent filed with the examiner a motion for reconsideration of his recommendation on this certification, which motion was denied by the examiner by order filed November 23, 1970.

issuance of the subpoena.[2] The hearing examiner made no express findings on such questions as the relevancy and need for the information sought. He mentions in a footnote that complaint counsel have indicated they have no intention of using the Census report in question to carry their initial burden of proof and that its only significance is in anticipation of an expected counter definition of the market which respondent may assert.

Respondent filed with its motion a memorandum of points and authority in which it asserts that it needs the Census material for two purposes: (1) cross-examination and rebuttal of the report which complaint counsel is expected to offer in evidence and (2) discovery of evidence necessary for preparation of its defense. In arguing its claimed right to the production sought, respondent states that it does not ask that "the data furnished by any particular establishment or individual under * * * title [13] * * * be identified." (13 U.S.C. § 9) All it seeks, it states, is the Bureau's mailing list which it avers will not violate the confidence of "any particular establishment" supplying the Bureau with information. According to the respondent the names and addresses of the establishments surveyed were not obtained by the Bureau from the establishments themselves; they were assertedly compiled by the Bureau from information made available to it by the Internal Revenue Service and the Social Security Administration.

The hearing examiner erred in certifying respondent's motion to the Commission without having first made his determination on respondent's need for the data and the appropriateness generally of the request. If it is in fact true as he found here that a specific law bars the production of such information, that circumstance would seem to be the beginning of his consideration of the discovery issue presented, not the end.

Although Section 3.37 requires certification of a request for a subpoena directed to another government official and withholds from the examiner authority to rule directly on such an application, the Commission nevertheless looks to the examiner for an initial determination. An application of this kind will usually, if not always, concern basic issues of discovery and evidence, areas in which the examiner has broad discretion and responsibility. The purpose of Section 3.37 is not to relieve the examiner of his essential role in this regard, it is mainly to provide a means of informing the Commission of any such action

[2] 13 U.S.C. § 9 provides in part:

"(a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—

* * * * * * *

"(2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified * * *."

to prevent the possibility of abuse.[3] The examiner who has broad authority over the conduct of the trial generally should consider a request to a government official on the basis of its merits in the context of the particular proceeding. His determination will be given substantial weight although the Commission in such instances reserves the right to reject his views if plainly in error. For reference, see our decisions on motions for subpoenas to government officials in *Ash Grove Cement Co.*, Docket No. 8785, (order issued October 22, 1970 [p. 1660 herein]) and *Missouri Portland Cement Company*, Docket No. 8783, (order issued simultaneously with the order issued herein [p. 1688 herein]).

The fundamental issue here is not one as the examiner in effect holds of whether or not another government agency may, pursuant to law, withhold data sought by respondent; rather, it is whether or not respondent has established a discovery right to the information it seeks. The examiner, as we have indicated above, should determine this question and he should arrive at his decision by reference to rules on evidence and discovery in the context of the whole proceeding and also by reference to the showing required by Section 3.37. He might also consider the seeming premature nature of the request which suggests the possibility of reservation of judgment until some later appropriate time in the trial.

We will return this to the examiner for his reconsideration and decision in light of our views herein expressed. Accordingly,

It is ordered, That the matter be, and it hereby is, returned to the hearing examiner for further proceedings consistent with the views herein expressed.

Commissioner Dennison not concurring for the reason that he would deny issuance of the subpoena for the reasons set forth by the hearing examiner.

MISSOURI PORTLAND CEMENT COMPANY

Docket 8783. Order and Opinion, Dec. 8, 1970

Order denying respondent's motions for issuance of subpoenas *duces tecum* directed to the Acting Director, Bureau of Mines, and Director, Bureau of Census.

Order and Opinion Denying Motions for Subpoenas to Government Officials

This matter is before the Commission upon two certifications from the hearing examiner both of which were filed November 6, 1970.

[3] A further purpose of Section 3.37 is to give the Commission an opportunity to work out appropriate arrangements with other agencies involved if a request is found to be justified.

The first is a certification of respondent's motion filed October 8, 1970, for the issuance of a subpoena *duces tecum* to Dr. Earl T. Hayes, Acting Director of the Bureau of Mines, United States Department of the Interior. The other is the certification of respondent's motion also filed October 8, 1970, for the issuance of a subpoena *duces tecum* to Dr. George H. Brown, Director of the Bureau of Census, United States Department of Commerce. On both motions the hearing examiner recommends denial. Other papers filed are respondent's brief on the certifications filed November 13, 1970, and complaint counsel's reply to such brief filed November 23, 1970.

The requested subpoena to Dr. Hayes of the Bureau of Mines, seeks certain documents and data concerning tables in Bureau of Mines Year Books and other publications as well as documents disclosing the identities of the persons preparing the specified tables and documents. The hearing examiner in certifying the matter states that the request relates to documents contained in certain Commission exhibits admitted into evidence May 10, 1970. He states further that the purpose of respondent's immediate request had been presented to him in various different forms previously and rejected by him. He concludes that this subpoena would require a lengthy and burdensome production task "not necessary to any appropriate discovery purpose" in the proceeding.

The requested subpoena to Dr. Brown of the Bureau of Census would require the production of certain data and information relative to a proposed Commission exhibit entitled "Concentration Ratios in Manufacturing Industry (1963)" a document which the hearing examiner states was prepared for the Senate Subcommittee on Antitrust and Monopoly by the Bureau of Census. The examiner reserved his ruling on the receipt of the proposed exhibit in evidence at respondent's request. He expressed the view however on a provisional basis that the specifications in the subpoena would appear to require a lengthy and burdensome production task "not necessary to any appropriate discovery purpose" in the case.

Although Section 3.37 requires certification of a request for a subpoena directed to another government official, it is nevertheless the initial responsibility of the examiner to rule on the discovery and evidence questions presented. The Commission gives substantial weight to the recommendation of the hearing examiner in such instances, and his opinion will be adopted unless it is shown to be clearly in error.

Respondent in its brief filed November 13, 1970, asserts that the hearing examiner has abused his discretion and that unless the Commission overturns his recommendations respondent will be denied due process. Respondent's point seems to be that the hearing examiner cannot receive into evidence a U.S. Government document and then neither require complaint counsel to place a witness on the stand to testify as

to its contents nor permit respondent to call such witness in order to attack the reliability and trustworthiness of the document and its contents. Respondent states that for the Commission to delay decision will lead to unnecessary expenditure of time for all concerned.

Mere loss of time, however, is not a sufficient basis for Commission intervention in the trial of the proceeding in matters relating to discovery and evidence. On the precise issues before the Commission, *i.e.*, the requests for subpoenas to government officials, we rely as noted above, largely on the examiner's determinations. He has considered the requests in the light of the circumstances of the proceeding (although only provisionally on the request concerning the Bureau of Census) and has decided in essence that the material is not necessary for respondent's discovery needs. There has been no showing made which would justify the Commission rejecting his recommendations and we will therefore deny the requests. Our decision here, though concerning only the examiner's recommendations, is analogous to a holding that the hearing examiner did not abuse his discretion in the areas where he otherwise is given broad discretion; we are not ruling one way or the other on the specific points which may be in issue on cross-examination and the admissibility of evidence. See also our decisions ruling on motions for subpoenas directed to government officials in *Ash Grove Cement Co.*, Docket No. 8785, (order issued October 22, 1970 [p. 1660 herein]) and *Avnet, Inc.*, Docket No. 8775, (order issued simultaneously with the order issued herein [p. 1686 herein]). Accordingly,

It is ordered, That respondent's motion filed October 8, 1970, for the issuance of a subpoena *duces tecum* to Dr. Earl T. Hayes, Acting Director of the Bureau of Mines, United States Department of Interior, be, and it hereby is denied.

It is further ordered, That respondent's motion filed October 8, 1970, for the issuance of a subpoena *duces tecum* to Dr. George H. Brown, Director of the Bureau of Census, United States Department of Commerce, be, and it hereby is, denied.

STERLING DRUG, INC.

Docket 8797. Order and Opinion, Dec. 18, 1970

Order authorizing the issue of a subpoena *ad testificandum* to Mr. Reese R. Morgan, U.S. Department of Commerce.

Order and Opinion Ruling on Certification of Request for Subpoena for Appearance of Government Official

This matter is before the Commission upon the hearing examiner's certification filed December 4, 1970, of complaint counsel's motion for the issuance of a subpoena *ad testificandum* addressed to Mr. Reese R.

Morgan, Chief, Chemical Section, Industry Division, United States Department of Commerce pursuant to Section 3.37 of the Commission's Rules of Practice.

The hearing examiner recommends that complaint counsel's application be granted. He made his recommendation apparently on the ground that respondent does not object to the granting of the motion and on the further ground that if, "as indicated in complaint counsel's application, * * * Mr. [Morgan's] testimony is limited to merely testifying as to the manner in which proposed CX 67 a–b was prepared, the hearing examiner finds no conflict with the provisions of 13 U.S.C.A., Section 9, as amended."

The whole question of the application of Commission Rule, Section 3.37 and the hearing examiner's responsibility thereunder has been dealt with in detail in two other decisions in interlocutory matters issued simultaneously herewith, namely, *Avnet, Inc.*, Docket No. 8775 [p. 1686 herein] and *Missouri Portland Cement Company*, Docket No. 8783 [p. 1688 herein].

In this instance, we will approve the issuance of the requested subpoena, but the hearing examiner is instructed to apply the principles set forth in the other matters referred to above. The hearing examiner should not base his determinations on questions relative to the scope of Mr. Morgan's testimony, either on direct or on cross examination, on the possible application, or lack thereof, of a confidentiality provision protecting the records of another agency; rather he should decide such questions on their own merits by reference to the procedural rules including the rules on the receipt of evidence applicable to Commission proceedings. Nothing herein stated however is to the prejudice of the examiner in exercising his broad discretion to determine the admissibility and the appropriateness of the testimony in all respects otherwise. Accordingly,

It is ordered, That the hearing examiner be, and he hereby is, authorized to issue a subpoena *ad testificandum* addressed to Mr. Reese R. Morgan, Chief, Chemical Section, Industry Division, United States Department of Commerce.

ASH GROVE CEMENT COMPANY

Docket 8785. Order and Opinion, Dec. 28, 1970

Order denying various respondent and third party appeals, vacating certain of the hearing examiner's orders, and remanding case to hearing examiner for appropriate action.

ORDER AND OPINION RULING ON INTERLOCUTORY APPEALS

The Commission has before it in this already much appealed proceeding further appeals which will be separately considered below.

I

Respondent on October 20, 1970, appealed from the hearing examiner's order filed October 9, 1970, conditionally granting a motion to quash in part and limiting subpoena *duces tecum* issued at the instance of respondent to third party, George W. Garrett, president, Stewart Sand and Material Company (Stewart) Kansas City, Missouri. The appeal was answered by Stewart as well as by complaint counsel.

The contentions made by respondent on this order of the examiner are (a) that the hearing examiner was too restrictive in limiting the return under Specification 1 to the materials concerning the "Kansas City area" and certain other records furnished by Stewart and (b) that the hearing examiner erred in granting Stewart's motion to quash specifications on the ground that respondent has not met the requirements of Rule 45 of the Federal Rules of Civil Procedure.[1]

So far as this appeal concerns the hearing examiner's application of Rule 45 of the Federal Rules of Civil Procedure, it will be granted for the reasons stated in our order and opinion issued in this proceeding on October 22, 1970 [p. 1660 herein]. The matter will be returned to the hearing examiner for appropriate action consistent with the Commission's views therein expressed. This appeal in all other respects will be denied for the reason that no sufficient showing has been made as required by Section 3.35(b) of the Commission's Rules of Practice.

II

Respondent on November 12, 1970, appealed from the hearing examiner's order of October 30, 1970, denying motions and applications for third party discovery subpoenas *duces tecum*. Respondent attached to its appeal the affidavit of Norman A. Fordyce. Complaint counsel filed an answer to such appeal on November 20, 1970 and respondent filed a reply on November 24, 1970.

The order appealed from in this instance covers various requests for the issuance of subpoenas to third parties including Lone Star

[1] Stewart in its answer asserts among other things that respondent on more than one occasion has failed to timely serve it with important documents concerning subpoenas issued against it. Complaint counsel also makes the point in its answer that Stewart was not timely served in this instance. The record contains a certificate of service showing that Stewart on the 9th day of November 1970 was served various documents to complete the service concerning respondent's appeal. Thus, it appears that service has been completed and that there has been sufficient time for Stewart to have further answered if it had desired to do so. In the circumstances we will consider the appeal, although in the future, failure to comply with the Commission's rules relating to the timely service of documents may require appropriate corrective action.

Stewart's further charge that respondent was late in filing this appeal is without substance. Respondent was not served with the examiner's October 9th order until October 13th; therefore, respondent's filing of its appeal on the 20th of October was timely under the Commission's rules.

Ready Mix Concrete Company, Geiger Ready Mix Company and twenty "certain concrete manufacturers." Respondent argues that the examiner's denial of the requested discovery is arbitrary, capricious, and violative of its due process rights.

The examiner in his order states that respondent has shown no actual need for the subpoenas sought in this instance and that if during the course of the presentation of complaint counsel's case-in-chief respondent's need for any such subpoenas to prepare for its defense becomes apparent, it will be given the opportunity to renew its request. In discovery matters, the hearing examiner has broad discretion and no showing has been made here to justify a review of his decision by the Commission at this stage of the proceeding. Moreover, no sufficient showing required by Section 3.35(b) of the Commission's Rules of Practice has been made. Thus, this appeal will be denied.

III

Finally, we have before us cross appeals by respondent and jointly by two third parties named in subpoenas from the orders of the hearing examiner filed October 21, 1970, and November 10, 1970.

Respondent filed an appeal pursuant to Section 3.35(b) on October 27, 1970, from the examiner's order of October 21, 1970, which order granted the motions of third parties Monarch Cement Company (Monarch) and Concrete Materials, Inc., (Concrete Materials) to quash subpoenas issued to them at the instance of respondent.[2] The examiner upon an application by Monarch and Concrete Materials to reconsider their motions, filed his second order on these subpoenas on November 10, 1970. Therein he referred among other things to the Commission's order and opinion filed October 22, 1970 and he denied the motion for reconsideration and the motions to quash in their entirety.

Respondent, in this instance, argues that the hearing examiner erred in applying Rule 45 (b)(2) and (c) of the Federal Rules of Civil Procedure and in requiring the advance payment of witness fees and costs. The question on the use of Rule 45 was dealt with by the Commission in its order and opinion issued herein October 22, 1970 and the principles there mentioned apply equally here. However, respondent's appeal is moot in this instance because of the examiner's subsequent order filed November 10, 1970, denying the motions to quash in their entirety. The appeal will be denied to dispose of the matter for the record.

Monarch Cement Co. and Concrete Materials, Inc., on November 24, 1970, jointly appealed from that part of the hearing examiner's order

[2] The subpoenas were issued to Vernon Barlow, vice president, the Monarch Cement Company and to Robert C. Brown, vice president, Concrete Materials, Inc.

filed October 21, 1970 which denies confidentiality "Mississippi River treatment" to the information sought and from the portions of the orders filed October 21, 1970, and November 10, 1970, denying motions to limit certain specifications of the subpoenas to the "Kansas City area." Their arguments are (a) that the denial of confidential treatment will result in the disclosure of trade secrets giving respondent a competitive advantage and (b) that certain specifications of the subpoenas extend beyond the relevant geographic market.[3]

So far as the appeal of Monarch and Concrete Materials takes issue with the examiner's rejection of their request for confidential treatment (*i.e.*, treatment like that granted in the matter of *Mississippi River Fuel Corporation*, Docket No. 8657, sometimes referred to as the Mississippi River treatment) our views are set forth in our order and opinion issued November 19, 1970 [p. 1671 herein] in this matter, concerning a similar appeal. For the reasons therein stated, we will grant the appeal to the extent that it involves the examiner's denial of petitioners' request for confidential treatment, vacate the examiner's orders and direct him to take appropriate action consistent with our views expressed in such prior order.

