

witness Koman. It is the view of Commissioner MacIntyre that the testimony of witness Koman should have been stricken for the reason stated in a dissenting opinion by him in January 1971 [78 F.T.C. 1564], during the course of an interlocutory appeal proceeding herein. Commissioner Jones agreed to the opinion on liability, but dissented to the order, and submitted a dissenting statement.

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IN THE MATTER OF

GEORGIA-PACIFIC CORPORATION

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

*Docket 8843. Complaint, May 26, 1971—Decision, Dec. 26, 1972.*

Consent order requiring, among other things, the divestiture by the nation's leading producer and distributor of softwood plywood, headquartered in Portland, Ore., of certain acquisitions alleged to be anticompetitive and monopolistic in nature. The principal provisions of the order are that the respondent shall create an independent corporation and transfer approximately 20 percent of its assets to said corporation. The order further restricts and prohibits future acquisitions in the timber industry in the South for five years and places a ten-year ban on the acquisition of the stocks and assets of softwood plywood concerns without prior Federal Trade Commission approval.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named above, as hereinafter more particularly designated and described, has violated and is now violating the provisions of Section 7 of the Clayton Act, as amended, (U.S.C. Title 15, Section 18) through the acquisition of the stock and assets of various corporations, as hereinafter more particularly designated and described, hereby issues its complaint pursuant to the provisions of Section 11 of the aforesaid Clayton Act (U.S.C. Title 15, Section 21) stating its charges in this respect in the following Count I.

The Federal Trade Commission, having further reason to believe that aforesaid party respondent also has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act, as amended (U.S.C. Title 15, Section 45), through the acquisition of the stock and assets of various corporations, as hereinafter more particularly designated and described, and it appearing to the Commission that a proceeding by it with reference thereto would be in the public

interest, also issues its complaint pursuant to the provisions of the aforesaid Federal Trade Commission Act stating its charges in this respect in the following Count II.

## COUNT I

## DEFINITIONS

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

*Softwood*—wood coming from a gymnosperm tree, otherwise known as coniferous woods such as pines, firs, spruces, and hemlocks. Generally light in texture, non-resistant and easily worked.

*Softwood plywood*—materials consisting of sheets of softwood glued or cemented together with the grains of adjacent layers arranged at right angles or at a wide angle and usually being made

- (a) of uniformly thin veneer sheets, or
- (b) of equal number of veneer sheets on either side of a thicker central layer.

## THE RESPONDENT

PAR. 2. Respondent, Georgia-Pacific Corporation, sometimes hereinafter referred to as "G-P," is, and has been, at least since January 1, 1960, a corporation organized, existing and doing business under the laws of the State of Georgia with its present office and principal place of business located at the Commonwealth Building, Portland, Oregon.

PAR. 3. G-P is engaged in the manufacture, sale, and distribution of a wide variety of wood products including, but not restricted to, softwood plywood, plywood specialties, lumber, and furniture. It also is engaged in the manufacture, sale and distribution of gypsum products, chemicals, wood by-products, and a variety of paper and paper products including board, newsprint, tissues, toweling and napkins, and paper.

PAR. 4. In the course and conduct of its business, G-P is, and has been, at least since January 1, 1960, engaged in selling its products to purchasers located in various States of the United States, and caused such products, when sold, to be transported from its facilities in various States of the United States to such purchasers located in various other States of the United States. In so doing G-P is engaged in "commerce," as "commerce" is defined in the Clayton Act, as amended, and has been continuously so engaged at least since 1960.

PAR. 5. G-P's development has been characterized through the years by continuous growth. For calendar year 1949, G-P had net

sales of approximately \$35,042,000, and its total assets approximated \$16,973,000. For calendar year 1959, net sales were approximately \$191,997,000, and its total assets had risen to approximately \$264,225,000.

PAR. 6. Much of G-P's growth prior to 1960 was the result of its acquisitions of stock or assets of other corporations. By 1960, G-P had become a highly integrated corporation within the lumber and softwood plywood industries, having its own source of raw materials, its own manufacturing plants, and its own distribution system. In 1960, G-P was a leading producer of softwood plywood, with production in that year of approximately 620,934,000 square feet ( $\frac{3}{8}$ " basis).

PAR. 7. By the end of 1969, G-P was the nation's largest producer of softwood plywood, with production in that year of approximately 1,922,379,000 square feet ( $\frac{3}{8}$ " basis).

PAR. 8. In 1960, G-P had ten softwood plywood plants located on the West Coast. By the end of 1969, it had 17 softwood plywood plants, nine of which were located in the southern part of the United States.

PAR. 9. As of the early part of 1970, G-P had formulated plans for the construction of four additional softwood plywood plants, all located in the South. When construction of these plants is completed, G-P's softwood plywood capacity will be increased by approximately 480 million square feet ( $\frac{3}{8}$ " basis).

PAR. 10. By 1969, G-P was the third largest producer of lumber in the United States and Canada, and the third largest producer of gypsum products in the United States. Additionally, it is a leading manufacturer of paper, pulp, and board products.

PAR. 11. In 1960, G-P owned in fee approximately 615,000 acres of timberland, and held cutting rights covering approximately 50 million additional board feet. At the end of 1969, G-P owned in fee in the United States, Canada, and Brazil, timberlands totaling approximately 4.5 million acres, of which approximately 3.5 million acres were in the United States. Also, it held exclusive cutting rights to an additional 1.5 million acres of timberlands.

PAR. 12. A significant portion of G-P's growth subsequent to 1960 is directly attributable to acquisitions by G-P of the stock or assets of formerly independent forest products corporations. During the period 1961-1968, G-P acquired 45 companies, whose total combined assets approximated \$396,000,000. Through these acquisitions, G-P gained ownership in excess of 2,432,000 acres of timberland.

## THE NATURE OF TRADE AND COMMERCE

PAR. 13. Softwood plywood is a separate and distinct product which is distinguished from all other building materials and all other products in a number of ways including, but not restricted to, its unique manufacturing process, physical characteristics, and end uses.

PAR. 14. In the United States prior to 1964, softwood plywood was manufactured almost entirely on the West Coast. In that year the domestic production of softwood plywood began in the South as a result of the development of new manufacturing techniques permitting utilization of the woods of southern pine trees, hitherto unsuitable for the manufacture of softwood plywood.

PAR. 15. The manufacture of softwood plywood is a very substantial industry in the United States. In 1968, approximately 14.7 billion square feet ( $\frac{3}{8}$ " basis) was produced with value of shipments approximately \$1,044,000,000.

PAR. 16. There has been a significant increase in the production of softwood plywood since 1963, with most of the increase occurring in the South. National production increased approximately 3.5 billion square feet ( $\frac{3}{8}$ " basis) during the period 1963-1969, while southern production accounted for approximately 2.8 billion square feet ( $\frac{3}{8}$ " basis) of this national increase.

PAR. 17. The participation by G-P in this increase in southern production has been substantial. G-P established the first plant for the production of southern pine softwood plywood at Fordyce, Arkansas, in 1963. By 1968 G-P had achieved a dominant position in the production of softwood plywood in the South, accounting for approximately 35.4 percent of softwood plywood produced in that region in that year. G-P's success in achieving this position has resulted primarily from a series of acquisitions and subsequent development of southern pine timber bases suitable for support of long term production of softwood plywood, including the acquisitions mentioned hereinafter, with the result that there is now a shortage of such bases in the southern pine region of the United States for development by others.

PAR. 18. Additionally, G-P is the leading producer of softwood plywood in the United States, accounting for approximately 14 percent of the nation's production in 1969, almost double the production of its nearest competitor.