The appeal of Monarch and Concrete Materials is denied in all other respects for the reason that no sufficient showing is made required by Section 3.35(b) of the Commission's Rules of Practice. Accordingly,

It is ordered, That respondent's appeal from the hearing examiner's order filed October 9, 1970, be, and it hereby is, granted to the extent set forth in this order and opinion and otherwise denied.

It is further ordered, That respondent's appeal from the hearing examiner's order of October 30, 1970, be, and it hereby is, denied.

It is further ordered, That respondent's appeal from the hearing examiner's order filed October 21, 1970, be, and it hereby is, denied.

It is further ordered, That the joint appeal of Monarch Cement Co. and Concrete Materials, Inc., from the hearing examiner's orders filed respectively on October 21, 1970, and November 10, 1970, be, and it hereby is, granted to the extent indicated in this order and opinion and it is otherwise denied.

It is further ordered, That the hearing examiner's orders filed respectively on October 21, 1970, and November 10, 1970, be, and they hereby are, vacated.

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[3] These appellants on October 28, 1970, and again on November 19, 1970, asked for an extension of time for filing their cross appeal and answer. Since they have filed their appeal which is here being considered and since respondent's appeal is mooted by the examiner's subsequent order, thus eliminating the need for an answer, no further action is required on the time extension requests.

It is further ordered, That this matter be, and it hereby is, remanded to the hearing examiner for appropriate action consistent with the Commission's views expressed in this order and opinion and to the extent applicable in its prior orders and opinions issued herein respectively, on October 22, 1970, and November 19, 1970.

ADVISORY OPINION DIGESTS*

No. 399. Plan for Merchandising by Lottery.

The Commission issued an advisory opinion relative to proposed weekly drawings for wigs.

The wigs are purchased at $5 each wholesale and retailed to consumers at $50. None have ever been sold at retail below this price. It is proposed to establish a method by which each buyer of a wig would be assured of a wig at a price of $50 or less. The method of operation would be as follows: Customers would be divided into groups of 10. Each week, each such customer in each such group would pay $5, and a drawing would be had, the winner to receive a wig. The next week, the nine remaining persons in the group of 10 would each pay $5, and one of them would receive a wig. This process would continue, until finally the last person in the group would pay the full price of $50 for the wig.

The Commission expressed the view that the proposed course of action would constitute a scheme to sell merchandise by means of a lottery or game of chance, a sales device long held to be illegal under the Federal Trade Commission Act, Section 5. The mere fact that each participant receives a thing of value for his contribution does not negate the existence of a lottery nor change the plan's essential nature as an appeal to the public's gambling instincts. Clearly, the participants in this drawing would be motivated by the chance of receiving something of more value than the amount they contributed. Hence, the nature of the appeal is unmistakable. (File No. 703 7051, released Jan. 19, 1970.)

No. 400. Labeling of Imported Magnetic Recording Tape.

Modifying the position announced in Advisory Opinion Digest No. 366 [76 F.T.C. 1103] (16 C.F.R. § 15.366), the Commission advised that:

Tape accompanying an imported tape recorder, if packaged to show country of origin, is not required to express quantity of contents as

*Prior to October 29, 1969, in conformity with the policy of the Commission, advisory opinions were confidential and available to the public only in digest form. Digests of advisory opinions were published in the Federal Register. The policy was changed on October 29, 1969, to provide for publication of advisory opinions and requests therefor, including names and details, when rendered, subject to any limitations on public disclosure arising from statutory restrictions, the Commission's rules, and the public interest. The policy was again changed on December 22, 1971, to provide for the placement in the Commission's public record of advisory opinions and requests therefor, including names and details, immediately after the requesting party has received the Commission's advice, subject to any limitations on public disclosure arising from statutory restrictions, the Commission's rules, and the public interest.

described in Advisory Opinion Digest No. 366 (16 C.F.R. § 15.366), provided the description of contents does not constitute an unfair or deceptive practice which would violate the Federal Trade Commission Act.

Cartridge tapes may be expressed in terms of playing time in lieu of a linear measurement.

Imported packaged magnetic recording tapes may continue to be distributed provided the country of origin is appropriately shown.

This action was taken to conform the opinion with the Commission's Statement of General Policy and Interpretation, Status of specific items under the Fair Packaging and Labeling Act, 16 C.F.R. § 503.2. (File No. 703 7055, released Jan. 19, 1970.)

No. 401. Designation of Landscaping Material by Volume on Containers.

In a previous advisory opinion the Commission advised that to designate the contents on containers of landscaping material by cubic measurement rather than by weight would be objectionable under Section 5, Federal Trade Commission Act.

The proposal considered involved the marketing of a processed clay material in physical form varying from pieces of approximately 2 inches down to 1/10 of an inch in diameter for use as a landscaping material, particularly around shrubs, trees, walkways and other non-grassed areas. Because the density of the product by volume is less and the area of coverage by weight greater than competing materials used for the same purpose it was represented that it would be more beneficial and informative to consumers to stipulate the container contents in cubic measurement instead of by the traditional contents by weight designation. Specifically, the Commission was asked:

May the product be marketed by showing the contents of the bags in which it is contained by way of cubic measurement and not by weight, leaving off all reference to weight?

Also, may the area the material will cover in square inches, feet, or yards to a specified depth be shown on the bags?

The Commission expressed the view that the product, being used mainly for ground covering purposes, is classified as a type of lawn and garden commodity and as such is not considered a "consumer commodity" as defined by the Fair Packaging and Labeling Act. Whether the proposed labeling would be an unfair or deceptive act must, therefore, be tested against the criteria of Section 5, FTC Act. Controlling in matters of this nature is whether the proposed course of action is fair to consumers according to recognized principles, not that it might be unfair according to tradition and the morals of the market place. The concept of "Unfair or deceptive acts or practices"

stresses business integrity, encourages legitimate trading, and protects consumers against commercial spoliation.

The Commission expressed the view that it would be more beneficial and informative to consumers if the contents were designated on the product containers by both weight and volume. Although not essential, it would also be beneficial and informative to consumers if the extent of area coverage to a predetermined depth by weight and by volume were included in such content designation.

The Commission further advised that its opinion is confined to so much of the request as falls within its jurisdiction and the extent, if any, to which another governmental agency, either local, State, or Federal, may be concerned is a matter to be determined by reference to that agency. (File No. 703 7037, released Jan. 19, 1970.)

No. 402. Marking of Shoe Soles Composed of Ground Leather.

The Commission issued an advisory opinion in regard to the proper marking of a material to be used in the manufacture of shoe soles.

The material in question is not leather but a man-made fibrous leather material bonded with an adhesive. It will be manufactured and sold in its natural form to manufacturers for use as shoe soles and/or heels. Shoe manufacturers will in all probability dye or stain the material so as to give it the appearance of leather or any other material as desired. Under no circumstances will the manufacturer of the material have any control over its appearance once it has been sold to shoe manufacturers.

Specifically, the following questions were raised in regard to the proper marking of the material:

(1) When the material is used for shoe soles and/or heels but does not have the appearance of natural leather, need there be any marking or labeling whatsoever?

(2) In those instances where the material is used for shoe soles and/or heels and does have the appearance of natural leather, is it necessary to mark or label the material with a designation indicating that it is not natural leather?

(3) In all cases where the answer to question 2 is in the affirmative and assuming that the material is easily visible, is it sufficient to mark the shoe part made from this material with its trade name?

(4) If the answer to question 3 is in the negative, what would constitute adequate and sufficient disclosure of the nature of the material?

In regard to the first question, where a manufacturer produces a leather-type product for use in shoes and knows or has reason to believe that after processing it will look like leather, the manufacturer must label the product as indicated in question 2.

Second, when the material is used for shoe soles and does have the appearance of leather, it is necessary for the shoe manufacturers to mark or label such materials with a designation which clearly discloses either: (1) The material is simulated or imitation leather, or (2) the general nature of the material in such manner as to show it is not leather or split leather. This requirement is imposed by Guide II of the Shoe Guides, but it should be noted that heels are specifically exempted from the marking provisions thereof.

Third, marking the shoe soles with the trade name would not be sufficient to remove the deception created by the false impression where the material is finished to have the appearance of leather. In short, there is nothing in the use of the trade name alone which would meet the requirements set forth in answer to question 2.

In response to the fourth question, Guide VI of the Shoe Guides sets forth a number of terms which would be acceptable in describing the nature of the material when it is finished to have the appearance of leather. Those terms are as follows: "simulated leather," "imitation leather," or that it is "ground, pulverized or shredded leather" (as the case may be). There are a variety of ways in which this objective could be accomplished and the foregoing quoted language is merely suggestive of some ways in which this could be done. (File No. 703 7041, released Feb. 4, 1970.)

No. 403. Union-Employer Agreement To Cease Importing a Competitive Product.

The Federal Trade Commission rendered an advisory opinion in regard to the legality of labor unions entering into collective bargaining agreements with their employer manufacturers whereby the manufacturers will agree to cease importing products of the type they manufacture.

It is alleged that the unions have made such a proposal to their employer manufacturers because of the increased imports which have resulted in decreased domestic production, increased domestic unemployment, loss of wages, etc. It is contemplated that penalties will be assessed against any manufacturer who violates the proposed agreement.

The Commission concluded that the immunity afforded to labor unions for certain labor activities is lost if the union combines with non-labor groups to effect a restraint of trade not intimately related to wages, hours, and working conditions and otherwise prohibited by the antitrust laws or Federal Trade Commission Act. (File No. 703 7045, released Feb. 4, 1970.)

No. 404. Franchise Sales Promotion Plan With Pyramiding Franchises and "Functional Override" Commission Implications.

In a previous advisory opinion the Commission advised that a violation of Section 5 of the Federal Trade Commission Act would result from the adoption of the following proposed franchise sales promotion plan.

The plan centers around the sale of a fruit juice drink through franchise independent businessmen who will assist in the franchisor's growth by training additional franchisees. For such performance an original franchisee will be paid a "Functional Override," or commission, of 1 percent of the gross sales of those they recruit and train (direct franchisees) and one-half of 1 percent of the gross sales of those recruited and trained by direct franchisees (indirect franchisees). In addition, original franchisees will be granted loan credits and cash bonuses for persons proposed and accepted as franchisees.

Although the plan was not intended to have "pyramid sales" implications and the "Functional Override" was to stop with the indirect franchisees insofar as an original franchisee is concerned, a direct franchisee may become an original franchisee and indirect franchisees may become direct, and subsequently original, franchisees by sponsoring other persons as franchisees. This being so the "Functional Override" continues throughout the chain down to the last indirect franchisee recruited who would be unable to derive any benefits from the plan for the reason that the continually expanding pyramid of franchisees would prevent the later franchisees from successfully recruiting still other participants.

A tabulation distributed through an operations manual to potential franchise purchasers indicates that an original franchisee may, in theory, benefit from the effort of at least twenty (20) other franchisees. This in the Commission's judgment is somewhat beyond the realm of possibility since an original franchise purchaser does not know the number of prior franchise purchasers nor the degree to which an available market has been saturated with franchises. The return to any given franchise participant will unquestionably be a great dal less than the theoretically achievable amount set forth. No single franchise participant can be certain what his return will be, if any, beyond perhaps that from his first few direct franchisees. Any further amount he might receive would accrue to him sheerly through chance. (File No. 703 7057, released Feb. 4, 1970.)

No. 405. Disclosure of Imported Fabric Used in American Flags.

The Commission issued an advisory opinion with regard to the manufacture of American flags made from imported cloth that it

would be necessary to clearly and conspicuously disclose the foreign country of origin of the printed fabric used in the production process under Section 4(b) (4) of the Textile Fiber Products Identification Act.

According to the facts considered in this opinion the printed fabric will originate in either Japan or Taiwan, depending upon where the best price can be obtained. The fabric will be shipped into the United States in a finished state in rolls of 50 to 100 yards per roll. Thereafter, it will be cut, hemmed on the side where cut, grommets attached, assembled, and packaged. The cost of the imported printed fabric or flag material will represent approximately 25 percent of total production costs. The remaining 75 percent will represent domestic labor and material costs. The latter consisting primarily of a pole upon which to hang the flag.

Section 4(b) (4) of the Textile Fiber Products Identification Act provides, among other things, that an imported textile fiber product shall be misbranded if it is not labeled so as to show the name of the country where the product was processed or manufactured. (File No. 703 7050, released Feb. 18, 1970.)

No. 406. Origin Labeling on Kits Containing Imported Beads.

The Commission rendered an advisory opinion concerning the proper labeling of a product line of craft kits containing imported glass beads.

Under the facts considered, the box containing the various items in the craft kit would be marked "Manufactured by * * *" with the name of an American company and its address although some of the items representing 20 percent of the total cost will consist of glass beads imported from Japan and Czechoslovakia. Additionally, loose beads in glass bottles will be offered for sale, the imported beads here representing about 40 percent of the total cost. Advice was requested as to whether each bottle should be marked with the name of the country from which the beads were imported, such as "Made in Japan," "Made in Italy," or "Made in France" as the case might be.

The Commission's advisory opinion reaffirmed the rule that "Made in U.S.A." markings are permissible only on products entirely of domestic origin. Therefore, "Manufactured by * * *" with the name of the American company and its address, being synonomous, would be improper since 20 percent of the components of the kits consist of imported beads. However, in the absence of any affirmative representation as to the origin of the kits and their contents, the Commission ruled that such failure to mark or mention the origin of the components on the outside of the box would not be regarded as deceptive. This ruling will not prevail as to the glass beads being offered for sale

to the public separately from the kits. In such circumstances, the country of origin of such items must be fully disclosed. (File No. 703 7060, released Feb. 18, 1970.)

No. 407. Association Discussion Limited to Voluntary Standardization Not Violative of Outstanding Cease and Desist Order.

The Commission issued an advisory opinion in which an association of librarians was advised that contemplated meetings with various publishers for the limited purpose of discussing standardization of forms, definitions and cataloging would not be violative of Commission administered statutes or the terms of an outstanding cease and desist order prohibiting the publishers from meeting for the purpose of discussing industry selling practices and procedures. Because of the provisions of the order the publishers had heretofore refused to meet as a group.

The Commission considered assurances that the proposed discussions would not involve matters of discounts, freight and other allowances, and other elements of price, and the fact that members of the association of librarians were book purchasers with a vital interest in the preservation of competition in the industry and the prevention of price fixing.

The association was further advised that Commission approval was based upon an understanding that any agreements reached at such meetings are to be entirely voluntary actions of each party involved without compulsion in any form. (File No. 703 7073, released March 20, 1970.)

No. 408. Debt Collection Forms and Envelopes Which Simulate Government or Other Official Documents.

The Commission advised sellers of skip tracer and debt collection forms that a proposal to use forms simulating Government and other official documents would be regarded as violative of an outstanding cease-and-desist order and Commission administered statutes.

In rejecting the proposal to use certain envelopes and forms, the Commission pointed out that:

(1) The general appearance of the proposed forms, when considered with numerous references to "Washington," "National," "Federal," Federal courts, and to the Federal Trade Commission, cause the forms to simulate Government or official documents.

(2) The forms do not disclose in a prominent place, in clear language and in type at least as large as the largest type (exclusive of captions) either that the sole purpose is to collect a debt, or that the U.S. Government is in no way connected with the request for payment.

(3) The forms do not disclose in a prominent place, and in clear language, the identity of the creditor to whom the debt is allegedly owed.

(4) The forms contain only a general statement of the rights of a creditor under state law to attach the real or personal property, income, wages, and other property of the debtor; the statement is misleading and inaccurate because, while it will be sold and used in many states, it does not set out the many variations in state laws, particularly the exemptions and restrictions.

(5) The forms represent by implication that the Federal Trade Commission and a federal court of appeals have approved them.

(6) The brown window envelope in which the forms are to be mailed simulate, by their general appearance and by reference to "Washington" and "Federal," envelopes used by the Federal Government for official purposes.

(7) Because of the similarity to envelopes used by the Federal Government and references to "Washington D.C." and "Federal," the envelope seems to come from a party other than the creditor. (File No. 713 7023, released April 13, 1970.)

No. 409. Labeling of Reconditioned Automotive Parts.

The Commission issued an advisory opinion with respect to labeling requirements applicable to used automotive engine accessories such as alternators, generators, starters, and similar parts which will be marketed in the United States after having been reconditioned in Taiwan with some new American or Taiwanese components such as wire and diodes.

It was proposed that scrapped and otherwise used automotive parts would be acquired in the United States and shipped to Taiwan for reconditioning with such new materials as might be necessary, and then returned to the United States for final assembling and marketing. No information was available as to what percentage of total costs would be accounted for by shipping, foreign labor, components of a foreign origin, domestic parts, or domestic labor.

Under these circumstances the Commission advised in general terms that:

(1) Labeling the reconditioned automotive parts "Made in U.S.A." would be a deceptive act or practice violative of Section 5, Federal Trade Commission Act.

(2) The Commission would not object to a full disclosure of all relevant facts to purchasers of the merchandise; and

(3) Insufficient information had been supplied to permit an informed decision as to whether all reference to origin or place of work done may be omitted entirely from labels on the commodities.

The Commission added that the United States Bureau of Customs should be consulted for applicable regulations affecting such activities. (File No. 703 7065, released Feb. 18, 1970.)

No. 410. Speed Ratings and Safety Claims for Tires.

The Commission advised that the proposed advertising of speed rating and safety claims for foreign made automotive tires would be considered deceptive and in violation of Section 5, Federal Trade Commission Act.

The statements to be used in advertising and promotional materials included: "The (tire) has an HR* speed rating—this means it has survived tests at 130 MPH for 24 hours straight." "The (tire) is rated at 130 MPH for 24 hours straight." At the bottom of the page would appear this asterisked footnote: "*Internationally-recognized speed rating of the European Tyre and Rim Technical Organization. Established in supervised tests by professional drivers. Not intended to encourage high-speed driving."

In a policy statement of June 3, 1969, entitled "F.T.C. Will Challenge Misleading Speed and Safety Representations in Automobile Tire Advertising," the Commission announced that "* * * it intends to challenge automobile tire advertising which misrepresents the overall speed and safety performance capabilities of tires. Examples of current advertising claims are '* * * built low and wide like a racing tire. Tested at 130 mph', '* * * all new, wide tire made especially for the young crowd and today's high performance cars', '* * * certified safe at 100 mph. So you're safe at 60, 70, or 80', 'Safety tested at over 100 mph * * *', 'Stamina so great we safety tested them at 130 mph', and 'stops 25% quicker'."

In the policy statement the Commission took the position that "There is reason to believe that claims of this type may be deceptive and misleading as to tire safety. The speed tests do not reveal how the tires will perform at such speeds under all road conditions encountered in normal driving at various stages of the life of the tires. Specifically, the tests do not reveal whether the tires at such speeds during normal use would withstand various road hazard impacts, the sustained flexing to which tires would be subjected, and whether the tires would remain seated on the rim of the wheel under such conditions." (File No. 703 7058, released Feb. 18, 1970.)

No. 411. Tripartite Promotional Plan Involving Use of "Cents Off" Coupons.

The Commission rendered an advisory opinion concerning a tripartite promotional plan involving use of "cents off" coupons redeemable after purchase of certain products sold in retail grocery stores.

It was proposed that the promotion, designed to ultimately cover a single large metropolitan trading area, would be operated in a small portion of the area for 30 days and then moved to an adjoining area for another 30 day period until the entire metropolitan area had been covered. The value of each coupon will depend upon the product purchased and will be attached on the shelf where the product is displayed. Each package of the promoted product will bear a sticker which the shopper removes and places on the "cents off" coupon as proof of purchase.

Participating manufacturers will pay a fixed fee for each retailer serviced, plus the value of the redeemed coupons, plus 2 cents to be passed on to cooperating retailers for services rendered. Each such supplier will be cautioned to notify his retail customers that the plan is available to them. Notice of the availability of the promotional plan will be made to retailers through wholesale distributors, local trade associations, advertising in the trade press, and through the buying offices of cooperatives and chain stores. In addition, spot checks of retail grocery stores in an intended area will be made by personal contact or telephone to determine whether they have knowledge of the program and that it is available to them.

The Commission expressed the view that implementation of the proposed course of action in the manner described would be unlawful unless (1) the plan is offered to all competing sellers of the supplier's products regardless of the type of store or location of the seller and (2) the value of the "cents off" coupon is accurately and adequately made known to the prospective purchaser prior to the purchase of the product to which the coupon relates. (File No. 695 7018, released March 20, 1970.)

No. 412. Country of Origin Labeling on Imported Textile Fiber Garments.

The Commission issued an advisory opinion concerning the requirements for noting the country of origin on labels of certain nylon or acrylic knit garments to be imported in the greige and thereafter dyed and finished in the United States.

One garment, made of nylon, has an f.o.b. price of $13.50 per dozen and the other garment, made of polyester, has an f.o.b. price of $23 per dozen. The cost of dyeing and finishing the garments in the United States is between $8 and $12 per dozen, an approximate increase of 50 percent in value. After dyeing and finishing, the garments become merchantable wearing apparel and will be appropriately identified as to fiber content and the RN number.

The Commission noted that Rule 34(a) of the rules and regulations issued as required by the Textile Fiber Products Identification Act

provides that: "Where the form of an imported textile fiber product is not basically changed, the country where such product was originally manufactured or processed shall be set out in the required information. As for example, a fabric imported into the United States in the greige but finished and dyed in this country must show the country where the fabric was manufactured or processed."

The Commission advised that the failure to mark the imported garments as to their country of origin would be violative of the Textile Fiber Products Identification Act. (File No. 703 7077, released March 20, 1970.)

No. 413. Country of Origin Labeling on Boxes Containing Imported Bearings.

The Commission rendered an advisory opinion concerning the proper marking of boxes containing metal bearings imported from Japan.

It was proposed that the bearings, manufactured in Japan, will have the term "Made in Japan" etched into the metal of each bearing. Catalog advertising describing these bearings will bear the legend "Made in Japan."

The Commission expressed the view that unless the box bears any representation that the content is a product of United States manufacture, the failure to mark thereon "Made in Japan" would not be deceptive. (File No. 703 7075, released March 20, 1970.)

No. 414. Uniform Warranty and Warranty Service System.

The Commission rendered an advisory opinion concerning a "Zip" Warranty and Warranty Service System to be offered farm and industrial machinery manufacturers for use in connection with sales of their equipment.

Under the proposed plan an equipment manufacturer, in warranting his merchandise, would supply (1) a geographically convenient replacement parts depot from which repair and replacements parts would be readily available to dealers and users; (2) a central means for receiving and handling equipment deficiency reports and complaints; (3) an incentive award program for employee-assemblers of individual troublefree equipment; (4) a comprehensive, uniform warranty on all equipment; (5) a cash award program for employee-assemblers based on annual sales of troublefree equipment. The heart of the seventeen (17) page warranty and service plan is a series of cash and other awards intended to encourage purchasers to report equipment deficiencies and to encourage service personnel to strive towards the goal of zero defects.

The Commission advised that use by farm and industrial equipment manufacturers of the submitted warranty plan would be unob-

jectionable except for the possible adoption by competitors of a warranty common to both. The Commission was of the view that it would be preferable for any participating supplier to establish the terms and conditions of his own warranty program without reference to the terms and conditions of a competitor's warranty program. (File No. 703 7076, released April 13, 1970.)

No. 415. Country of Origin Labeling on Crates Containing Unfinished Imported Raincoats and on Garments After Being Finished in the United States.

The Commission rendered an advisory opinion with respect to (1) it requirements for foreign origin disclosure in the labeling on containers of unfinished "Dacron" polyester and rayon raincoat bodies and raincoat carry-bags to be imported from the Orient and (2) the necessity for disclosing the foreign country of origin on labels of the finished garments and bags which are to be sold as a unit to consumers at the retail level.

Under the proposed operation various sized raincoat bodies will be imported without collars, buttons or buttonholes. Material for the carry-bags, cut to size, will also be imported without buttons or buttonholes. After importation, American made buttons and various styled American made collars will be sewn onto the coat body, and the buttonholes cut out and bound. American made buttons will be sewn onto the carry-bags and the buttonholes cut out and bound. The estimated costs in the operation are $2 as the f.o.b. value of the unfinished garment body and bag material and $1.23 as the cost of domestic labor and material.

The submittal of facts disclosed that the Bureau of Customs would consider importer-finishers as the ultimate purchasers of the unfinished raincoats and bags within the meaning of the amended Tariff Act of 1930, and that an exception from the marking of the country of origin requirement on each individual raincoat body and carry-bag would be granted so long as the containers in which the unfinished material will be imported are legibly and conspicuously marked as to indicate the foreign country of origin of the contents and so long as Customs Officers at the Port of Entry are satisfied that such containers will reach the ultimate purchasers unopened.

The Commission advised, based on its understanding of the factual submittal, particularly in light of the provisions of Section 4(b) (4) of the Textile Fiber Products Identification Act and the labeling exception granted by the Bureau of Customs, that (1) no additional marking on the containers or unfinished materials therein will be required beyond that requirement imposed by the Bureau of Customs; (2) that the raincoats to be sold to consumers at the retail level after

having been finished in the United States must be labeled so as to clearly and conspicuously disclose the foreign country of origin of the imported fabrics; and (3) in the absence of any affirmative representation that the finished raincoat carry-bag is made entirely in the United States it will not be necessary to disclose the foreign country of origin of the imported fabric thereof. (File No. 703 7079, released April 13, 1970.)

No. 416. Meaning of Phrase "Leave Your Pocketbook At Home."

The Commission rendered an advisory opinion concerning the proposed use of the phrase "Leave your pocketbook at home" in light of the requirements of the Truth in Lending Act, Section 144, and Regulation "Z", promulgated thereunder (12 C.F.R. § 226.10(d)(2)).

The phrase in question would be used in television and mail circular advertising by sellers of clothing at retail on installment sales contracts. It was presented that customers may make the first payment at some future time and that "The customer may take the clothing with him at the time the purchase is made rather than wait until the first payment has been made. In ninety-nine out of a hundred cases, the purchaser does take the clothing with him at the time the purchase is made."

The Commission advised it had concluded that the proposed phrase is equivalent to, or synonymous with, a "no down payment" claim. Under these circumstances it would be improper to use the proposed phrase without disclosing the specific credit terms required by Section 226.10(d)(2) of Regulation "Z". Specifically, the advertising must disclose the following credit information whenever no down payment claims are made:

(1) The cash price,

(2) The number, amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended,

(3) The annual percentage rate, and

(4) The deferred payment price of the article offered for sale.

(File No. 703 7082, released April 13, 1970.)

No. 417. Use of Term "Manufacturer."

The Commission rendered an advisory opinion as to whether producers of electronic display systems may be referred to as "manufacturers" of such equipment in informational materials furnished the press.

It was submitted that such firms produce and sell electronic display systems and related equipment to those interested in obtaining current transactions on the stock exchange. In order to produce such equipment, various components such as electronic parts, motors, pumps, frames, and related materials are purchased from many sources and

assembled into a completed unit at a manufacturing plant in the northeastern States. Some of these components are stock items, others are made to specification and in some instances machine work is necessary in order to properly assemble the basic components into completed units.

On the basis of the information supplied, the Commission concluded that such producers, because they shape basic materials and components into finished products by hand-labor and by machinery, are the manufacturers of electronic display systems and related equipment. In the premises, the Commission advised that it would not object to references of such producers as the manufacturer of the systems in informational materials sent to the press. (File No. 703 7085, released April 13, 1970.)

No. 418. Four Point Tripartite Promotional Advertising Plan.

The Commission responded to a request for an advisory opinion regarding the legality of a proposed four point three-party promotional advertising program to be offered suppliers and retailers in the grocery field.

Under the program as presented for consideration, the first point involves contracting with retailers for the use of one or more mass display areas in their stores by suppliers. (A mass display area is defined as that space set aside for the display of merchandise of the same manufacturer, usually at the end of an aisle.) Suppliers would be charged and retailers remitted (less 15 percent agency fee) one-half cent per display area for each person entering the store each week, the number to be determined by the number of sales slips run through each cash register. Supplier's customers would be notified of the program's availability through bulletins included in suppliers' and wholesalers' mailing, through letters to direct buyers, and directly by mail to any other of the suppliers' customers. Suppliers would be limited to 10 percent of the available mass display areas in a given market during a calendar year.

The second point involves the offer of a plan to suppliers for making funds available to retailers for the advertising of suppliers' product as a supplement to each mass display. Suppliers would be charged and retailers remitted (less 15 percent agency fee) one-fourth cent per person entering the store (as determined by cash register sales slips) per week for inclusion of the supplier's product as a feature in the body of the retailer's newspaper advertising. Retailers would also qualify for this allowance through distribution of handbills and/or mailers reasonably covering his trading area. Supplier's customers would be notified of the program's availability through bulletins included in suppliers' and wholesalers' mailing, through letters to direct

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buyers, and directly by mail to any other of the supplier's customers.

The third point involves arranging radio/television commercials for suppliers announcing that their products are available at named retail outlets. The commercials would supplement the mass display promotions. Time requirements for spot commercials would be pooled so as to obtain the best "frequency rate." Each customer of a participating supplier would receive at least one commercial without cost. The total number of commercials furnished a customer would be computed by dividing an amount computed by multiplying the retailer's customer count (as determined by cash register sales slips) by one-eighth cent per person and dividing by the cost per commercial.

Under the fourth point it was proposed to supply to retailers and suppliers a sales survey which would include consumer reaction to a product, reasons for consumer purchases of a product, and when possible, a reaction to the product after use, and with retailer cooperation, comparision of sales with competing products.

The Commission advised it was of the view that were the program, other than the proposed sales survey under point four, implemented in the manner described no law administered by the Commission would be violated. The sales survey in point four of the plan, which calls for the exchange of price or quantity sales information among retailers, or between retailers and suppliers, might be used in such manner as to lessen competition and since the legality of any such survey depends on the manner of its implemention, the Commission is unable to advise on this aspect of the plan. (File No. 703 7083, released May 4, 1970.)

No. 419. Tripartite Promotion Based on Television Game Show.

The Commission rendered an advisory opinion relative to the legality of a television game entitled "Your Name's a Winner" sponsored by a local retailer and national food suppliers.