PAR. 19. G-P is also the leading distributor of softwood plywood, accounting for approximately 18.3 percent of the mill shipments in the United States in 1969.

PAR. 20. There has been a significant increase in the level of concentration in the production of softwood plywood. In 1963, the top four and top eight producers had approximately 25.92 percent and 38.60 percent of the nation's production, respectively. By the end of 1969, these shares had increased to 34.59 percent and 49.21 percent, respectively.

PAR. 21. There has also been a significant increase in the level of concentration in the national distribution of softwood plywood. In 1963, the top four and top eight distributors of softwood plywood accounted for 36.38 percent and 50.04 percent of domestic mill shipments, respectively. By 1969, these shares had increased to 48.22 percent and 63.50 percent, respectively.

PAR. 22. The aforesaid increase in concentration has been paralleled by a number of independent softwood plywood concerns leaving the industry, either by virtue of merger, joint venture, or by voluntarily ceasing operations.

#### THE ACQUISITIONS

#### Fordyce Lumber Company

PAR. 23. Prior to and until April 1963, Fordyce Lumber Company, sometimes hereinafter referred to as "Fordyce," was a corporation organized, existing and doing business under the laws of the State of Arkansas with its office and principal place of business located at Fordyce, Arkansas.

PAR. 24. Fordyce was engaged in the production and sale of lumber. In the year preceding its acquisition by G-P, Fordyce produced approximately 32,384,000 board feet of lumber. In that year Fordyce's lumber sales amounted to approximately \$2,300,000, and the stated value of its assets was approximately \$20,937,000. Included among such assets were approximately 160,000 acres of forested timberlands.

PAR. 25. In the course and conduct of its business prior to April 1963, as aforesaid, Fordyce sold its products to purchasers located in various States of the United States and caused such products, when sold to be transported from its facilities in Arkansas to such purchasers located in various other States of the United States. In so doing Fordyce was engaged in "commerce," as "commerce" is defined in the Clayton Act, as amended.

PAR. 26. In April 1963, Georgia-Pacific Corporation acquired all of the stock and assets of Fordyce Lumber Company for approximately \$20,800,000.

PAR. 27. Subsequent to the aforesaid acquisition G-P abandoned the lumber operation at Fordyce, Arkansas and constructed a plant for the

production of softwood plywood. Such plant with an original annual capacity to produce 90 million square feet of softwood plywood, subsequently enlarged to a 120 million square feet capacity, began production in December 1963. Such plant was supplied, at least in substantial part, with timber acquired in the aforesaid acquisition of Fordyce.

#### American Timber Products Company

PAR. 28. Prior to and until September 1, 1965, American Timber Products Company, sometimes hereinafter referred to as "American Timber," was a corporation organized, existing and doing business under the laws of the State of Delaware with its office and principal place of business located at Portsmouth, Virginia.

PAR. 29. American Timber was engaged in the production of lumber which was used internally by it and by its wholly-owned subsidiary corporations in the manufacture of a variety of wood products, including wooden crates and baskets, wire bound crates and veneer stock. American Timber had lumber facilities located at Portsmouth, Virginia and Murfreesboro, North Carolina. Various plants of its subsidiary corporations were located in Arkansas, Georgia, New Jersey, and North Carolina. In the year preceding its acquisition by G-P, American Timber produced approximately 8,677,000 board feet of lumber which it used internally. In that year the stated value of its assets was approximately \$11,667,960. Included among such assets were approximately 30,000 acres of timberlands situated in North Carolina and Virginia.

PAR. 30. In the course and conduct of its business prior to September 1, 1965, as aforesaid, American Timber sold its products to purchasers located in various States of the United States and caused such products, when sold, to be transported from its facilities in various States to purchasers located in various other States of the United States. In so doing American Timber was engaged in "commerce," as "commerce" is defined in the Clayton Act, as amended.

PAR. 31. On or about September 1, 1965, Georgia-Pacific Corporation acquired all of the assets of American Timber Products Company for approximately 210,000 shares of G-P common stock valued at approximately \$11,970,000.

PAR. 32. In 1965, G-P constructed a softwood plywood plant at Emporia, Virginia, with a rated annual capacity of 100 million square feet. Subsequent to the aforesaid acquisition, G-P began using the timber so acquired to supply a part of the needs of this plant.

Jeffreys, Spaulding Manufacturing Company, Incorporated and  
Spaulding Lumber Company, Incorporated

PAR. 33. Prior to and until October 1965, Jeffreys, Spaulding Manufacturing Company, Incorporated, sometimes hereinafter referred to as "Jeffreys," and Spaulding Lumber Company, Incorporated, sometimes hereinafter referred to as "Spaulding," were corporations organized, existing, and doing business under the laws of the State of Virginia, with their offices and principal places of business located at Chase City, Virginia.

PAR. 34. Jeffreys and Spaulding were closely held corporations administered by the same executive officer, George M. Spaulding, and operated so as to mutually benefit each other.

PAR. 35. Jeffreys and Spaulding were both engaged in the production and sale of lumber. In the year preceding their acquisition by G-P the combined lumber sales of Jeffreys and Spaulding amounted to approximately \$2,654,000, and the stated values of their assets were approximately \$2,300,000 and \$2,700,000, respectively. Included among such assets were the combined total of approximately 33,000 acres of timberland.

PAR. 36. In the course and conduct of their businesses prior to October 1965, as aforesaid, both Jeffreys and Spaulding sold their products to purchasers located in various States of the United States and caused such products, when sold, to be transported from their facilities in Virginia to such purchasers located in various other States of the United States. In so doing both Jeffreys and Spaulding were engaged in "commerce," as "commerce" is defined in the Clayton Act, as amended.

PAR. 37. In October 1965, Georgia-Pacific Corporation acquired all of the assets of Jeffreys, Spaulding Manufacturing Company, Incorporated and Spaulding Lumber Company, Incorporated. The combined consideration paid by G-P for these acquisitions was 80,112 shares of G-P common stock, which was valued at approximately \$4,570,000.

PAR. 38. The timberlands acquired in the aforesaid acquisitions served to assure long-term production stability for G-P's softwood plywood plant at Emporia, Virginia.

Barrow Manufacturing Company and Barrow Land & Timber  
Company

PAR. 39. Prior to and until November 1966 Barrow Manufacturing Company, sometimes hereinafter referred to as "Barrow," and Barrow

Land & Timber Company, sometimes hereinafter referred to as "Barrow Land," were corporations organized, existing, and doing business under the laws of the State of North Carolina, with their offices and principal places of business located at Ahoskie, North Carolina.

PAR. 40. Barrow and Barrow Land were closely held corporations administered by the same executive officer, John K. Barrow, Jr., and operated so as to mutually benefit each other.

PAR. 41. Barrow was engaged in the production and sale of lumber. In the year preceding its acquisition by G-P, Barrow produced approximately 12,676,000 board feet of lumber. In that year Barrow's lumber sales amounted to approximately \$1,110,000. Barrow Land was a land and timber holding company which did not engage in manufacturing. The combined stated value of the assets of Barrow and Barrow Land was approximately \$1,015,000. Included among such assets were the combined total of approximately 6,000 acres of timberlands and cutting contract rights to approximately 5,000,000 board feet of timber.

PAR. 42. In the course and conduct of these businesses prior to November 1966, as aforesaid, Barrow sold its products to purchasers located in various States of the United States and caused such products, when sold, to be transported from Barrow's facilities in North Carolina to such purchasers located in various other States of the United States. In so doing Barrow was engaged in "commerce," as "commerce" is defined in the Clayton Act, as amended, and by virtue of the manner in which Barrow Land was operated for the benefit of Barrow, aforesaid Barrow Land was likewise engaged in "commerce."