It was proposed that a television game show type program be produced and sponsored primarily by a local grocery retailer at a contract price determined by the number of "game pieces" (resembling Bingo cards) distributed by that retailer to customers for the play of the game. Home viewers cross off the letters of their own names on a game piece against those flashed on the television screen and receive all prizes appearing in the squares of the crossed-off row, including a hidden prize. The show producer would sell each square as advertising space to national manufacturers and suppliers, some of whom will be suppliers to the sponsoring retailer. The products involved in each advertising space would be prominently displayed during the course of the game show, and the suppliers of each would be featured at all times.

The Commission expressed the view that insofar as a supplier to a retailer-sponsor is an advertising contributor to the game show problems under the amended Clayton Act would be present. The advertising rights of a national supplier purchasing a square constitutes a payment of something of value to or for the benefit of a customer within the meaning of that Act. On the other hand, if the advertising rights to all such squares are sold to non-suppliers of the sponsoring merchant so that a supplier-customer relationship would not exist, the Act's prohibitions are not applicable.

The Commission advised, because the proposed program contemplates that some of the advertisers would be suppliers to a sponsoring retailer, implementation and production of the television game show "Your Name's a Winner" in the manner outlined would raise serious questions under Sections 2(d) and 2(e) of the amended Clayton Act and Section 5 of the Federal Trade Commission Act. (File No. 703 7081, released May 4, 1970.)

No. 420. Multiple Foreign Origin of Parts Disclosure on Partially Imported Toys.

The Commission rendered an advisory opinion concerning a proposed country of origin labeling on the containers of sets of toy racing cars and tracks. The labeling would include the following language:

> Contents made in Great Britain and/or U.S.A. and/or Canada, as specified therein.
>
> Box printed in Great Britain.

Seven different sets of toy racing cars would be sold through retail stores to the general public, with the most expensive set retailing at $22.50. At present, it is not known what percentage of the parts would originate in Great Britain, Canada or the United States. The plastic track would be made either in the United States or Canada, and the metal cars would originate in Great Britain. The paper container would also be made in Great Britain. The imported parts will be clearly and conspicuously marked as to their foreign country of origin. The cars and tracks will be packaged in a container which can, and normally would be opened for inspection by prospective purchasers prior to the purchase thereof.

On the basis of the presentation, the Commission advised that it would interpose no objection to the proposed language being printed on the toy containers. (File No. 703 7092, released May 4, 1970.)

No. 421. Origin Disclosure on Imported (9 Percent to 15 Percent) Air Filter Parts.

The Commission responded to a request for an advisory opinion regarding a foreign country of origin marking on acquarium valves and filters.

According to the presentation the merchandise in question is a two- three-, or four-outlet gang valve connected by a plastic tubing to an air filter. The entire device is mounted on a plastic bracket designed to be hung over the top edge of an aquarium. All parts of the assembly are manufactured in the United States except for the bracket and filter which are produced in and imported from Hong Kong. These parts are identical and represent about 15 percent of the total cost of the two-way gang valve, about 11 percent of the total cost of the three-way gang valve, and about 9 percent of the total cost of the four-way gang valve. The filter, including the filteration material with which it is filled, is designed for use for the life of the gang valve and in ordinary use it is not replaced.

The Commission expressed the view that in the absence of any affirmative representation that the product is made in the United States or any misrepresentation that might mislead the purchasing public as to the country of origin of the bracket and filter, under the facts presented, the failure to mark the origin of the products would not be regarded as deceptive. (File No. 703 7086, released May 4, 1970.)

No. 422. Preticketing of Imported Candles.

The Commission responded to a request for an advisory opinion with respect to the legality of importers affixing preprinted labels bearing a retailer's discount selling price on packages of prepriced imported candles.

It was proposed that importers of packaged and prepriced candles would affix onto each individual package a pressure-sensitive label printed with a retail-customer's discount selling price. For example, the package as imported may bear a preprinted retail price of 41 cents and a retailer's discount selling price of 34 cents. Two questions were asked on the basis of this presentation:

(1) Is it permissible for importers of record to affix a discount operator's price label on the packages?

(2) If so, may this be done in the country of origin?

The Commission expressed the view that the affixing by importers of a retailer's price on the package would not in and of itself be violative of the laws administered by this agency and that the place where this operation is performed would not be determinative of its legality. The Commission cautioned, however, that the contemplated arrangement is a preticketing scheme which must comply with the requirements of Section 5, Federal Trade Commission Act. (See Commission's Guides Against Deceptive Pricing (16 C.F.R. Part 233).) Should the contemplated price saving claim as represented by the retailer's discount price label have the tendency and capacity to deceive and mislead the consuming public, then the importers as knowing participants in

the preticketing arrangement would share responsibility for such deception.

Further, if the service of affixing an individual customer's pricing labels on packages is not generally available on proportionally equal terms to all other of an importer's customers competing in the resale of imported candles, the providing of such a service to one customer may constitute a violation of Section 2(e) of the amended Clayton Act. (File No. 703 7093, released June 8, 1970.)

No. 423. Availability of Tripartite Promotional Advertising on Shopping Carts.

The Commission rendered an advisory opinion concerning the advertising of food and nonfood products on shopping carts in retail grocery stores.

The program submitted for Commission consideration involved two plans. Plan A related only to the advertising of food items. Seller-advertisers would be charged a rate commensurate with the number and length of time shopping carts are used to display his advertising and the estimated number of in-store shoppers exposed to such advertising. Participating retail grocers would be paid for the use of his shopping carts based on the number and length of time his equipment is used for supplier advertising and the estimated number of shoppers exposed to such advertising. Stores without shopping carts will be offered placards or shelf-markers without cost and will be paid on the basis of the number of customers exposed to the advertising. All competing retail grocers would be informed of this plan by personal solicitation, advertisements in trade journals and direct mailing to all in business at least 6 months prior to the start of the plan.

Under Plan B nongrocery items not available for resale by participating retail grocers would be advertised only in those stores which have shopping carts. The rates and payments to advertisers and participating retailers would be the same as in Plan A.

The Commission advised it would interpose no objection to the implementation of Plan A provided the following conditions were met:

(1) If the advertised grocery products are being handled by other than grocery stores, the other stores must also be notified of their right to participate in the plan, provided they compete with the favored retail grocery stores. Moreover, all competing customers must be notified of the plan, regardless of whether they purchase direct from the supplier or through some intermediary.

(2) Payments to smaller participating stores with shopping carts should be made on the same terms as those to the smaller stores without shopping carts.

(3) Since the plan calls for performance of certain obligations which are normally performed by a supplier, Guide 13 of the Commission's Guides for Advertising Allowances should be consulted.

The Commission advised further that Section 2(d) or 2(e) of the amended Clayton Act would not be applicable to that part of the program described as Plan B. This conclusion is based upon the statement that the nongrocery items, which are to be advertised only in retail grocery stores with shopping carts, would not be available for resale in such stores. However, the Commission cautioned, if the advertising on the shopping carts indicate the name of any particular dealer where the advertised products may be purchased, then the advertising should also indicate the names of all competing dealers. (File No. 703 7097, released June 8, 1970.)

No. 424. Tripartite Promotional Program Using Trash Receptacle Panels for Advertising.

The Commission responded to a request for an advisory opinion concerning a proposal to offer advertising panels on trash receptacles to advertisers of products and services.

Under the program trash receptacles would be placed in public service areas where permission is obtained from the property owner, city government, or the person who controls the premises. Advertising thereon would be sold to producers on a yearly contract basis, the rates to be determined by the location and pedestrian traffic in the area. Product advertising will only advertise the product and will not indicate where it is available, however, service advertising will probably direct potential customers to the service.

Physical servicing of the receptacles would be handled in many ways. Where they are placed on city streets, arrangements would be made with the city government to empty them and to report their condition. Where the receptacles are placed at motels, hotels, service stations, and like locations, arrangements would be made with persons who normally service such areas. Where the receptacles are placed in shopping centers or shopping malls, arrangements would be made with merchants within such areas to empty them and report on their condition. A fee would be paid to those rendering these services.

The Commission expressed the view that payments to a merchant to service trash receptacles which may display advertising of products that he sells would be objectionable under Section 2(d) of the amended Clayton Act. The proposed program would be unobjectionable under this Act where payments for servicing the receptables are made to anyone other than merchants engaged in the sale of the advertiser's products. (File No. 703 7089, released June 8, 1970.)

No. 425. Combining Advertising for Mailing Purposes.

The Commission rendered an advisory opinion concerning a proposal to combine manufacturer and retailer advertising into one mailing piece. The intended program involves the attaching of packets containing direct-to-consumer redeemable coupons and other advertising material prepared for various manufacturers and service organizations to the tabloid or booklet type mail advertising of national or regional retailing organizations. The purpose of the proposed program is to minimize mailing costs for the participating organizations. As each party to the arrangement would pay a proportonate share of the preparation, postage and other mailing costs, the mailing expenses for each would be reduced about one-half.

The Commission expressed the view that to the extent a participating retailer will realize a saving in mailing costs because the advertising material of one or more of his suppliers is inserted in the packets prepared by the other participant who is under contract with such suppliers, a discriminatory promotional allowance will have been accorded by such supplier to that retailer. However, the same result will not pertain where the packet contents are limited to those products and services not available from the participating retailer.

The Commission advised that so long as precautionary measures are taken as will insure that the packet contents are limited to the advertising of those products and services which are not available from or through a participating retail organization, implementation of the proposed program in the manner outlined will raise no questions under Section 2 (d) or (e) of the amended Clayton Act. (File No. 703 7095, released June 8, 1970.)

No. 426. Quality Designation on Jewelry of Identical Construction.

The Commission responded to a request for an advisory opinion concerning a proposal to use the quality designation "Yellow Gold or White Rhodium Electroplated" on jewelry of identical construction which may be electroplated with either metal.

The view was expressed by the Commission that although there may be some instances where a consumer might be able to properly interpret such a quality designation, the vast majority of consumers would be confused through use of any dual designation. Moreover, if the the use of such a dual designation were to be approved, it would logically follow that approval would have to be given to the use of triple, quadruple, etc., designations. The end result would be utter chaos for the vast majority of consumers who would be thrown into a jungle of quality designations from which they could not intelligently extricate themselves.

Under these circumstances, the Commission advised that it cannot give its approval to such dual quality designation because the use thereof would probably serve to confuse and deceive prospective purchasers in regard to the quality of the products being bought. (File No. 703 7071, released June 8, 1970.)

No. 427. Guarantee Advertising for Refrigerator Compressors.

The Commission rendered an advisory opinion regarding the proposed advertising of a 10-year guarantee for compressors used in refrigerators.

The proposed advertising, which would appear as a 30-second television commercial, would guarantee the compressors for 10 years in writing and if they do not last that long a new compressor will be given the customer free, and further, for the first 5 years the manufacturer will pay labor charges and the customer will pay for pickup and delivery.

The Commission advised that the proposed advertising is not in harmony with the language used in the submitted guarantee or with Guide 1 of the Commission's Guides Against Deceptive Advertising of Guarantees in three important aspects.

(1) The advertising offers a replacement for any compressor found to be defective, whereas the guarantee provides that any defect will be repaired or replaced. Thus, the advertising is inconsistent with the actual provisions of the guarantee. Either the advertising should be revised to conform with the guarantee and include the disclosure of a possible repair job or replacement, or the guarantee should be changed and made consistent with the proposed advertising. If an election is made to change the advertising, it should also disclose whether the guarantor or the purchaser has the option of repairing or replacing.

(2) The guarantee provides that the manufacturer will repair or replace any parts he finds defective. The fact that the manufacturer alone makes the determination as to whether or not a part is defective is a material limitation and should be disclosed in advertising.

(3) The guarantee provides that the customer will pay an "analysis charge for determining defects." This is a material limitation on the 10-year guarantee which could be a significant factor in the purchaser's selection of a refrigerator, and therefore the fact that an analysis charge is imposed should be disclosed in the advertising. (File No. 703 7094, released June 8, 1970.)

ADVISORY OPINIONS WITH REQUESTS THEREFOR*

Use of word "jewel" in connection with the sale and advertisement of a synthetic stone. (File No. 703 7098)

Opinion Letter

May 19, 1970

Dear Mr. Langston:

This is in response to your request in behalf of Zale Corporation for an advisory opinion.

The Commission understands that the applicant proposes to advertise and sell a synthetic diamond under the name "Flare-Jewel." The applicant wishes to know whether the use of the word "jewel" in connection with the sale and advertisement of a synthetic stone would be in violation of any law administered by the Federal Trade Commission.

The Commission is of the view that the use of the term "Flare-Jewel" to refer to synthetic stones without clearly disclosing that such stones are not natural stones or natural jewels would be in violation of the Federal Trade Commission Act, Section 5.

By direction of the Commission.

Letter of Request

March 18, 1970

Gentlemen:

I represent a jewelry concern who in the very near future intends to manufacture and sell various synthetic stones.

My client anticipates advertising and selling one of the stones, a synthetic diamond, under the name "Flare-Jewel." It is my understanding that it is an unfair trade practice to use the word "gem" in reference to a synthetic diamond.

I would very much appreciate receiving your advice and opinion as to whether the word "jewel" falls into the same category as the word "gem" and whether the use of the word "jewel" in connection with the sale and advertisement of a synthetic stone would put my client in vio-

*See footnote on page 1696 herein.

lation of any rule or regulation of the Federal Trade Commission. I shall await your reply.

Yours truly,
/s/
H. A. Langston, Jr.
Attorney at Law

Obligation of FTC to enforce the standard of flammability in DOC FF-1-70 for carpets and rugs, as applied to rental mats. (File No. 703 7105)

Opinion Letter

June 2, 1970

Dear Mr. Ehrlich:

Reference is made to your letters of April 21 and May 19, 1970, requesting an opinion as to whether or not the Commission will be obligated to enforce the standard of flammability in DOC FF-1-70 for carpets and rugs, as applied to rental mats, which form the basis of services rendered by the Institute of Industrial Launderers and the Kex National Association.

The Commission has given careful consideration to this matter. It has concluded that the mats in question come within the scope of Sec. 3(a) of the Flammable Fabrics Act and must therefore conform to the applicable flammability standard. The Commission is also of the opinion that the practice in question would come within the provision of Sec. 5 of the FTC Act.

By direction of the Commission.

Supplemental Letter of Request

May 19, 1970

Gentlemen:

This letter is submitted as a supplement to my letter dated April 21, 1970, with reference to the applicability of the above Standard to entrance mats.

In my previous letter, I did not discuss the possibility of the application of Section 5 of the Federal Trade Commission Act to entrance mats once the Standard is effective. Since it occurs to me that such a question might arise, I would like to take this opportunity to present my views on that question.

It seems to me that Section 5 is inapplicable and that to attempt to apply Section 5 to entrance mats would be highly discriminatory.

Apparently it is not contemplated that Section 5 will be applied to hotel-keepers. Nevertheless, a hotel-keeper rents rooms to customers, including carpeting. The carpeting may be washed enough times to remove or destroy its flame-resistant properties. There seems to be no intent to test the hotel carpeting even at periodic intervals, much less to test the hotel carpeting each time it is rented to a customer. Indeed, to do so would be rather absurd.

On the other hand, it would be highly discriminatory to hold that although a hotel-keeper is not subject to Section 5 each time he rents a room and carpet, the laundry is subject to Section 5 each time it rents an entrance mat.

This becomes even more apparent when the purpose of the Standard is considered. The Standard, in general, is for the purpose of giving some degree of protection to the user. Hotel carpeting is used in foyers, halls and rooms where, if fire occurs, the carpeting is in close proximity to other furniture, drapes and beds. An entrance mat, as already pointed out in some detail in my previous letter, is generally a small mat and by its very nature and purpose, is used at the entrance door to a building, where there is normally little, if any, fire hazard. To hold that a hotel-keeper who rents out rooms and carpeting is a user not subject to the Standards or to Section 5, but that laundries which rent out entrance mats are not subject to the Standards but are subject to Section 5, would be not only discriminatory, but discriminatory against the one which presents the least hazard.

In addition, to hold entrance mats subject to Section 5 would impose severe and needless economic hardships upon the entrance mat industry. I assume that after the Standards are effective, the entrance mat industry will be able to purchase only mats which have been treated to be fire-resistant, since the Standards will apply to all manufacturers at the time of the original sale. This will substantially increase the original cost of its mats to the industry. But, if the industry were held to be subject to Section 5, the only course the industry could follow would be to test the mats for fire-resistance each time the mats were picked up from a customer and before renting them out again. This would not only impose a substantially higher original cost, but a continuing increased cost of operating. No distinction can be drawn, as a practical matter, between mats. There is no practical method, short of destruction, for testing mats to determine the extent to which they have lost fire-resistant properties. This would depend primarily on the extent of use and the number of washings between uses. Since mats are handled in batches of hundreds at a time, the industry would be compelled to add a fire-resistant treatment to every mat every time it is washed between uses. This would add a substantial expense to the least hazardous item.

As far as the users of the mats are concerned, this additional and substantial cost would be passed on to them, needlessly increasing the cost to consumers on items of minimum hazard.

To draw a parallel again, obviously no hotel-keeper is going to be compelled to treat his carpeting with a fire-resistant treatment in between each room rental or risk being in violation of Section 5. But applying Section 5 to the entrance mat industry would essentially require such a treatment between each rental and require it in the case of the item which presents the minimum hazard.

Under all of the circumstances set forth herein, as well as in my previous letter of April 21, 1970, it is urgently requested that the Federal Trade Commission issue a ruling that rental entrance mats are not subject to the above Standard or testing under the Standard and not subject to Section 5 of the Federal Trade Commission Act, once they have been bought in compliance with the Standard.

Respectfully,
/s/ Bernard H. Ehrlich

Letter of Request

April 21, 1970

Gentlemen:

This letter is being written because of serious problems created by the above Standard for members of two associations which I represent, if the Standard is held to be applicable to them.

Prompt attention to this matter is urgently requested for the reason that if the Standard is not ruled to be inapplicable, the time is already running for taking this question to the United States Circuit Court of Appeals.

The two associations are the Institute of Industrial Launderers and the Kex National Association. These associations have as members over 750 laundry plants, whose total volume of business is in excess of 800 million dollars. These companies, among other services provided to the public, rent "entrance" mats to commercial concerns, government and business establishments.

A study of the above Standard suggests that its primary aim is to control the flammability of those pile floor-coverings, both in the private and public sectors, which are permanently installed for esthetic effects or functional benefits. More basically, the Standard seems designed to protect a housewife and her family when she buys and uses a carpet as well as eliminating the installation or use of carpeting in such places as hotels, when the carpeting may be dangerously flammable.

It should also be noted that the purpose of the Standard, as stated in

the Notice, is to protect the public against unreasonable risk of the occurrence of fire arising from the hazards of rapid flash burning or continuous or slow burning or smoldering and that the Standard "is *limited* to carpets and rugs" which currently present such unreasonable risks. The rental entrance mats do not present such unreasonable risks, as other carpets or rugs may. Their very name describes their function. They are normally comparatively small, used just inside the entrance to hotels, office buildings or other establishments, to remove dust from the shoes of people entering the building. They are not used throughout the building as are other carpets and rugs. They are normally not in contact or proximity to drapes and other furnishings.

It is the purpose of this letter to present certain problems of the entrance mat industry under the above Standard which indicate that the Standard is not applicable to this industry.

During 1962, the rental industrial laundry industry introduced to its customers a rental mat (rug), treated with a chemical, that was placed in building entrances for the express purpose of collecting and holding dust from shoes when people walked across the mat surface. The item became so popular that it was and is, used throughout buildings to police traffic lanes and to improve the buildings overall cleanliness level. This development was so successful that building owners and maintenance managers are conditioned to demanding entrance mats in their establishments. A new concept, a new industry, sprang from that development that took place only eight years ago.

Obviously, these mats become soiled and must be cleaned. Representatives of the industrial laundry have prescribed schedules, usually weekly, for picking up soiled mats and leaving clean ones at the point of use. The soiled ones are returned to the laundry where they are washed at temperatures of 200° F., with heavy alkali and detergent charges to remove the collected soil and the dust collecting chemicals. Then, after many rinses, fresh dust collecting chemical is added, the mat is dried and is rolled for delivery to the customer.

The basic product used by industrial laundries in meeting the demand for "entrance" or "dust control" mats is a tufted mat having a cut-pile cotton surface, a heavy duck backing and a highly skid-resistant latex back-coating. This product is made in various dimensions to meet various demands.

Other mats have a pile made from synthetic fibers, for example, nylon, polyesters and acrylics and these pile yarns are tufted into various supporting backing fabrics, such as glass scrim, polyester non-wovens and cotton duck. As a final backing, the assembly is fused into a vinyl chloride film usually about 100 mils thickness.

It must be assumed at the outset that after the effective date of the Standard, all mats purchased by the laundries will be in compliance with the Standard because the obligation of meeting the Standard is placed on the manufacturer at the time of sale. It is my view that it is only at that point that the obligation is imposed.

The laundry should be considered the ultimate consumer of the rugs and therefore not subject to the Standard.

It is quite obvious that neither the Flammable Fabrics Act nor the Standard applies to consumers.

For example, a housewife buys a rug, properly treated to conform to the Standard. But, being a very fussy housewife, she washes or shampoos her rug every day. It may be that, after a period of time, she has washed away the fire-retardant qualities of her rug. It is quite clear under these circumstances that neither she, nor the manufacturer who originally and properly sold her the rug, is liable for a violation of the Act or the Standard.

Similarly, a hotel may buy and lay a rug which complied with the Standard when sold to it by the manufacturer. Over a long period of time, the rug may be washed or shampooed on many occasions. It may reach the point where it will not meet the Methenamine pill test, either with or without the 10 pre-test washings. Nevertheless, it is quite clear that under those circumstances, neither the original manufacturer or seller nor the hotel keeper, is in violation of either the Act or the Standard.

This is obviously because the Act and the Standard do not attempt to follow the rug for its lifetime in the hands of the ultimate consumer, under all and varying conditions of use and care. It seems to be clear that the Act and the Standard cease to apply when the rug has reached the hands of the consumer.

This is supported by two factors which I consider to be conclusive as to the applicability of the Standard.

1. The Notice of Standard, as published in the Federal Register, in the final paragraph, sets up an "effective date" and provides that all

> * * * carpets and rugs, *manufactured for sale on or after that date shall comply with the Standard.* (Emphasis supplied)

2. I have been advised by the office of the General Counsel of the Department of Commerce that it was neither its design nor intent to formulate a Standard to be applied other than at the time of manufacture and sale and that the Standard is neither designed nor intended to apply to the rental "entrance" mat industry.

In our view, the laundry is the consumer. The mat or rug is purchased by the laundry for use in its business, not for resale. It remains the property of the laundry until it is worn out and discarded.

The business of the laundry is renting out these rugs temporarily. At various times the rug may be in storage at the laundry, not rented out and not in use. At times the rug will be in the process of washing at the laundry or on the laundry truck. At other times, it is temporarily in use at the premises of a customer, but still belongs to the laundry as a part of its business or business service.

In many way, this situation is analagous to that of the housewife who is not covered by the Standard or the Act. Nevertheless, she may well lend her rug to a neighbor. She may give it to her daughter. Or, as very frequently happens, she may rent her house to a tenant, furnished, including the rug, without any requirement that the rug must then meet the Standard. The rug having complied with the Standard at the time of purchase, she is freed of any responsibility in her later transactions, including rental of her house, furniture and rug.

Similarly, the laundry purchases a rug which must, at the time of purchase, comply with the Standard. The laundry is the consumer, purchasing the rug for use in its business, just as the hotel keeper is the consumer, using the rug in its business. The hotel keeper rents rooms to customers, including the furniture and rug, just as the laundry rents the rug to customers. There seems to be no difference between renting a rug to a customer and renting a room, furniture and rug to a customer. Yet each time a hotel keeper rents a room and rug to a customer, he is not required to see to it that his rug, originally bought in compliance with the Standard, will still meet the test prescribed by the Standard.

As another illustration, suppose the owner of an office building, instead of renting an entrance mat, makes an outright purchase of the mat. Thereafter, the responsibility for washing, cleaning and processing for dust attraction becomes his. Any such purchase he makes must comply with the Standard at the time of purchase. But it is quite clear that he has no further responsibility under the Act or the Standard, as a consumer, to see that for the life of the rug, no matter how much he washes it, it must always be in condition to meet the test prescribed in the Standard. There is no essential difference whether he buys the rug and cleans it himself, or rents one from a laundry which cleans it for him.

Nowhere is there any statement as to when the test should be applied to see whether a rug meets the Standard, except the statement in the Notice of Standard that it must meet the test when manufactured for sale. Obviously, the rug must meet the Standard when it is sold by the manufacturer. But after that, when it is in use on a hotel floor, for example, must it still meet the test? And for how long? One month? Five years? Ten years? In varying periods the rug, once in

use, may never have been washed or may have been washed fifty times. It is impossible to conceive that the Standard contemplated that when a rug has been on a hotel floor for five years, inspectors may then come along and cut eight samples out of the rug, give them 10 more washings in addition to whatever number it already had on the floor and then subject the samples to the pill test.

And just imagine an inspector showing up at Mrs. Brown's house five years after she bought a rug for her living room, cutting eight samples out of her living room rug, and then testing them!

The very fact that at any time after the manufacture and sale, mere testing for compliance compels destruction, again indicates that such future testing is not contemplated. It is one thing to apply a test at time of manufacture when a sample may be drawn from a run. It is entirely different to try to apply a test at a later time. Even if a rug is still in a retail store, for sale, to test at that time would be to destroy the rug by cutting out all the necessary samples. The same would be true of testing a rug or carpet on a living room or hotel room floor. It seems absurd to say that a Standard applies at a time when testing involves destruction. Rather than destroy in order to test, the carpet or rug might just as well be thrown out without testing.

All of the above problems and illustrations inescapably compel the conclusion that one test and only one test is contemplated and that test is at the time of sale by the manufacturer. Indeed, as already mentioned, this has been confirmed to me by the Department of Commerce.

It may be that at some future date, a determination may be made that rental entrance mats should be covered by a Standard. If so, a Standard can then be drawn to cover the industry and to cope with its problems, which was not even attempted in the present Standard, and designedly so.

Nevertheless, the mere enactment and publication of a Standard, without specific exemption of the rental entrance mat industry, has created confusion and raised doubts on the part of members of the industry, which can only be put to rest by a ruling that this Standard is not applicable.

For all of the above reasons, it is urgently requested that the Federal Trade Commission issue a ruling that rental entrance mats are not subject to the above Standard or testing under the Standard, once they have been bought in compliance with the Standard.

Again may I stress that your prompt action will be greatly appreciated since the time for appeal to the Court is already running.

Many thanks for your kind cooperation.

Respectfully,
/s/ Bernard H. Ehrlich

Suppliers advertising in a customer's proposed catalog. (File No. 703 7108)

Opinion Letter

June 4, 1970

Dear Mr. Walter:

This is in response to your request of April 30, 1970 for an advisory opinion.

The Commission is of the view that the proposed course of action is subject to the requirements of the Clayton Act, section 2 (d), as amended. Thus, the proposed payments by suppliers to you for advertising would be unlawful ". . . unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities." Were you "knowingly to induce or receive" a payment made in violation of the Clayton Act, Section 2 (d), as amended, the Federal Trade Commission Act, Section 5 would be violated also.

By direction of the Commission.

Letter of Request

April 30, 1970

Dear Sirs:

We request an advisory opinion on the legality, as it pertains to your agency's scope, of the following new venture that we are considering.

We propose to purchase products from manufacturers for resale to consumers. Sales of these products, by us, would be generated through dissemination to prospective customers of a publication consisting solely of catalog pages featuring the products that we stock.

Manufacturers of the products we stock and sell would be offered advertising space within this catalog at the rate of $3000 for one-half page, $6000 for a full page. They could use this space for any purpose. These manufacturers could purchase as much advertising space in this catalog as they wished, regardless of the volume of their sales to us.

Manufacturers who do not sell to us would not be eligible to advertise in this publication.

We ask for your opinion as to whether this type of marketing firm would violate any laws or regulations enforced by the FTC.

Cordially,
ELECTRONIC DISTRIBUTING & MARKETING
Edward J. Walter
Publisher

Tripartite advertising promotional plan using grocery shopping carts. (File No. 703 7096)

Opinion Letter

June 10, 1970

Dear Mr. Graham:

This is in further response to your letters of March 26 and April 10, 1970 requesting an advisory opinion regarding a tripartite advertising promotional plan whereby National In Store Advertising Company would lease advertising space on bascarts (grocery shopping carts) or similar equipment from supermarkets and other stores and establishments.

The Commission has carefully considered the plan as outlined in your letters and concluded that implementation of the proposed plan would probably violate Section 2(d) of the amended Clayton Act.

By direction of the Commission, with Commissioner Elman not concurring.

Supplemental Letter of Request

April 10, 1970

Dear Mr. Steinbach:

It is my understanding that the above matter has been assigned to you for consideration and appropriate handling.

After I wrote to Mr. Shea on March 26, 1970, requesting an advisory opinion as to the Plan of our client, National In-Store Advertising Co., I had some further discussion with our client concerning Guide 7 of the Commission's Guides (May 29, 1969). Our client wants to make certain that it will be complying with this Guide and it has authorized me to advise you that it will inform all competing customers that if they take part in the plan, they will receive the larger of either:

(A) Four (4) Dollars per year for each bascart used or sign placed (or some other specified amount to all competing customers), or;

(B) One-percent (1%) of the total amount paid by said competing customer to any third party whose product is advertised in said plan.

Our client hopes that this will comply completely with Guide 7. If not, please let us know and our client will attempt to amend its plan to comply.

Sincerely yours,
Donald K. Graham

Letter of Request

March 26, 1970

Dear Mr. Shea:

This firm represents the National In-Store Advertising Company, Inc. which is incorporated under the laws of the State of Mississippi. Our client is planning to enter into a tripartite promotional plan and the purpose of this letter is to request an advisory opinion from the Commission concerning the validity of this plan.

The basic plan of our client is to lease advertising space on bascarts or similar equipment from supermarkets and other stores and establishments. Our client would pay to the supermarket and other competing customers $1.00 per 13 weeks period for each bascart upon which our client's advertising appears. The amount paid by our client would be the same to all lessors, i.e. $1.00 for each bascart. Our client would furnish to the lessors advertising signs which would be affixed by the lessors to their bascarts. In the event a store or other establishment which desires to participate in the plan does not use bascarts or similar equipment, it would be given an opportunity to lease equivalent space to our client on a counter or wall of its premises. The size of such signs would be the same size as the signs on the bascarts and the amount paid to the lessor would be the same, i.e. $1.00 for each such sign. After our client has leased this advertising space, from a supermarket or store, it would rent such space to third parties for the advertising of their products. The lessors and such third parties would have no direct relationship and there would be absolutely no financial arrangements between them with respect to the advertising by our client.