PAR. 43. In November 1966, Georgia-Pacific Corporation acquired all of the assets of Barrow Manufacturing Company and all of the stock and assets of Barrow Land & Timber Company. The combined consideration paid by G-P for these acquisitions was 25,000 shares of G-P common stock, which was valued at approximately \$1,200,000.

PAR. 44. The timberlands acquired in the aforesaid acquisitions served to supplement G-P's timber supply for its softwood plywood plant at Emporia, Virginia.

#### Reynolds & Manley Lumber Company

PAR. 45. Prior to and until February 1966, Reynolds & Manley Lumber Company, sometimes hereinafter referred to as "Reynolds & Manley," was a corporation organized, existing, and doing business under the laws of the State of Georgia with its office and principal place of business located at Savannah, Georgia.



PAR. 46. Reynolds & Manley was engaged in the production and sale of lumber. In the year preceding its acquisition by G-P, Reynolds & Manley produced approximately 7,266,000 board feet of lumber. In that year, Reynolds & Manley's lumber sales amounted to approximately \$1,300,000, and the stated value of its assets was approximately \$1,877,000. Included among such assets were approximately 13,000 acres of timberland.

PAR. 47. In the course and conduct of its business prior to February 1966, as aforesaid, Reynolds & Manley sold its products to purchasers located in various States of the United States and caused such products, when sold, to be transported from its facilities in Georgia to such purchasers located in various other States of the United States. In so doing Reynolds & Manley was engaged in "commerce," as "commerce" is defined in the Clayton Act, as amended.

PAR. 48. In February 1966, Georgia-Pacific Corporation acquired all of the assets of Reynolds & Manley Lumber Company for 40,500 shares of G-P common stock valued at approximately \$2,470,500.

PAR. 49. Subsequent to the aforesaid acquisition, G-P abandoned the lumber operations at Savannah, Georgia, and replaced them with a new mill located at Port Wentworth, Georgia. It also constructed a plant for the production of softwood plywood at Savannah, Georgia. This plant had an original annual capacity of 50 million square feet of softwood plywood. The acquisition of Reynolds & Manley served to assure long-term production stability for G-P's softwood plywood plant at Savannah, Georgia.

Williams Furniture Corporation and Southern Coatings and  
Chemical Company

PAR. 50. Prior to and until October 20, 1967, Williams Furniture Corporation, sometimes hereinafter referred to as "Williams," and Southern Coatings and Chemical Company, sometimes hereinafter referred to as "Southern," were corporations organized, existing and doing business under the laws of the State of South Carolina with their offices and principal places of business located at Sumter, South Carolina.

PAR. 51. Many of the stockholders of Williams were also stockholders of Southern. The two corporations together with their subsidiaries were operated under similar management as a complex of interrelated businesses.

PAR. 52. Williams and its five wholly-owned subsidiaries were engaged in the manufacture and sale of furniture, softwood plywood and doors. Southern was engaged in the production and sale of paint

and a variety of chemical products. Additionally, it operated a pine sawmill at Russellville, South Carolina. In the year preceding their acquisition by G-P, Williams and Southern had combined sales of approximately \$26,290,000, and the stated value of their combined assets was approximately \$31,100,000. Included among such assets were approximately 170,000 acres of land in South Carolina containing in excess of 400 million board feet of pine and hardwood timber.

PAR. 53. In the course and conduct of their businesses prior to October 20, 1967, as aforesaid, both Williams and Southern sold their products to purchasers located in various States of the United States and caused such products, when sold, to be transported from their respective facilities located in various States of the United States to such purchasers located in various other States of the United States. In so doing both Williams and Southern were engaged in "commerce," as "commerce" is defined in the Clayton Act, as amended.

PAR. 54. By virtue of a merger occurring on or about October 20, 1967, whereby Williams Furniture Corporation and Southern Coatings and Chemical Company were merged with and into Georgia-Pacific Corporation, said Georgia-Pacific Corporation acquired all of the assets of said Williams Furniture Corporation and said Southern Coatings and Chemical Company. In connection with the aforesaid merger the consideration for the conversion of Williams stock and Southern stock was approximately 1,142,857 shares of G-P \$1.40 convertible preferred stock values at approximately \$40,000,000.

PAR. 55. Subsequent to the aforesaid merger, G-P constructed a softwood plywood plant at Russellville, South Carolina which was supplied, at least in substantial part, with timber acquired in the aforesaid merger with Williams and Southern.

#### Tommy Reynolds Lumber Company

PAR. 56. Prior to and until December 1967, Tommy Reynolds Lumber Company, sometimes hereinafter referred to as "T.R.," was a corporation organized, existing and doing business under the laws of the State of Arkansas with its office and principal place of business located at Hamburg, Arkansas.

PAR. 57. T.R. was engaged in the production and sale of lumber. In the year preceding its acquisition by G-P, T.R. produced approximately 42,162,000 board feet of lumber. In that year T.R.'s lumber sales amounted to approximately \$3,400,000, and the stated value of its assets was approximately \$2,300,000. Included among such assets was a 10-year cutting contract relating to Georgia-Pacific Corpora-

tion land, under the terms of which 100 million feet of timber remained to be cut by T.R.

PAR. 58. In the course and conduct of its business prior to December 1967, as aforesaid, T.R. sold its products to purchasers located in various States of the United States and caused such products, when sold, to be transported from its facilities in Arkansas to such purchasers located in various other States of the United States. In so doing T.R. was engaged in "commerce," as "commerce" is defined in the Clayton Act, as amended.

PAR. 59. In December 1967, Georgia-Pacific Corporation acquired all of the assets of Tommy Reynolds Lumber Company for 27,080 shares of G-P common stock valued at approximately \$1,547,000.

PAR. 60. Subsequent to the aforesaid acquisition, G-P abandoned the lumber operations at Hamburg, Arkansas. Prior to the acquisition, G-P had constructed two softwood plywood plants at Crossett, Arkansas. The T.R. acquisition facilitated the utilization of such plants, and afforded access to needed timber supplies for these softwood plywood facilities.

The Urania Lumber Company, Limited

PAR. 61. Prior to and until September 1968, the Urania Lumber Company, Limited, sometimes hereinafter referred to as "Urania," was a corporation organized, existing, and doing business under the laws of the State of Louisiana with its office and principal place of business located at Urania, Louisiana.

PAR. 62. Urania was engaged in the production and sale of lumber. In the year preceding its acquisition by G-P, Urania produced approximately 25,281,000 board feet of lumber. In that year, Urania's lumber sales amounted to approximately \$2,200,000, and the stated value of its assets was approximately \$42,422,200. Included among such assets were approximately 130,000 acres of pine timberlands.

PAR. 63. In the course and conduct of its business prior to September 1968, as aforesaid, Urania sold its products to purchasers located in various States of the United States and caused such products, when sold, to be transported from its facilities at Urania, Louisiana to such purchasers located in various other States of the United States. In so doing Urania was engaged in "commerce," as "commerce" is defined in the Clayton Act, as amended.

PAR. 64. In October 1967, Georgia-Pacific Corporation acquired all of the stock and assets of Edenborn, Inc., a Louisiana corporation, for approximately \$12,000,000. The principal asset of Edenborn, Inc.

was a 30 percent ownership in the outstanding capital stock of the Urania Lumber Company, Limited.

PAR. 65. In September 1968, Georgia-Pacific Corporation acquired the remaining outstanding stock and assets of the Urania Lumber Company, Limited for approximately \$34,122,200.

PAR. 66. Subsequent to the aforesaid acquisition of Urania, G-P abandoned the lumber operation at Urania, Louisiana and constructed a plant for the production of softwood plywood. Such plant had an original annual capacity to produce 140 million square feet of softwood plywood. Such plant will be supplied, at least in substantial part, with timber acquired in the aforesaid acquisition of Urania.

#### Sledge Lumber Corporation

PAR. 67. Prior to and until April 1969, Sledge Lumber Corporation, sometimes hereinafter referred to as "Sledge," was a corporation organized, existing and doing business under the laws of the State of North Carolina with its office and principal place of business located at Whiteville, North Carolina.

PAR. 68. Sledge was engaged in the production and sale of lumber. In the year preceding its acquisition by G-P, Sledge produced approximately 15,000,000 board feet of lumber. In that year Sledge's lumber sales amounted to approximately \$1,625,000, and the stated value of its assets was approximately \$7,070,000. Included among such assets were approximately 20,000 acres of forested timberlands.

PAR. 69. In the course and conduct of its business prior to April 1969, as aforesaid, Sledge sold its products to purchasers located in various States of the United States and caused such products, when sold, to be transported from its facilities in North Carolina to such purchasers located in various other States of the United States. In so doing Sledge was engaged in "commerce," as "commerce" is defined in the Clayton Act, as amended.

PAR. 70. In April 1969, Georgia-Pacific Corporation acquired all of the assets of Sledge Lumber Corporation for approximately \$6,985,000.

PAR. 71. Subsequent to the aforesaid acquisition, G-P commenced the construction of a plant for the production of softwood plywood in Whiteville, North Carolina. Such plant with an original annual capacity to produce 110 million square feet of softwood plywood is scheduled to begin production in 1971. Such plant will be supplied, at least in substantial part, with timber acquired in the aforesaid acquisition of Sledge.

## Reynolds &amp; Draper Lumber Company

PAR. 72. Prior to and until August 1969, Reynold & Draper Lumber Company, sometimes hereinafter referred to as "Reynolds & Draper," was a corporation organized, existing, and doing business under the laws of the State of Arkansas with its office and principal place of business located at El Dorado, Arkansas.

PAR. 73. Reynolds & Draper was engaged in the production and sale of lumber. In the year preceding its acquisition by G-P, Reynolds & Draper produced approximately 44,700,000 board feet of lumber. In that year Reynolds & Draper's lumber sales amounted to approximately \$4,286,000, and the stated value of its assets was approximately \$3,400,000. Included among such assets were approximately 10,000 acres of pine timberland.

PAR. 74. In the course and conduct of its business prior to August 1969, as aforesaid, Reynolds & Draper sold its products to purchasers located in various States of the United States and caused such products, when sold, to be transported from its facilities in Arkansas to such purchasers located in various other States of the United States. In so doing Reynolds & Draper was engaged in "commerce," as "commerce" is defined in the Clayton Act, as amended.

PAR. 75. In August 1969, Georgia-Pacific Corporation acquired all of the assets of Reynolds & Draper Lumber Company for 49,008 shares of Georgia-Pacific common stock valued at approximately \$2,450,000.

PAR. 76. Subsequent to the aforesaid acquisition, G-P commenced the construction of a plant for the production of softwood plywood at New Waverly, Texas. Such plant with an original annual capacity to produce approximately 140,000,000 square feet of softwood plywood is scheduled to begin production in early 1971. Such plant will be supplied, at least in substantial part, with timber acquired in the aforesaid acquisition of Reynolds & Draper.

## Reynolds-Wilson Lumber Company

PAR. 77. Prior to and until August 1969, Reynolds-Wilson Lumber Company, sometimes hereinafter referred to as "Reynolds-Wilson," was a corporation organized, existing and doing business under the laws of the State of Texas with its office and principal place of business located at Corrigan, Texas.

PAR. 78. Reynolds-Wilson was engaged in the production and sale of lumber. In the year preceding its acquisition by G-P, Reynolds-Wilson produced approximately 53,800,000 board feet of lumber. In that year Reynolds-Wilson's lumber sales amounted to approximately

\$5,113,000, and the stated value of its assets was approximately \$6,154,000. Included among such assets were approximately 9,000 acres of pine timberland.

PAR. 79. In the course and conduct of its business prior to August 1969, as aforesaid, Reynolds-Wilson sold its products to purchasers located in various States of the United States and caused such products, when sold, to be transported from its facilities in Texas to such purchasers located in various other States of the United States. In so doing Reynolds-Wilson was engaged in "commerce," as "commerce" is defined in the Clayton Act, as amended.

PAR. 80. In August 1969, Georgia-Pacific Corporation acquired all of the assets of Reynolds-Wilson Lumber Company for approximately 89,820 shares of Georgia-Pacific common stock valued at approximately \$4,491,000.

PAR. 81. Subsequent to the aforesaid acquisition G-P commenced the construction of a plant for the production of softwood plywood at New Waverly, Texas. Such plant with an original annual capacity to produce 140,000,000 square feet of softwood plywood is scheduled to begin production in early 1971. Such plant will be supplied, at least in substantial part, with timber acquired in the aforesaid acquisition of Reynolds-Wilson.

#### ADVERSE COMPETITIVE EFFECTS

PAR. 82. The cumulative effect of the aforesaid acquisitions by Georgia-Pacific Corporation of the stock and assets of Fordyce Lumber Company; American Timber Products Company; Jeffreys, Spaulding Manufacturing Company, Incorporated; Spaulding Lumber Company, Incorporated; Barrow Manufacturing Company; Barrow Land & Timber Company; Reynolds & Manley Lumber Company; Williams Furniture Corporation; Southern Coatings and Chemical Company; Tommy Reynolds Lumber Company; the Urania Lumber Company, Limited; Sledge Lumber Corporation; Reynolds & Draper Lumber Company and Reynolds-Wilson Lumber Company may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale of softwood plywood in the United States as a whole in the following ways, among others:

- (a) Potential competition between G-P and the aforesaid corporations acquired by it has been eliminated;
- (b) Potential competition among and between the aforesaid corporations acquired by G-P has been eliminated;
- (c) The dominant position of G-P has been enhanced and may be further enhanced;

(d) An industry trend toward concentration has been accelerated and may be further accelerated;

(e) The degree of concentration has been increased and may be further increased;

(f) The entry of new competitive entities has been and may continue to be made more difficult;

(g) The actual and potential competitive power of G-P has been enhanced to the point where it threatens the existence of a significant competitive segment of the industry structure;

(h) The availability of southern pine timber bases suitable to support long term production of softwood plywood has been substantially decreased.

#### THE NATURE OF THE VIOLATION

PAR. 83. The acquisition by Georgia-Pacific Corporation of the stock and assets of the aforesaid corporations together with the cumulative effect thereof as hereinbefore alleged in this Count I constitute a violation of Section 7 of the Clayton Act (U.S.C. Title 15, Section 18), as amended.

#### COUNT II

#### DEFINITIONS

PAR. 84. The allegations set forth in Paragraph 1 of Count I are hereby incorporated by reference and made a part of Count II as if fully rewritten herein.

#### THE RESPONDENT

PAR. 85. The allegations set forth in Paragraphs 2 through 12, inclusive, of Count I are hereby incorporated by reference and made a part of Count II as if fully rewritten herein.

#### THE NATURE OF TRADE AND COMMERCE

PAR. 86. The allegations set forth in Paragraphs 13 through 22, inclusive, of Count I are hereby incorporated by reference and made a part of Count II as if fully rewritten herein.