It is the intention of our client to give all competing supermarkets, stores and other such establishments the opportunity to participate in the plan on proportionally equal terms to the extent possible. Any competing customer desiring to participate in the plan would be permitted to do so and our client would pay each customer the same amount for each advertising sign placed on a bascart or elsewhere on the premises. No special allowances would be made to any customer.

Our client will take reasonable action to inform all competing customers of the availability of its plan. Notice of the availability and essential features of the plan will be placed periodically in publications of general distribution in the trade in each area where our client offers its plan. In the event competing customers do not elect to participate in the plan at its inception, they will be permitted to participate at any later time if they so desire. Our client also will attempt to contact competing customers directly to the extent possible. This will be done by mail and by direct personal contact by salesmen where pos-

sible. If these methods of notification prove inadequate, other methods will be utilized.

As indicated above, all supermarkets and other stores and outlets which have bascarts may participate in the plan. However, all other competing customers may also participate even though they do not use bascarts. Such customers will be permitted to lease advertising space to our client on the same terms as the customers using bascarts. No competing customer will be excluded from the plan by our client and no customer will receive more favorable terms than any other.

Our client will inform all competing customers of the details of its plan and in so doing will provide them with sufficient information to give a clear understanding of the exact terms of the offer, including all alternatives, and the conditions upon which payment will be made. Our client will take reasonable precautions to see that services it is paying for are furnished. This will be done by periodic checks of the premises of the supermarkets and other competing customers leasing advertising space to our client.

Our client intends to operate its business on a national basis. It will offer its plan to all competing retailers in any area where the plan is put into effect.

In entering into lease agreements our client will make every effort to comply with Guide 13 of the Guides for Advertising Allowances and Other Merchandising Payments and Services which was promulgated by the Federal Trade Commission on May 29, 1969.

Please let us know if additional information concerning this plan is required and we will see that you receive it promptly. In the event the member of the Commission's staff who reviews this plan finds any objection to it, we would greatly appreciate his contacting us and giving our client an opportunity to revise the plan in order to eliminate the objection.

We hope that this request for an advisory opinion can be given prompt attention and we will look forward to an early reply.

Sincerely yours,
Donald K. Graham

Statistical reporting program implemented through a national institute. (File No. 703 7107)

Opinion Letter

June 10, 1970

Dear Mr. Conner:

Reference is made to your request for an advisory opinion governing a proposed statistical reporting program to be implemented through the National Plant Food Institute.

The plan you have submitted and accompanying papers are incorporated by reference herein.

In summary, however, the Commission understands your proposed plan to be as follows:

Those industry members who are members of National Plant Food Institute will be invited and urged to participate in the program. Industry members who are not members of National Plant Food Institute will also be invited and urged to participate in the program. Individual companies will confidentially provide specified data to a third party. The third party, preserving the confidentiality of the data as to individual companies, will assemble the information received and will derive therefrom specified ratios and aggregate figures. These ratios and aggregates will be made freely available on a non-discriminatory basis to all who may have need of them. No projections or estimates as to the future are contemplated.

There is nothing inherently unlawful in what you propose and the Commission would not object if you were to implement your plan. Your are cautioned, however, that an unlawful trade restraint would result if you were through concerted action improperly to use the gathered information in a way which would restrict the freedom of action of those who buy and sell.

By direction of the Commission.

The Proposal as Submitted

July 15, 1969

TO: Members, NPFI Executive Committee
FROM: E. M. Wheeler
Gentlemen:

A preliminary proposal for a financial data project was approved by the Board at its June meeting. Since then, the Controller Committee has met and has made a few modifications in the proposal. These are minor but, since this is a new project—and one which we consider very important—I would like you to examine it carefully

Afte receiving the Executive Committee's suggestions and approval, we will consult with counsel and secure any governmental approval deemed necessary to insure ourselves we are not running into antitrust problems. Completion of this step then takes us into a sales-ratification position with not only our own members but anyone else in the industry who desires to participate. *Unless we have broad support of the industry this effort will be meaningless.*

Since coming into the industry I have been impressed by two things:

One. A dearth of meaningful financial and statistical guide lines on which sound management decisions can be reached.

Two. An intense expressed desire by management to do a better job for its customers, stockholders and employees.

The proposed Fertilizer Industry Financial Report is designed to help the industry to attain the desired goal as outlined in "Two" above. I urge your approval and support.

Attached is the outline of the proposal prepared by the Controller Committee. This outline is a condensation of many hours of work by a top-notch group of men in our industry. Undoubtedly, some of your own personnel have contributed to it. (See attached committee list.)

As is done with the Fertilizer Index, all individual company data will be handled in a strictly confidential manner by a highly reputable accounting firm. Twice yearly the data will be prepared and a public report in dollars (Exhibit "A") will be released together with the aforementioned ratios as outlined in detail on pages 7 and 8.

Simultaneously, your own company data will be converted to ratios and returned only to you for individual company study and action.

We have discussed this project with three of the top eight national firms. Estimates thus far indicate that the cost of the project is well within our budgeted item of $15,000.

I look forward to getting your response on this by Thursday, July 31.

SUBJECT: *NPFI FERTILIZER INDUSTRY FINANCIAL REPORT*

I. *Purpose and Primary Criteria*

A. The Fertilizer Industry Financial Report has the objective of assisting management in decision making by providing:

1. Individual companies with key ratios and other other data which will enable closer scrutiny and more effective management of the industry's financial condition, as well as enabling a company to compare its data with those of the industry.

2. Information such as that concerning profit levels and returns on investments that can be useful in:

(a) Improving the industry's image with financial and other public groups.

(b) Providing protective evidence in objection to additional taxation or other regulatory controls.

B. The following additional criteria are observed:

1. The data from which this information is obtained must be available or obtainable with minimum effort.

2. The information must be in keeping with the competitive structure of the industry.

3. The statistical information for the industry may be made available to the public.

4. The individual company reports to the tabulating organization will be kept *strictly confidential* and should never be sent to the NPFI.

5. The cost of tabulation and distribution will be borne by the NPFI.

6. All U.S. and Canadian companies in the industry may participate whether or not members of NPFI.

7. No information will be reported for a Class Where no more than three companies report or where one company's data represents more than 50% of the data reported for that Class.

II. *Operating Detail*

A. Reporting Companies:

1. Prepare the NPFI Fertilizer Industry Financial Report (See Exhibit A) for the 12-month period ended June 30 and the 12-month period ended December 31.

2. Mail the June 30 report to arrive at the Tabulating Bureau no later than August 15, and mail the December 31 report to arrive by February 15.

B. *National Plant Food Institute:*

Provide liaison between Tabulating Bureau and reporting companies.

C. Independent Tabulating Bureau (Selected from one of Big 8 CPA firms):

1. Supply reporting companies with list of companies participating in each category.

2. Summarize reporting company statistics into industry totals.

3. Compute ratios, trends and analyses for:

(a) Each reporting company

(b) Total industry

4. Provide each reporting company with its analysis and an analysis for the total industry.

5. Provide NPFI with industry data only.

D. Fertilizer Industry Financial Report Format—Line Caption Definitions:

NOTES.—1. Money items are reported in thousands of dollars.

2. Reported data is restricted as closely as possible to those related to the fertilizer business (data for other agricultural products may be included if they are an integral part of the fertilizer business and do not materially distort the data.) *Exclude* industrial chemicals.

3. Where related data such as sales or receivables are unavailable, both are ignored for ratio analyses.

1. Cash and Marketable Securities—Cash and marketable securities necessary to the efficient operation of the company's plant food business. (Line 1)

2. Trade Receivables, Net—Total amount of notes and accounts receivable from the sale of products and services collectible within one year. (Line 2)

3. Inventories—

(a) Plant Food Products—Cost of all fertilizer materials produced or purchased for resale or to be consumed in the manufacture of fertilizer products for sale. (Line 3)

(b) Other Agricultural Products—Cost of all other agricultural products produced or purchased for resale or to be consumed in the manufacture of other agricultural products. (Line 4)

(c) Supplies (Line 5)—

(1) Supplies used in the manufacture of finished goods but not becoming part of the finished product.

(2) Supplies which become a part of finished goods but which costs are not significant to the product value.

(3) Spare parts and small tools.

4. Other Current Assets—Current assets necessary for the normal operation of the fertilizer business not included elsewhere. (Line 6)

5. Total Current Assets—Total of all current assets used in the fertilizer business. (Line 7)

6. Property, Plant & Equipment—Includes cost of land, land rights, buildings, equipment, patents, trademarks and goodwill. (Line 8)

7. Accumulated Depreciation & Depletion—The accumulated charges to operations for depreciation and depletion of tangible assets and amortization of intangible assets. (Line 9)

8. Other Assets—All non-current assets common to the fertilizer business not included elsewhere. (Line 12)

9. Total Assets—All assets used in the ordinary operation of the plant food operations. Excludes long-term investments in non-plant food businesses. (Line 14)

10. Sales, Plant Food in Tons—Report total tons of all plant foods sold. (Line 15)

11. Sales, Net—

(a) Plant Food—All sales of plant food products and services, less discounts and allowances. Include export sales. (Line 16)

(b) Other—All sales of other products and services complementary to the plant food business and which are more or less common to the industry, less discounts and allowances. (Line 17)

12. Cost of Sales—

(a) Plant Food—As defined in reporting company accounts. (Line 19)

(b) Other—As defined in reporting company accounts. (Line 20)

13. Gross Profit—Total sales less total cost of sales. (Line 22)

14. Selling, General & Administrative Expense—

(a) Research & Development—Basic research in new plant food process and product development. (Line 24)

(b) Advertising & Promotion—(Line 25)

(c) Other Selling, General & Administrative Expenses—All S. G. & A. not reported in Research & Development or Advertising & Promotion. Includes all Home Office allocations directly identifiable to the plant food portion of the company's business and offsite warehousing expenses. (Line 26)

15. Interest Income—Notes Receivable. (Line 29)

16. Service Income—Accounts Receivable—Finance charges to customers on open account. (Line 30)

17. Other Income (Expense), Net—Financial and other income and expense items not included in another caption. NOTE: Interest on long-term debts and federal taxes on income is excluded from this report. (Line 31)

18. Net Income, Before Interest & Taxes—Computed before interest on long-term debts and federal taxes on income. (Line 33)

E. Fertilizer Industry Financial Report Format—Columnar Heading Explanations (Report one Class only).

1. Basic Potash Producers (Column I)

2. Basic Integrated Company—One which produces one or more N–P–K products and sells these products wholesale and/or retail. May or may not also purchase other plant foods for production and resale. (Column II)

3. Non-Basic Integrated Company—One which buys plant food products for resale at wholesale and retail levels. (Column III)

4. Intra-Industry Sales Elimination—Avoid duplication of sales and cost of sales by eliminating sales to other companies participating in the Cooperative I Information System. A list of other reporting companies which should be eliminated will be provided by the tabulating service. (Column IV)

5. Supplementary Statistics—

(a) Retail Operations—Defined as sales to the ultimate consumer, e.g., farmers, gold courses, fruit growers, etc. (Column VI)

(1) Sales, Net—Plant Food—Total sales of products and services, less discounts and allowances. (Line 16)

(2) Cost of Sales—Plant Food—Laid—in cost of materials to the retail outlets. On-site costs for labor, equipment (including depreciation), etc. are excluded from this caption.

(b) Plant Food Inventory—Report plant food inventory at the end of each month. (Column VIII)

(c) Trade Receivables, Net—Report receivables from sale of all agricultural products at the end of each month. Include receivables from all sales reported on line 19. (Column IX)

(d) Number of Employees—Report number of employees on the payroll at the end of each month. Include temporary help. (Column X)

(e) Total Payroll Expense—Report all direct compensation such as salaries, wages and commissions, unemployment compensation, social security, vacation pay, insurance and other such payroll expenses. (Column XI)

F. Formulae for Various Possible Ratios and Other Statistics.

1. $\dfrac{\text{Net Income Before Interest \& Taxes}}{\text{Total Assets}} = \dfrac{\text{Line 34}}{\text{Line 14}}$

2. $\dfrac{\text{Total Sales}}{\text{Total Assets}} = \dfrac{\text{Line 18}}{\text{Line 14}}$

3. Plant Food Inventory Turnover $= \dfrac{\text{Line 19}}{\text{Average of Column VIII}}$

4. Receivables Turnover $= \dfrac{\text{Line 18}}{\text{Average of Column IX}}$

5. Total Assets Per Employee $= \dfrac{\text{Line 14}}{\text{Average of Column X}}$

6. Capital Expenditures, Net = Line 11 end of current year Less Line 11 end of preceding year

7. Capital Expenditures, Gross = Line 8 end of current year Less Line 8 end of preceding year

8. Gross Profit to Sales $= \dfrac{\text{Line 22}}{\text{Line 18}}$

9. Net Income to Sales $= \dfrac{\text{Line 34}}{\text{Line 18}}$

10. Research & Development as a percentage of Sales $= \dfrac{\text{Line 24}}{\text{Line 18}}$

11. Advertising & Promotion as a percentage of Sales $= \frac{\text{Line 25}}{\text{Line 18}}$

12. Payroll Expenses as a percentage of Sales $= \frac{\text{Total of Column XI}}{\text{Line 18}}$

13. Financial Cost of Total Assets (Prime Rate) = Line 14×(Prime Rate)

14. Financial Cost of Total Assets (Effective Rate) = Line 14×(Prime Rate−80%)

Disclosure of origin of imported parts of a seam ripper which is assembled in the United States. (File No. 703 7111)

Opinion Letter

June 11, 1970

Dear Mr. Ament:

This reply is in response to your request for permission to label your Arrow Seam Ripper as "Made in USA."

According to the Commission's understanding of the facts, the blade is made in West Germany and the plastic handle and sheath are made in the United States. After assembly in the United States, the seam ripper is attached to a display card for resale to the general public.

The Commission has given careful consideration to this matter and has concluded that it would be improper to label the seam rippers as "Made in USA." It is also of the opinion that a clear and conspicuous disclosure of the country of origin of the imported blade should be made on the front panel of the display card. If you desire, you may disclose the domestic origin of the handle and sheath.

By direction of the Commission. Commissioner Elman not concurring.

Letter of Request

April 16, 1970
Attn: Mr. Paul A. Jamarik
Attorney-Adviser

Dear Sir:

Today, we have been advised by Mr. Hugh B. Helm, Chief Division of Advisory Opinions, that our inquiry regarding the labeling of our Seam Rippers has been forwarded to your offices.

Enclosed please find a card which illustrates this item.* In case there

*The illustration is not reproduced herein.

should be a question, please be kind enough to contact us, and we shall gladly furnish you with any information you still might require.

Looking forward to receiving your favorable decision,

Very truly yours,
HERMAN AMENT, IMPORT-EXPORT
Norman L. Ament

Disclosure of origin of imported treble hooks used in the manufacture of fishing lures. (File No. 703 7101)

Opinion Letter

June 16, 1970

Dear Mr. Boehm:

This reply is in response to your request for an advisory opinion in regard to the question of whether it is necessary to disclose the foreign country of origin of imported treble hooks used in the manufacture of fishing lures.

According to information which you have supplied to the staff, the hooks will be imported from Norway and Sweden. They will represent less than 10% of the cost of producing the finished product, with the remaining 90% representing the cost of American-made components used in the manufacture of the fishing lures.