#### THE ACQUISITIONS

#### Fordyce Lumber Company

PAR. 87. The allegations set forth in Paragraphs 23, 24, 26, and 27 of Count I are hereby incorporated by reference and made a part of Count II as if fully rewritten herein.

PAR. 88. A substantial part, if not all, of the assets obtained by G-P in the Fordyce acquisition became a part of the interstate business of G-P and were used for the benefit and enhancement of interstate operations.

American Timber Products Company

PAR. 89. The allegations set forth in Paragraphs 28, 29, 31 and 32 of Count I are hereby incorporated by reference and made a part of Count II as if fully rewritten herein.

PAR. 90. A substantial part, if not all, of the assets obtained by G-P in the American Timber acquisition became a part of the interstate business of G-P and were used for the benefit and enhancement of its interstate operations.

Jeffreys, Spaulding Manufacturing Company, Incorporated and  
Spaulding Lumber Company, Incorporated

PAR. 91. The allegations set forth in Paragraphs 33, 34, 35, 37 and 38 of Count I are hereby incorporated by reference and made a part of Count II as if fully rewritten herein.

PAR. 92. A substantial part, if not all, of the assets obtained by G-P in the Jeffreys acquisition and in the Spaulding acquisition became a part of the interstate business of G-P and were used for the benefit and enhancement of its interstate operations.

Barrow Manufacturing Company and Barrow Land & Timber  
Company

PAR. 93. The allegations set forth in Paragraphs 39, 40, 41, 43 and 44 of Count I are hereby incorporated by reference and made a part of Count II as if fully rewritten herein.

PAR. 94. A substantial part, if not all, of the assets obtained by G-P in the Barrow acquisition and in the Barrow Land acquisition became a part of the interstate business of G-P and were used for the benefit and enhancement of its interstate operations.

Reynolds & Manley Lumber Company

PAR. 95. The allegations set forth in Paragraphs 45, 46, 48 and 49 of the Count I are hereby incorporated by reference and made a part of Count II as if fully rewritten herein.

PAR. 96. A substantial part, if not all, of the assets obtained by G-P in the Reynolds & Manley acquisition became a part of the interstate business of G-P and were used for the benefit and enhancement of its interstate operations.



Williams Furniture Corporation and Southern Coatings and Chemical  
Company

PAR. 97. The allegations set forth in Paragraphs 50, 51, 52, 54 and 55 of Count I are hereby incorporated by reference and made a part of Count II as if fully rewritten herein.

PAR. 98. A substantial part, if not all, of the assets obtained by G-P in the merger with Williams and Southern became a part of the interstate business of G-P and were used for the benefit and enhancement of its interstate operations.

Tommy Reynolds Lumber Company

PAR. 99. The allegations set forth in Paragraphs 56, 57, 59 and 60 of Count I are hereby incorporated by reference and made a part of Count II as if fully rewritten herein.

PAR. 100. A substantial part, if not all, of the assets obtained by G-P in the T.R. acquisition became a part of the interstate business of G-P and were used for the benefit and enhancement of its interstate operations.

Edenborn, Inc. and the Urania Lumber Company, Limited

PAR. 101. Prior to and until October 1967, Edenborn, Inc., sometimes hereinafter referred to as "Edenborn," was a Louisiana corporation.

PAR. 102. Edenborn owned approximately 30 percent of the capital stock of the Urania Lumber Company, Limited.

PAR. 103. In October 1967, Georgia-Pacific Corporation acquired all of the stock and assets of Edenborn.

PAR. 104. Prior to and until September 1968, the Urania Lumber Company, Limited, sometimes hereinafter referred to as "Urania," was a corporation organized, existing, and doing business under the laws of the State of Louisiana with its office and principal place of business located at Urania, Louisiana.

PAR. 105. Urania was engaged in the production and sale of lumber. In the year preceding its acquisition by G-P, Urania produced approximately 25,281,000 board feet of lumber. In that year, Urania's lumber sales amounted to approximately \$2,200,000, and the stated value of its assets was approximately \$42,422,200. Included among such assets were approximately 130,000 acres of pine timberlands.

PAR. 106. Already owning 30 percent of the stock of Urania by virtue of its acquisition of Edenborn, Georgia-Pacific Corporation, in September 1968, acquired the remaining outstanding stock and assets

of the Urania Lumber Company, Limited for approximately \$34,122,200.

PAR. 107. Subsequent to the aforesaid acquisition of Urania, G-P abandoned the lumber operation at Urania, Louisiana and constructed a plant for the production of softwood plywood. Such plant had an original annual capacity to produce 140 million square feet of softwood plywood. Such plant will be supplied, at least in substantial part, with timber acquired as a result of the aforesaid acquisitions of Edenborn and Urania.

PAR. 108. A substantial part, if not all, of the assets of Urania obtained by G-P by virtue of its acquisitions of Edenborn and Urania, as aforesaid, became a part of the interstate business of G-P and were used for the benefit and enhancement of its interstate operations.

#### Sledge Lumber Corporation

PAR. 109. The allegations set forth in Paragraphs 67, 68, 70 and 71 of Count I are hereby incorporated by reference and made a part of Count II as if fully rewritten herein.

PAR. 110. A substantial part, if not all, of the assets obtained by G-P in the Sledge acquisition became a part of the interstate business of G-P and were used for the benefit and enhancement of its interstate operations.

#### Reynolds & Draper Lumber Company

PAR. 111. The allegations set forth in Paragraphs 72, 73, 75, and 76 of Count I are hereby incorporated by reference and made a part of Count II as if fully rewritten herein.

PAR. 112. A substantial part, if not all, of the assets obtained by G-P in the Reynolds & Draper acquisition became a part of the interstate business of G-P and were used for the benefit and enhancement of its interstate operations.

#### Reynolds-Wilson Lumber Company

PAR. 113. The allegations set forth in Paragraphs 77, 78, 80 and 81 of Count I are hereby incorporated by reference and made a part of Count II as if fully rewritten herein.

PAR. 114. A substantial part, if not all, of the assets obtained by G-P in the Reynolds-Wilson acquisition became a part of the interstate business of G-P and were used for the benefit and enhancement of its interstate operations.

## D. L. Fair Lumber Company

PAR. 115. Prior to and until January 9, 1965, D. L. Fair Lumber Company, sometimes hereinafter referred to as "D. L. Fair," was a corporation organized, existing and doing business under the laws of the State of Mississippi with its office and principal place of business located at Louisville, Mississippi.

PAR. 116. D. L. Fair owned a portable sawmill, a flooring mill and a dimension mill which, prior to January 9, 1965, were under lease to other parties. D. L. Fair also owned approximately 92,000 acres of pine timberlands located in the vicinity of Louisville, Mississippi.

PAR. 117. On or about January 9, 1965, Georgia-Pacific Corporation acquired all of the stock and assets of D. L. Fair Lumber Company for approximately \$11,750,000.

PAR. 118. Subsequent to the aforesaid acquisition G-P constructed a softwood plywood mill at Louisville, Mississippi, which was supplied, at least in substantial part, with timber acquired in the aforesaid acquisition of D. L. Fair.

PAR. 119. A substantial part, if not all, of the assets obtained by G-P in the D. L. Fair acquisition became a part of the interstate business of G-P and were used for the benefit and enhancement of its interstate operations.

## ADVERSE COMPETITIVE EFFECTS

PAR. 120. The cumulative effect of the aforesaid acquisitions by Georgia-Pacific Corporation of the stock and assets of Fordyce Lumber Company; American Timber Products Company; Jeffreys, Spaulding Manufacturing Company, Incorporated; Spaulding Lumber Company, Incorporated; Barrow Manufacturing Company; Barrow Land & Timber Company; Reynolds & Manley Lumber Company; Williams Furniture Corporation; Southern Coatings and Chemical Company; Tommy Reynolds Lumber Company; Edenborn, Inc.; the Urania Lumber Company, Limited; Sledge Lumber Corporation; Reynolds & Draper Lumber Company; Reynolds-Wilson Lumber Company; and D. L. Fair Lumber Company may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale of softwood plywood in the United States as a whole in the following ways, among others:

(a) Potential competition between G-P and the aforesaid corporations acquired by it has been eliminated;

(b) Potential competition among and between the aforesaid corporations acquired by G-P has been eliminated;

(c) The dominant position of G-P has been enhanced and may be further enhanced;

(d) An industry trend toward concentration has been accelerated and may be further accelerated;

(e) The degree of concentration has been increased and may be further increased;

(f) The entry of new competitive entities has been and may continue to be made more difficult;

(g) The actual and potential competitive power of G-P has been enhanced to the point where it threatens the existence of a significant competitive segment of the industry structure;

(h) The availability of southern pine timber bases suitable to support long term production of softwood plywood has been substantially decreased.

#### THE NATURE OF THE VIOLATION

PAR. 121. The acquisition by Georgia-Pacific Corporation of the stock and assets of the aforesaid corporations together with the subsequent use of such assets and the cumulative effect thereof as hereinbefore alleged in this Count II were and are all to the prejudice and injury of the public and constitute unfair methods of competition in commerce and unfair acts in commerce in violation of Section 5 of the Federal Trade Commission Act (U.S.C. Title 15, Section 45), as amended.

#### DECISION AND ORDER

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

The Commission, by order issued November 21, 1972 [p. 1041 herein], having withdrawn this matter from adjudication pursuant to Section 2.34(d) of its rules; and

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

The Commission having thereafter given careful consideration to the executed consent agreement and being of the opinion that the relief provided by the order contained therein will restructure the softwood

plywood industry by creating a new and viable national entity thereby enhancing competition on a nationwide basis, and having therefore determined that the relief is adequate and appropriate in all respects to dispose of this matter, and having also duly considered the data, views, arguments and comments submitted by interested members of the public and having held a public hearing before the Commission on December 18, 1972, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Georgia-Pacific Corporation is a corporation organized, existing and doing business under the laws of the State of Georgia, with its office and principal place of business located at 900 S.W. Fifth Avenue, Portland, Oregon.
2. The Federal Trade Commission has jurisdiction of this proceeding and of the respondent, and the proceeding is in the public interest.

#### ORDER

For the purposes of this order, the following definitions shall apply:

1. *Respondent*—Georgia-Pacific Corporation, its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns and any person, partnership, corporation, or other legal entity acting for or on its behalf or with its express or implied consent; *Provided, however*, That the term respondent shall not be construed to include Louisiana-Pacific.
2. *The South*—The States of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Oklahoma, Arkansas, Louisiana, Texas, and Tennessee.
3. *Market price*—the price established within the same area, for similar quantities, grades and types of the commodity being sold.
4. *Single ownership*—one or more parcels of timberland in which any interest in the fee is commonly or jointly held by any one or more persons, trust, partnerships, corporations or other legal entities.
5. *Person*—any individual, partnership, firm, association, corporation, governmental agency or other legal or business entity.

#### PARAGRAPH 1

*It is ordered*, That Respondent shall:

- (A) Prior to thirty (30) days from the date of service of this order (hereinafter referred to as the "effective date") have existing or cause to be formed an independent corporation (herein-

after called "Louisiana-Pacific") with at least sufficient shares of authorized common stock in order to comply with the provisions of this order and with by-laws containing a provision which shall insure compliance with subparagraph (G) hereof;

(B) Within sixty (60) days of the effective date mail to its stockholders a notice of a special meeting of stockholders, together with a proxy statement containing the recommendation of management that the stockholders authorize the transfer of assets called for by this order;

(C) Prior to thirty (30) days after the effective date transfer to Louisiana-Pacific assets of respondent, including 45 plants and mills, having a net worth of not less than \$150,000,000 and more fully described in Appendices 1 and 2 of this order,\* in exchange for all of the capital stock of Louisiana-Pacific and the assumption by Louisiana-Pacific of the liabilities transferred in connection with the assets referred to;

(D) Prior to February 1, 1973, after retaining shares of Louisiana-Pacific stock for possible distribution under respondent's Contingent Valuation Contracts, distribute the remainder of said stock of Louisiana-Pacific to the stockholders of record on January 2, 1973, in the ratio of one share of Louisiana-Pacific stock for each four shares of respondent's stock held on January 2, 1973, and shall make appropriate provisions for the handling of fractional shares;

(E) Within ninety (90) days of distribution of the Louisiana-Pacific stock, the amount credited to all salaried personnel in respondent's Stock Bonus Plan shall be transferred to a similar plan for the salaried employees who were former employees of respondent and who shall become employees of Louisiana-Pacific, and a like procedure shall be followed regarding the pensions of hourly employees so involved;

(F) Make available executive personnel of respondent, including officers who have present responsibility concerning the properties to be transferred by the respondent to Louisiana-Pacific. These officers shall resign from their respective positions with the respondent upon assuming their office with Louisiana-Pacific and all of the present personnel of the respondent presently employed by the respondent in the respective operations transferred to Louisiana-Pacific shall be transferred to Louisiana-

\**Infra*, pages 1011-16.

Pacific. In addition, all of the present respondent personnel involved in timber management, timber and log purchases and logging for these operations shall likewise be transferred to Louisiana-Pacific. The present sales organization of respondent now selling all of its lumber production, kitchen cabinets, and aluminum and wood door and window production for the properties transferred to Louisiana-Pacific shall likewise be transferred to Louisiana-Pacific; and

(G) Respondent shall provide that:

1. prior to the distribution of the Louisiana-Pacific stock to the stockholders of respondent, respondent shall vote the stock of Louisiana-Pacific for the election of an interim board of directors to serve until the election of an initial board of directors by the stockholders of Louisiana-Pacific;

2. Louisiana-Pacific shall within sixty (60) days of the distribution of the Louisiana-Pacific stock call a stockholders' meeting for the purpose of electing an initial board of directors;

3. except as provided for in subparagraph 1 hereof and except with respect to organizational matters prior to the distribution of the Louisiana-Pacific stock to the stockholders of respondent, Georgia-Pacific Corporation shall not vote any stock of Louisiana-Pacific which it shall hold or which shall be held under its direction or control;

4. no nominee for the initial board of directors of Louisiana-Pacific shall at the time of his election be an officer or director of respondent; and

5. subsequent to the election of the initial board of directors of Louisiana-Pacific no officer or director of respondent shall concurrently serve as an officer or director of Louisiana-Pacific nor shall any officer or director of Louisiana-Pacific serve concurrently as an officer or director of respondent.

#### PARAGRAPH 2

*It is further ordered,* That Respondent may, as requested by Louisiana-Pacific, for a period of ten (10) years from the effective date, purchase the softwood plywood production of Louisiana-Pacific at the current market price for such product and on the same terms and conditions as other purchases of softwood plywood made by respond-

ent, but only up to the percentage of Louisiana-Pacific's production as set forth immediately hereafter :

	<i>Percent</i>
1st year-----	100
2nd year-----	80
3rd year-----	60
4th year-----	40
5th to the 10th year-----	20

*Provided, however,* That the purchases by respondent from Louisiana-Pacific of redwood plywood siding shall not be considered to be included in the limitations or in the percentages set forth above.