It the absence of any affirmative representation that the fishing lures are made in their entirety in the United States, or any other misrepresentation that might mislead purchasers as to the country of origin, the Commission is of the opinion that, under the facts as presented, the failure to mark the origin of the imported hooks will not be regarded by the Commission as deceptive.

By direction of the Commission.

Letter of Request

April 3, 1970

Gentlemen:

Many of our members manufacture fishing lures, the component parts of which are all made in the United States with the exception of the fishhook which is imported. For clarification purposes, we would very appreciate an advisory opinion from you as to how these products should be marked.

Thank you for your help.

Very truly yours,
A. J. Boehm
Executive Director

Franchise program for automobile replacement glass business. (File No. 703 7102)

Opinion Letter

June 16, 1970

Dear Mr. Rudnick:

This is in response to your recent letter requesting an advisory opinion with regard to the proposed franchise program of the Globe Glass Company.

The Commission understands that the program will operate as follows: Globe proposes to franchise qualified persons (principally existing automobile replacement glass businesses) to conduct an automobile replacement glass business, incorporating Globe methods and procedures including the mobile installation service, under Globe's trade names and trade and service marks. Among the provisions of the franchise agreement outlined in your letter, we note that Globe will place no restrictions on the franchisee's pricing policies, operating territory or customers to be served. Globe further proposes to charge an initial franchise fee, an advertising fee to be spent for advertising and promotion, plus a royalty and service fee for the use of its trade names and trade and service marks, in addition to various training, consulting, accounting and other services to be rendered by Globe to its franchisees. Globe states that franchisees will be completely free to purchase part or all of the glass requirements from other sources, provided minimum specifications are met.

However, we note that "Globe proposes to reduce the royalty and service fee payable by a franchisee in proportion to the volume of his purchases of replacement glass from Globe. The proportionate reduction in royalty and service fees will be available to all franchisees on the same basis, though it is not intended that these reductions be based on any 'cost justification' formula."

The Commission has carefully considered your proposal and is of the view that its implementation in the manner described would be in violation of Section 3 of the Clayton Act, and possibly of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. Provisions in the franchise agreement whereby the franchisee is precluded from dealing freely in the goods of competitors under pain of higher royalty and service fees are subject to Section 3 of the Clayton Act, and, insofar as such royalty and service fees are reduced to certain purchasers, a price discrimination under Section 2 of the Clayton Act, as amended, may result as to competing customers.

By direction of the Commission, with Commissioner Elman not concurring.

Letter of Request

March 19, 1970

Dear Mr. Secretary:

In accordance with Section 1 of the Procedures and Rules of Practice of the Federal Trade Commission, we hereby request an advisory opinion of the Commission with respect to the legality under Section 5 of the Federal Trade Commission Act, Section 3 of the Clayton Act and Section 2 of the Robinson-Patman Act of the franchise program described herein.

Globe Glass Company ("Globe") is a large installer of replacement automobile glass purchased from several manufacturers and processors. Automobile glass replacement is a highly competitive business with many individual business units in varying in size from annual volumes of $50,000 to $10,000,000. At the present time Globe operates through approximately 13 company owned stores, all of which offer a mobile service (i.e., damaged automobile glass is replaced at the customer's home or place of work). Globe proposes to franchise qualified persons (principally existing automobile replacement glass businesses) to conduct an automobile replacement glass business, incorporating Globe methods and procedures, including the mobile installation service, under Globe's trade names and trade and service marks.

Globe proposes to offer to sell to its franchisees at competitive prices part or all of their requirements for replacement automobile glass. The franchisees would be completely free to purchase part or all of their glass requirements from other sources, provided minimum specifications are met. Globe further proposes to charge an initial franchisee fee for the grant of the franchise and a royalty and service fee for the use of its trade names and trade and service marks and various training, consulting, accounting and other services to be rendered by Globe to its franchisees on a continuing basis. Globe may also charge an advertising fee to be spent by it for advertising and promotion.

Globe anticipates that it will earn a profit on sales of replacement glass to its franchisees sufficient to reimburse it in part for the services to be rendered to them. Globe desires to earn a reasonable fee for its services to its franchisees and does not desire to collect a full royalty and service fee in addition to its profit on sales of replacement glass. Accordingly, Globe proposes to reduce the royalty and service fee payable by a franchisee in proportion to the volume of his purchases of replacement glass from Globe. The proportionate reduction in royalty and service fees will be available to all franchisees on the same basis, though it is not intended that these reductions be based on any "cost justification" formula.

The undersigned believes the proposed plan is distinguishable from the Brown Shoe case by reason of the franchisee's complete freedom of choice: he can pay for the services to be received as a franchise by payment of a full royalty and service fee and purchase his requirements of replacement glass from any source whose products meet minimum specifications; or he can purchase glass from Globe in sufficient quantities and pay a proportionately reduced royalty and service fee.

No restrictions will be placed by Globe on the franchisee's pricing policies, operating territory or customers to be served.

The franchise program described herein is not presently in effect (i.e., Globe has granted no franchises as of the date hereof and has no existing agreements or arrangements with any automobile replacement glass business other than its own stores). Globe is not presently the subject of any investigation or other proceeding by the Commission or any other Government agency.

Globe will appreciate having the Commission's advisory opinion at the Commission's earliest convenience. We will promptly supply any additional information that the Commission deems to be required to render its advisory opinion.

Sincerely,
Lewis G. Rudnick
for RUDNICK & WOLFE

Publication by consultants of monthly bulletin on a subscription basis to suppliers of metal fabrications. (File No. 703 7112)

Opinion Letter

June 23, 1970

Dear Mr. Reynolds:

This is in response to your request for an advisory opinion.

The Commission understands that you propose to publish a monthly bulletin for circulation on a subscription basis to suppliers of metal fabrications. The publication would list the original equipment manufacturer's name, the name of his purchasing agent, a brief description of his requirements for metal fabrications for the month including sizes, shapes, quality, quantity, engineering difficulty or sophistication and closing dates for accepting quotations on these requirements.

The Commission is of the view that implementation of the proposed course of action in the manner described would not violate any law administered by the Commission.

By direction of the Commission.

Substitute Letter of Request

May 19, 1970

Attention: Mr. Henry Williams

Dear Mr. Williams:

Please consider this letter and the contents herein as being in lieu of our letter of May 11, 1970.

We are anticipating the publication of a monthly activities report, similar to the Dodge Report in the building industry.

Using this report as an example, we would like to describe in detail what our intentions and plans are. The Dodge Report is a publication which goes to subscribers of its services who are interested in the construction and building industry. These interested parties would be contractors, soils and structural engineers, architects, mechanical contractors, construction suppliers and developers. The publication *circulates* to its *subscribers* every *contemplated building project* that it has listed with its service. The interested parties named above are, therefore, in a position to make their availability known to the building or project owner, to offer their services in their respective fields or to submit bids on different phases of the construction.

By the same token, our proposition is of a similar nature, but will be directed toward metal fabrication manufacturers in Ohio.

We have been engaged by, for and with manufacturing for 15 years, serving in our capacity as consultants. In these years of experience, we have seen a need for a greater communications tool between the original equipment manufacturers and the metal fabrication suppliers to know one anothers needs and capabilities, respectively.

As an example * * * XYZ Corporation manufacturers (or assembles) finished kitchen ranges. In order to produce these finished ranges, fabricated metal parts must continually be purchased from outside sources (the metal fabrication supplier). Most original equipment manufacturers (the finished range manufacturer) deals with or purchases his fabricated metal parts, from only a small number of metal fabrication manufacturers.

This is due, many, many times, to a lack of exposure of *other* metal fabrication manufacturers who could *also* be in a position to offer their facilities to this range manufacturer.

By the same token, the range manufacturer may quite often have a requirement for a metal fabricated part that is more difficult to produce than his normal requirements. His present suppliers perhaps are not equipped to supply him with his requirement . . . so the manufacturer (XYZ Corp.) must quickly locate another source . . . but

this is difficult to do because of inexposure of himself and of his many possible suppliers.

Our solution to the problems I have mentioned and many more related problems is to produce a monthly publication, circulated to subscribers only.

This publication would list the Original Equipment Manufacturer's name, the name of their Purchasing Agent, a brief description of their requirement for the month, including sizes, shapes, quality, quantity, engineering difficulty or sophistication, and the opening and closing dates for accepting quotations on these requirements.

This publication would be circulated to our metal fabrication supplier subscribers, who would study the listings . . . determine what they are or are not capable of producing . . . and then submit quotes directly to the Purchasing Agent on the parts that they are capable of producing.

This would provide the metal fabrication supplier with an equal opportunity to bid or submit quotes, and would supply the original equipment manufacturer with a wider range of facilities, capabilities and prices.

As we see it, this would fill a supply and demand need on a much larger scale, and on a more competitive basis to both the original equipment manufacturer and the metal fabrication supplier.

Our concern at this point is whether the law provides for such a publication?

Are the purchasing needs of a publicly held corporation public knowledge?

Does this violate any trade regulations? Or, are there any regulations with which a publication of this nature must comply?

Again, we wish to state that our main concern is to provide a greater opportunity for small metal fabrication suppliers to bid or submit quotes on original equipment manufacturers' requirements, and to provide the original equipment manufacturer with a greater variety of suppliers from which to choose.

We see a definite need and wish to use our experience in filling that need.

Your prompt reply to our inquiry will be most appreciated. We shall await word from you.

Sincerely,
JOHN E. REYNOLDS, INC.
John E. Reynolds
President

Letter of Request

May 11, 1970

Gentlemen:

We are anticipating the publication of a monthly activities report, similar to the Dodge Report in the building industry.

This publication, however, would be listing the needs of Original Equipment Manufacturers in the area of metal fabrication.

As we see it, at present, original equipment manufacturers are accepting quotes or bids from only a small number of suppliers for their metal fabrication requirements. This, we feel, is because the original equipment manufacturer is not fully aware of the many metal fabrication suppliers who have the facilities and knowhow to quote on their requirements.

By the same token, the metal fabrication suppliers are not aware of the many original equipment manufacturers who have a definite need for their products at any given time.

We propose to approach all of the original equipment manufacturers in Ohio to request from them what their monthly needs are in the metal fabrication field.

Our next step would be to tabulate their individual needs in the same manner as Dodge Report, and then publish and put on the market, the results of these tabulations.

This would allow any interested metal fabrication supplier, his salesmen or representatives to purchase this report monthly at a very low dollar amount. This, in turn, would provide the metal fabrication supplier with an equal opportunity to bid or submit quotes to the original equipment manufacturers in Ohio.

As we see it, this would fill a supply and demand need on a much larger scale, and on a more competitive basis to both the original equipment manufacturer and the metal fabrication supplier.

Our concern at this point is whether the law provides for such a publication?

Are the purchasing needs of a publicly held corporation public knowledge?

Does this violate any trade regulations?

Are there any regulations with which a publication of this nature must comply?

Is there such a service to the best of your knowledge?

Again, we wish to state that our main concern is to provide a greater opportunity for small metal fabrication suppliers to bid or submit quotes on original equipment manufacturers' requirements, and to

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provide the original equipment manufacturer with a greater variety of suppliers from which to choose.

For your information, we have been in metalworking market research for fifteen years and are well aware of this communications problem and, we feel this would be a fair and equitable approach to solving it.

Your prompt reply to our inquiry will be most appreciated. We shall await word from you.

Sincerely,
JOHN E. REYNOLDS, INC.
John E. Reynolds
President

Sale of denture cleanser to grocery wholesalers and related outlets at higher prices than product is now being sold to drug wholesalers. (File No. 703 7115)

Opinion Letter

July 22, 1970

Dear Mr. Millane:

This is in further reference to your request of June 12, 1970, for Commission advice concerning your proposal for selling denture cleanser to grocery wholesalers and related outlets at higher prices than the product is now being sold to drug wholesalers.

As the Commission understands your submittal, the product is now being sold directly to drug wholesalers with suggested consumer and retail prices published in the Drug Topics' *Red Book* and the American Druggist's *Blue Book.* You intend to expand distribution by selling to wholesale grocers and others through brokers while continuing your direct sales to drugwholesalers. Because of the difference in selling costs as between direct and brokerage house sales you propose other than drug wholesalers, such increase to reflect and include only the fees paid to brokerage houses for their services in selling your product.

The Commission is of the view that to the extent the higher prices to be charged grocery wholesalers and related outlets include an amount paid brokers by your firm for their services in connection with the sale of your product an unlawful discount or allowance in lieu of brokerage will have been accorded drug wholesaler recipients of the lower prices.

Accordingly, the Commission is of the opinion that institution of your proposed pricing program would expose your firm to charges of

granting unlawful discounts or allowances in lieu of brokerage to drug wholesalers in violation of Section 2(c), amended Clayton Act. Under the circumstances of your presentation your direct buying customers, the drug wholesalers, would be exposed to charges of receiving or accepting an unlawful discount or allowance in lieu of brokerage in violation of Section 2(c), amended Clayton Act.

By direction of the Commission.

Letter of Request

June 12, 1970

Dear Mr. Helm:

We manufacture a denture cleanser presently in distribution only in Orange County, California. We sell directly to the drug wholesalers without the use of brokers and/or agents. Our suggested consumer and retail prices are published in the Drug Topics' *Red Book*, and the American Druggist's *Blue Book*.

We intend to expand our sales and distribution into the grocery and related outlets, and to utilize the services of brokers. We will continue to service the drug wholesalers direct, at least in the Southern California Area.

We are confronted by the problem of different selling costs between direct sales and brokerage sales and the restrictions of the Clayton Act. We wish to raise the wholesale price to the grocery and related wholesalers, over what we now charge the drug wholesalers. The amount of the increase would directly reflect the increase in selling costs.

We believe that Paragraph 2(a) of the Clayton Act allows us to increase the price as outlined above, and would appreciate your comments and opinion.

Thank you for your cooperation, and are anxiously awaiting your reply.

Very truly yours,
NORVAL COMPANY
Arthur J. Millane

Tripartite promotional plan in the grocery field. (File No. 703 7106)

Opinion Letter

August 3, 1970

Dear Mr. Miller:

This is in response to your further request in behalf of Mobile Advertising, Inc. for an advisory opinion.

The Commission has carefully studied your letter of April 16, 1970, as amended by your letter of April 22 and 27, 1970, and as further amended by your letter of June 12, 1970.

With the understanding that the alternatives, as proposed in the revised plan, must be truly of equivalent value and appropriately communicated to the retailers, the Commission is of the view that implementation of the proposed course of action in the manner described would not violate the laws administered by the Commission.

By direction of the Commission.

Third Supplement to Letter of Request

June 12, 1970

Attention: Henry Williams, Esq.
Re: Mobile Advertising, Inc. File No. 703 7106
Honorable Sir:

Reference is made to the application for an advisory opinion set forth in the letter of the undersigned dated April 16, 1970 (as amended by the letters of the undersigned dated April 22, 1970 and April 27, 1970) and the response to said application contained in the recent letter of the Secretary of the Commission. In light of the comments of the Commission, the applicant has reformulated the portion of its plan found to be objectionable and hereby amends its plan in the following respect:

Retailers who elect to participate in the applicant's plan shall be required initially to select one of two available methods for determining the amount of payment to which they shall be entitled.

Under the first alternative, participants with an annual gross volume over $150,000 will receive an aggregate per annum payment from the applicant at the rate of $43 per $100,000 of the participant's annual gross volume and participants with an annual gross volume of $150,000 or less will receive an aggregate per annum payment from the applicant at a rate of $60 per $100,000 of the participant's annual gross volume, with a minimum payment of $60.