PARAGRAPH 3

*It is further ordered,* That for a period of five (5) years from the effective date, respondent shall cease and desist from acquiring directly or indirectly any fee ownership or leasehold interest in pine or mixed pine and hardwood timberland in the South which is held in single ownership exceeding 25,000 acres, *Provided, however,*

(A) that this limitation shall not apply to land acquired for and utilized for a purpose other than in plywood production ;

(B) that, for the purpose of determining whether 25,000 acres have been acquired, acres acquired from a single owner in separate transactions will only be accumulated if they occur within 12 months of each other ;

(C) that this limitation shall not apply to any tract regardless of its size on which respondent at the time of said acquisition and at the effective date shall have cutting rights thereon existing on the effective date and a bona fide offer has been made for such land by a person not affiliated with respondent ; and

(D) that if respondent does acquire said timberland pursuant to Paragraph 3(C), respondent is :

(a) Prohibited from using from said lands so acquired any greater volume of plywood logs for use in any softwood plywood plant of respondent than the average annual amount taken from said lands by respondent in the three (3) years prior to said acquisition ;

(b) Prohibited from terminating (except for substantial breach) any cutting contract, timber deed or any other right held by any other person other than the person from whom such timberland was acquired, in respect of timber on such acquired lands.

(c) Required to offer for sale annually, on the open market and at market prices, the same volume of softwood timber



from the acquired lands as that board footage constituting the average annual open market sales of softwood timber cut from the acquired lands during the three (3) calendar years ending immediately prior to such acquisition by third parties having no interest in the fee of such lands;

(d) Required, within sixty (60) days of any acquisition of such interest, to file a report in writing with the Federal Trade Commission setting forth in detail a description of the interest so acquired and the information necessary to insure compliance with the provisions of this order.

## PARAGRAPH 4

*It is further ordered,* That for a period of five (5) years if respondent acquires, for utilization in any plywood plant, directly or indirectly any fee ownership or leasehold interest in pine or mixed pine and hardwood timberland in the South, which is held in single ownership ranging in size from 10,000 acres to 25,000 acres, respondent is:

(A) Prohibited from using from said lands so acquired any greater volume of plywood logs for use in any softwood plywood plant of the respondent than the average annual amount taken from said lands by respondent in the three (3) years prior to said acquisition;

(B) Prohibited from terminating (except for substantial breach) any cutting contract, timber deed or any other right held by any other person other than the person from whom such timberland was acquired, in respect of timber on such acquired lands;

(C) Required to offer for sale annually, on the open market and at market prices, the same volume of softwood timber from the acquired lands as that board footage constituting the average annual open market sales of softwood timber cut from the acquired lands during the three (3) calendar years ending immediately prior to such acquisition by third parties having no interest in the fee of such lands;

(D) Required, within sixty (60) days of any acquisition of such interest, to file a report in writing with the Federal Trade Commission setting forth in detail a description of the interest so acquired and the information necessary to insure compliance with the provisions of this order; and

(E) Prohibited from acquiring in any one year more than 100,000 such acres.

Decision and Order

PARAGRAPH 5

*It is further ordered,* That for a period of five (5) years from the effective date, respondent is prohibited from utilizing in its individual softwood plywood plants now in operation any higher percentage of pine timber purchased in the open market (which as used herein shall mean all acquisitions of southern pine plywood timber other than from lands held by respondent in fee), than the percentage of such timber utilized by the said individual plants of respondent from open market purchases made in 1972, except that the following plants of respondent may purchase on the open market such logs up to the percentage set opposite the plant listed below:

	<i>Percent</i>
Crossett, Arkansas Number 1 .....	20
Crossett, Arkansas Number 2 .....	20
Fordyce, Arkansas .....	20
Chiefland, Florida .....	95
Emporia, Virginia .....	95
Russellville, S. C. ....	75
Whiteville, N.C. ....	85

*Provided, however,* That if any event beyond the control of respondent shall occur which prevents respondent from cutting timber on lands held by respondent in fee, respondent shall be relieved of the limitation on open market purchases, but only to the extent that such event shall have prevented the acquisition of timber from lands held in fee by respondent; *and provided further,* That within ninety (90) days following the end of each of the five annual periods during which this prohibition is in effect, respondent shall file with the Federal Trade Commission a report showing compliance with the provision of this order.

PARAGRAPH 6

*It is further ordered,* That for ten (10) years from the effective date, respondent shall cease and desist from acquiring, directly or indirectly through subsidiaries, or otherwise, for its use in the manufacture of softwood plywood, from any person, firm or corporation other than the manufacturer thereof or a regular dealer or distributor of such equipment in the ordinary course of such dealer's or distributor's business:

- (A) Any equipment specifically designed for the manufacture of softwood plywood;
- (B) Any equipment specifically designed and theretofore used in the manufacture of softwood plywood; and

(C) Any equipment thereafter converted by respondent, directly or indirectly, into equipment specifically designed for the manufacture of softwood plywood; in the absence of prior Federal Trade Commission approval of such acquisition.

## PARAGRAPH 7

*It is further ordered,* That for a period of ten (10) years from the effective date, respondent shall cease and desist from acquiring, directly or indirectly, through subsidiaries, or otherwise, the whole or any part of the share capital or assets of, or any other interest in, any other person, firm or corporation engaged in the manufacture of softwood plywood in the United States immediately prior to such acquisition, in the absence of prior Federal Trade Commission approval of such acquisition; *Provided, however,* That nothing contained in this paragraph shall preclude or be deemed to preclude respondent from acquiring timberlands or any interest therein or timber in any form (including but not limited to stumpage, logs, veneers, chips, sawdust, and cores); and, *Further provided,* That nothing contained in this paragraph shall apply to purchases of lumber, plywood, machinery, or any other product, by respondent in the regular conduct of its business from suppliers in the regular conduct of their businesses, or to sales made by respondent in the regular conduct of its business.

## PARAGRAPH 8

*It is further ordered,* That respondent while it has voting control of Louisiana-Pacific shall not cause or permit except in the ordinary course of the operation of its business any deterioration in the value of any of the plants, machinery, parts, equipment, timberland, or any other property or assets of the corporations to be transferred which may impair their present capacity or market value unless such capacity or value be restored prior to transfer.

## PARAGRAPH 9

*It is further ordered,* That respondent shall within sixty (60) days after date of service of this order, and every ninety (90) days thereafter during the first calendar year following the effective date and thereafter sixty (60) days following each succeeding nine annual periods submit in writing to the Federal Trade Commission a verified report setting forth in detail the manner and form in which respondent intends to comply or has complied with this order. All compliance reports shall include such information necessary or pertinent to insure compliance with the provisions of this order.

## PARAGRAPH 10

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

## FOREWORD TO APPENDICES 1 AND 2

The contracts relating to the purchase of raw material for use in connection with the operation of the various properties described in Appendices 1 and 2, together with all property leases and leases on automotive and other equipment will be assigned to Louisiana-Pacific Corporation by Georgia-Pacific Corporation.

## APPENDIX 1

## SAMOA DIVISION

This division, headquartered at Samoa, California, with timberlands and plants located in the Northern California coastal area, manufactures kraft pulp, lumber and plywood products.

Division assets include the following:

*Timber.* Three major tracts of fee timber, involving 125,000 acres of timberland. Timber is 71 percent redwood, 25 percent Douglas fir, and 4 percent other species. Annual harvest is approximately 300,000M ft. Logging is performed by company and contract personnel.

*Sawmills.* Three redwood sawmills, located at Samoa, Big Lagoon and Carlotta with a combined capacity of 214,000M ft. operate on a two-shift basis with a crew of 680 men. Rough lumber is transferred to three remanufacturing plants located at Eureka, Cloverdale and Healdsburg. The remanufacturing plants process approximately 50,000M ft. per year and employ 210 persons. A studmill, cutting 60,000M ft. per year and glueboard plant is also located at Samoa.

*Plywood.* This plant, located at Samoa, employs 290 men and produces approximately 127,000M ft. ( $\frac{3}{8}$ "') of fir and redwood plywood per year.

*Pulp.* 600 ton per day pulp mill constructed in 1964-65 employs 275 people and operates on 65 percent fir and 35 percent redwood chips. Redwood and fir chips come from G-P operations and from local mills in the area. This mill produces bleached kraft pulp which is shipped approximately 55 percent to export markets and 45 percent domestically. G-P converting plants are a user of this pulp.

*Chip Export.* A new chip export facility has just been completed wherein G-P will supply redwood chips for export and handle and load fir chips for other exporters.

All plants are in good repair with many continued capital improvements being made. Total Samoa division employment is 1,800.

#### UKIAH DIVISION

The Ukiah operations, headquartered at Ukiah, California, is made up of 8 sawmills and one millwork plant. Principal products are Douglas fir, redwood and white fir lumber, pulp chips and moulding. A total of 865 people are employed.

Division's assets include the following:

*Timber.* Fee timber involves 157,500 acres of timberland. The timber species is principally Douglas fir, along with some redwood, white fir and pine. In addition to fee timber, the mills cut a substantial volume of Forest Service timber purchased on the open market. Logging is performed principally by contract operators.

*Sawmills.* 8 sawmills, located at Alderpoint, Covelo, Dinsmore, Fort Bragg, Orrville, Potter Valley, Ukiah and Willits, California, have an annual rated capacity of 413,000M ft. A remanufacturing or millwork plant, located at Calpella, California, produces door jambs and mouldings. All plants are in good repair and equipped with modern milling equipment.

#### INTERMOUNTAIN DIVISION

This operation, headquartered at Coeur D'Alene, Idaho, consists of seven sawmills and one planing mill located in southeastern Washington, eastern Oregon, and northern Idaho, and manufactures pine, fir, hemlock and other white wood species of lumber and pulp chips. A total of 765 people are employed in the division.

Division assets include the following:

*Timber.* Fee timber consists of 107,000 acres of timberland. The timber species are principally pine, fir, hemlock and other white woods. The mills are currently cutting a substantial volume of Forest Service timber purchased on the open market. Logging is performed principally by contract loggers.

*Sawmills.* 7 sawmills located at Pilot Rock, Oregon, Walla Walla, and Ione, Washington, and Post Falls, Moyie Springs, Chilco, and Priest River, Idaho, have an annual rated capacity of 225,000M ft. A remanufacturing or planing mill located at Sandpoint, Idaho, processes rough lumber produced at the Priest River and Chilco sawmills. All plants are in good repair and equipped with modern milling equipment.

## WEATHER-SEAL DIVISION

The Weather-Seal Division is comprised of six plants manufacturing complete lines of wood windows, doors and cabinets, and aluminum windows and doors. About 50 percent of 1972 sales will be made through the Distribution Division, with the balance sold by outside salesmen or through Nu-Sash dealers.

The *Orrville, Ohio*, plant produces wood windows, most of which are sold by outside salesmen. This is a union plant employing 109 people. Annual rated capacity (one 8-hour shift, five days a week) is 200,000 windows. G-P owns the 157,000 square foot plant, which is 13 years old and in good condition.

The *Ottawa, Ohio*, plant produces wood casement windows, solid core doors and kitchen cabinets. Windows and doors are sold through the Distribution Division and by outside salesmen. Cabinets are produced in six major styles and three colors with many size variations and are sold through the Distribution Division. This is a union plant employing 153 people. Annual rated capacity is 75,000 windows, 200,000 doors and 125,000 cabinets. G-P owns the 351,000 square foot plant, which is nine years old and in good condition.

The *Caldwell, Ohio*, plant manufactures aluminum windows used by schools and offices as replacement windows. All sales are made outside G-P, with Nu-Sash dealers handling about 50 percent of the volume. This small, non-union plant employs 30 people. Annual rated capacity is 126,000 windows. G-P has a lease option on the 24,000 square foot plant, which is four years old and in very good condition.

The *Winesburg, Ohio*, plant produces aluminum storm doors and windows for residential construction. All sales are made through the Distribution Division. This is a non-union plant employing 152 people. Annual rated capacity is 450,000 windows and 200,000 doors. G-P has a lease option on the 41,000 square foot plant, which is 15 years old and in good condition.

The processing operation at *Norton, Ohio*, produces Nu-Sash aluminum windows and doors for residential replacement. The windows are sold mainly through Nu-Sash dealers and the doors mainly through Distribution Division and outside salesmen. This union plant employs 134 people. Annual rated capacity is 210,000 windows and 282,000 doors.

The extrusion operation at *Norton, Ohio*, produces aluminum sashes from purchased aluminum billets. All production is used in the processing operation at Norton or is transferred to the Caldwell and Winesburg plants. This union plant employs 38 people. Annual rated capacity is 9 million pounds of extrusions.

The extrusion and processing operations at *Norton* are both located in one 138,000 square foot plant which is owned by G-P. It is 12 years old and in fair condition.

An agreement may be reached with the Anaconda Company to acquire the metal operations of the Weather-Seal Division which encompass the plants at Norton, Caldwell and Winesburg, Ohio. This is subject to board approval of the Anaconda Company.

#### TEXAS-LOUISIANA OPERATIONS

These operations consist of three plywood plants, one particleboard plant with another one under construction, five sawmills with another one under construction, and one wood treating plant. Products produced are softwood plywood, particleboard, creosoted poles and lumber. A total of approximately 1,500 people are employed.

*Timber and Timberland.* Fee timber involves 118,000 acres of timberland.

*Plants.* The three plywood plants located at Urania, Louisiana; New Waverly, Texas; Corrigan, Texas, with an annual rated capacity of 499 million square feet,  $\frac{3}{8}$ " basis.

The particleboard plant is at Urania, Louisiana, with an annual rated capacity of 72 million square feet  $\frac{3}{4}$ " basis; and one is under construction at Corrigan, Texas.

Five sawmills, located at DeQuincy, Louisiana; Jasper, Texas; Kountze, Texas; and two at New Waverly, Texas, have a total annual rated capacity of 144,800,000 board feet; an additional sawmill is under construction at Carthage, Texas.

One 1600M cu. ft. treating plant for creosote and Womax treating of poles and lumber is at Urania, Louisiana. Raw material comes mostly from Urania lands. Sales are primarily to public utilities for transmission poles.

*Miscellaneous.* The Forestry Department, which also operates the treating plant, is responsible for managing the timber and procurement of all raw materials for the plants.

#### KETCHIKAN (50 PERCENT OWNED)

The Ketchikan operations, located at Ketchikan and Annette, Alaska, are comprised of a pulp mill and two sawmills. Georgia-Pacific and FMC each share 50 percent ownership in these operations.

*Pulp Mill.* This modern 640-ton per day pulp mill, constructed in 1954, produces approximately 225,000 tons per year of dissolving pulp for shipment to domestic and export markets. This pulp is used principally in the manufacture of rayon fibers and cellophane film. Sub-

stantial capital expenditures have been made over the recent years to keep the mill up to date and modern. Approximately 500 persons are employed.

*Sawmills.* Two sawmills located at Ketchikan and Metlakatla, Alaska, with an annual capacity of 160,000M bd. ft. produce spruce and hemlock lumber, principally for export markets. The mills have been recently remodeled and modernized. Total employment in the two