Under the second alternative, payments to participants shall be computed on the basis of the case purchases made by the participant of the products advertised (e.g. $.10 per case). A different value shall be assigned to each particular product advertised; however, the value shall be consistently applied to determine payments to retailers electing this method of computation, subject to one exception: retailers whose annual gross volume is $150,000 or less shall have a value assigned to the products which they purchase which shall be 40% greater than that applied to the purchases of participants whose annual gross volume is over $150,000 (e.g. $.14 per case).

In all instances, retailers which have trucks available to be utilized under the plan shall earn their payments by carrying the applicants advertising frames thereon. In all other instances (in which trucks are not available), the participants shall earn its payments by performing alternative services referred to in the plan as originally submitted which it is able to perform; the amount of such services to be proportionally comparable with those performed by truck operators.

The applicant's plan, as previously submitted, shall in all other respects remain unchanged.

At this time I respectfully request that the applicant's plan, as modified, be examined by the Commission and that an advisory opinion be rendered.

I offer you any assistance which I may be able to render in facilitating this matter.

Respectfully submitted,
Michael Miller

Second Supplement to Letter of Request

April 27, 1970

Attention: Henry Williams, Esq.
Re: Mobile Advertising, Inc.
Honorable Sir:

As General Counsel to the above captioned corporation and on their behalf, the undersigned hereby submits this additional amendment to its letter of request for an advisory opinion dated April 16, 1970 (as previously amended by letter dated April 22, 1970).

In the last paragraph of page two of the aforementioned letter of request, the applicant states that in the instance of an operator who is a wholesaler, the revenue to be distributed will equal 35% of the gross advertising revenue generated by the frames viz: 10% to be retained by the wholesaler-operator and 25% to his customers i.e., independent retailers.

Please be advised that the 25% figure is a maximum allowance and is to be disbursed only in exchange for services rendered by such independent retailers, such as in-store signs, handbills, local advertising, etc. The amount of services to be performed will be comparable to those performed by competing retailers who operate trucks and participate in the plan. The nature of the services to be performed will be those which a retailer is able to provide. The disbursement is to be made only on proof that the required services have been rendered.

Respectfully submitted,
Michael Miller

First Supplement to Letter of Request

April 22, 1970

Attention: Henry Williams, Esq.
Re: Mobile Advertising, Inc.
Honorable Sir:

As General Counsel to the above captioned corporation and on their behalf, the undersigned hereby submits, at your request, this amendment to its letter of request for an advisory opinion dated April 16, 1970.

In the first paragraph of page three of the aforementioned letter, the applicant refers to cash allowances to be paid to entities desiring to participate in the applicant's proposed plan who are unable to do so. It is not stated in the letter how the *total* amount of the cash allowance is to be computed.

Where the entity desiring to participate in the plan is an operator of leased trucks whose lessor will not consent to the operators' participation in the plan, applicant will give such operator a cash allowance (for services rendered) equal to the amount such operator would have received had it participated in the plan. To compute such figure, applicant will assume that the rate of "fill" (i.e., number of signs with advertising thereon) for the entity's trucks is equal to the rate of fill in the marketing area in which such entity is located.

Where the entity desiring to participate in the plan is a retailer whose wholesaler does not participate, applicant will give such retailers a cash allowance (for services rendered) equal to the amount they would have received had the wholesaler participated. Once again, the computation of such figure will be based upon the number of trucks the wholesaler operates and assuming a rate of fill experienced in the wholesaler's marketing area.

The relative distributions of such cash allowance will be made as stated in the April 16th letter and will be in exchange for the services enumerated therein.

Respectfully submitted,
Michael Miller

Letter of Request

April 16, 1970

Attention: Henry Williams, Esq.
Re: Mobile Advertising, Inc.
Honorable Sir:

As General Counsel to the above captioned corporation and on their behalf, the undersigned hereby submits this request, in lieu of letters

of request submitted to you dated March 20, 1970 and March 30, 1970, for an advisory opinion with respect to a proposed plan of said corporation.

I. THE PROPOSED PLAN

The applicant proposes to lease rights from operators of food store chains and grocery product wholesalers to install advertising frames on their trucks. The leases are to be for a period of five years. It is intended that each truck involved be equipped with eight frames, four on each side of the truck.

The advertising frames will each measure 2′6″ in height by 6′ in width. The applicant will install, maintain and service (change advertisements) the frames which are to be supplied by the applicant. If the operator so elects, he will install, maintain and service the frames, which will be supplied by the applicant, and the operator will be reimbursed for the expenses of such services up to the following maxima:

Installation	$100 per truck.
Maintenance and servicing	$30 per truck per month.

Advertising will be sold to food and grocery store products manufacturers. The rate for advertising will be a uniform $30 per frame per month.

The applicant intends to offer the benefits of this plan to every food products distributor, including chain stores, cooperative wholesalers, voluntary wholesalers and unaffiliated independent groceries.

The participating operators of trucks will be paid for the lease of the rights they grant to the applicant in the form of a percentage of the gross advertising revenue generated from the frames on its trucks. In the instance of an operator which owns its own retail food outlets, such operator will receive 25% of the gross advertising revenue from the frames installed upon its trucks. Since the rate of advertising will be $30 per month per frame, such operator will receive $7.50 per frame per month ($30x25%) as his revenue for permitting the installation upon his trucks of the frames. Clearly, this rate will be utilized by the chain stores and the cooperative wholesalers since in each instance the operator of the truck is also the owner of the retail outlets. Each such operator will be required to verify that it does not receive any benefits of the Plan in the form of payments from participating wholesalers with whom it deals.

In the instance of an operator who is a wholesaler selling products to retail food outlets which it does not itself own, the revenue to such operator will be 35% of the gross advertising revenue generated from the frames on his truck, or $10.50 per frame per month ($30x35%). In this case the operator of the trucks will be required, as part of his

contract with the applicant, to covenant and certify to the applicant that he will distribute an amount equal to 25% of the gross advertising revenue from the frames on his trucks to his customers (independent retailers). In other words, such operator retains 10% of the gross advertising revenue for administering the plan and distributed 25% of the gross advertising revenue to the retailers who are in competition with the chain stores and cooperative wholesalers who are also receiving 25% of the gross total revenue from frames for their participation in the plan. In distributing the proceeds to his customers, the wholesaler will be required to make such distribution upon the basis of the relative dollar amounts of purchases by the independent retailers from the operator to be computed upon the basis of a period to be determined and consistently applied and limited to purchases of the products advertised.

In instances where a potential participant communicates to applicant a desire to participate in the plan but cannot because either it is a retailer whose wholesaler does not participate or it is an operator whose truck lessor will not consent, such entity will be given a cash allowance to be utilized for services it is able to provide, such as in-store signs, handbills, local advertising, etc. The relative amounts of such allowances will be based upon the relation of each recipient's volume in the products advertised to the total volume of all participants in such products.

Assignments of advertising to the participants' trucks will be in the exclusive control of the applicant. In instances where the advertiser has not purchased complete market coverage (i.e., his ad is not on every truck in the market) the applicant will apportion the advertising among the participants' trucks to be utilized by allotting each participant the percentage of the trucks needed for the ad that his trucks bear to all participating trucks in the market.

Upon approval of this plan by the Commission, the applicant intends to implement the plan throughout the United States on a region by region basis. In each region the applicant will engage specialized direct mail houses to distribute announcements to the headquarters of every food chain, every cooperative wholesaler, every voluntary wholesaler, every grocery wholesaler, and each and every individual independent grocery retail outlet and their owners which have been in existence for six months or more. Further, the applicant will advertise in appropriate trade journals and shall also release publicity statements to appropriate trade and financial publications.

II. DISCUSSION

It is clear from the above-proposed plan that payments received by the applicant from manufacturers which are disbursed by applicant

to truck operators in the food distribution business are advertising allowances subject to Section 2(d) of the Robinson-Patman Act. The following discussion relates the applicant's proposed plan to the Guides For Advertising Allowances And Other Merchandising Payments and Services, promulgated by the Commission on May 29, 1969 (hereinafter called "Guides").

An analysis of the applicant's proposed plan as it relates to the Guides will be facilitated by a general discussion of the market to which the applicant will offer such plan. Essentially, there will be four types of enterprises participating: Chain stores ("chains"), retailer-owned cooperatives ("cooperatives") and wholesalers ("wholesalers") selling to independent retailers ("independents"). It is clear that individual Independents cannot participate on their own, since in almost all cases these entities do not own the trucks necessary to effectuate the plan. (They do, however, receive the same benefits as their competitors as shown below.)

Of these four types of enterprises, three are deemed to be operating at the retail functional level of distribution, viz: Chains, Cooperatives and Independents. The remaining type, i.e., Wholesalers, are deemed to be operating at the wholesale functional level of distribution. (See *FTC v. MEYER*, 390 U.S. 341, 19 L.Ed. 122, 88 S. Ct. 904; and Guide 3, including definition therein of "Competing Customers" and *Example 2.*) However, the individual Independents who are customers of the Wholesalers are operating at the retail functional level of distribution. (*Ibid*)

Therefore, Chains, Cooperatives and Independents (herein in the aggregate "Retailers"), are "competing customers" of the advertisers and the applicant's plan must be equally available to them upon proportionally equal terms (Guides 3 and 12). On the other hand, Wholesalers are not "competing customers" of the Retailers and the terms offered to the Wholesalers need not be proportionally equal to those offered to the Retailers (*FTC v. MEYER*, *supra;* and Guide 3). However, the terms offered to competing wholesalers must be proportionally equal (Guide 12).

Although the applicant is proposing to offer only one plan, there are adjustments in the terms to afford proportional equality to all competing customers. When the plan is offered to a Wholesaler, the plan provides that such operator shall receive 35% of the gross advertising revenue generated by the frames on his trucks. Ten percent of the gross advertising revenue is to be retained by the Wholesaler and 25% of the gross advertising revenue is to be distributed to the Independents who are his customers. Therefore, 25% of the gross advertising revenue is distributed at the retail functional level of distribution. When the plan is offered to a Retailer (Chains or Coop-

eratives), the plan provides that such operator shall receive 25% of the gross advertising revenue generated by the frames on his trucks. Once again, therefore, there is a distribution of 25% of the gross advertising revenue at the retail functional level of distribution.

According to the terms of the plan, therefore, all competing Retailers are given equal terms and the plan itself does not discriminate in favor of any particular class of customer (Guide 12). This also holds true for the application of the plan with respect to all competing Wholesalers. The disparity of offering 25% to Retailers and 10% to Wholesalers is permitted by the holding in *FTC v. MEYER*, *supra*.

The aforementioned equality of terms would be a useless gesture in attempting to offer proportional equality were it not for the existence of a natural market phenomenon: There is a direct relationship between the volume of business generated by a store and the number of trucks required to service its needs. A large chain store retail outlet will require the same number of trucks to service its needs. A large chain store retail outlet will require the same number of trucks to service its needs as such number of competing Independents which have, in the aggregate, the same volume as such chain store outlet.

The applicant's research indicates that each trailer truck handles approximately $1,700,000 in volume per annum. A sample of the data complied by applicant follows:

Name of entity	Number of trucks	Volume
Loblaw, Inc.	152	$248,000,000
P. & C. Food Markets, Inc.	52	87,000,000
S. M. Flickenger Co., Inc. (wholesaler)	140	240,000,000
Victory Markets, Inc.	61	105,000,000
Acme Markets, Inc.—Buffalo	41	62,000,000
Acme Markets, Inc.—Syracuse	52	76,000,000

Therefore, the greater the volume of an entity the greater its number of trucks; the more trucks it has, the greater the service it provides for advertisers (i.e., reach and frequency). This relationship in the number of trucks to the store's volume effectuates a natural proportional equality when added to the equality of terms offered by applicant's plan.

To further insure a proportional equality of terms to competing Independents, the applicant is requiring the participating Wholesaler to distribute the retail portion of the gross advertising revenue upon the basis of the relative dollar volumes of its customers during a specific period to be determined and consistently applied, and limited to the purchases of products advertised.

Taking all of the factors discussed above into consideration, it becomes reasonably apparent that applicant's proposed plan provides proportionally equal terms required by Guide 7.

Guide 9 mandates that a plan ". . . should in its terms be usable in a practical business sense by all competing customers." There is no question about the usability of the plan by competing Wholesalers since they are all required by the nature of their business to operate trucks. At the retail level, this plan is clearly usable by the Chains and the Cooperatives which operate their own trucks as a part of their business operations. The only entities at this level not able to participate in that are the Independents. However, these entities are the recipients of the economic benefits of the plan upon proportionally equal terms with their competitors through the participation of their Wholesalers.

Guide 9 further provides: "With respect to promotional plans offered to retailers, the seller should insure that his plans or alternatives do not bar any competing retailer customers from participation whether they purchase directly from him or through a wholesaler or other intermediary." On its face the plan effectuates the intendment of this clause. The plan is "functionally available" to all competitors insofar as all share equally the benefits of participation . . . whether they own trucks or not. The excellent economic incentives provided for in the plan (highly profitable passive income to participants) almost insures participation by most Wholesalers. Further protection is afforded to the Independent by the provision in the plan that porportionally equal cash allowances will be given to Independents whose Wholesalers do not participate in exchange for services they are able to provide, i.e., in-store signs, handbills, local advertising, etc. Also, the applicant believes that the offer of its plan to the Retailers through Wholesalers will create a situation similar to that referred to in *Example 5* of Guide 8, viz: The Independents will request the Wholesaler to participate in the plan and receive from the applicant 10% of the gross advertising revenue for administering the plan. In the instance of an operator who desires to participate but cannot because he leases his trucks and cannot obtain his truck lessor's consent, the same cash allowance will be offered in exchange for the services enumerated above. The entire effect of all these provisions of the plan is to effectuate the availability of the plan to all competing customers in accordance with Guide 9.

The applicant proposes to utilize an alternative provided for in Guide 8, i.e., Its notification will include a summary of the essential details of the plan and the method to contact the applicant, either for more information or for participation. The notice will state that the

plan is available to all entities desiring to participate. The applicant will be in charge of informing prospective participants of the existence and terms of the plan and the applicant's contract with the advertisers will so covenant pursuant to Guide 13. The applicant will also undertake to verify the effectiveness of its notifications and will require the Wholesalers to distribute and certify such distribution made to the Retailers. These undertakings will be made by the applicant pursuant to Guide 13 and will be adequate to meet the standards of Guide 8. (See Proposed Plan for the details of notification.)

III. GENERAL

The proposed course of action described herein is not currently being followed by the applicant and is not the subject of a pending investigation or other proceeding by the Commission or any government agency.

The undersigned and the applicant undertake to amend and supplement the information described herein at your request prior to submission to the Commission for approval. Please be so kind as to contact the undersigned prior to submission to the Commission of any problems or disqualifications of the proposed plan herein described.

At this time I respectfully request that approval of this proposed plan be expedited to the extent that you are able in order to permit the applicant to embark upon its proposed plan at the earliest possible date.

I offer to you any assistance which I may be able to render in facilitating this matter.

Respectfully submitted,
Michael Miller

Tripartite promotional plan involving the placing of pictures of advertised products on shelves of retail stores. (File No. 703 7117)

Opinion Letter

August 7, 1970

Dear Mr. Gomon:

This reply is in response to your request for an advisory opinion in regard to the legality of the proposed promotional plan outlined in your letters of May 13 and June 11, 1970. The plan will involve the placing of pictures on shelves in retail stores handling the sale of those products.

The Commission has given careful consideration to your request and has concluded that it would interpose no objection thereto, provided the following three conditions are met: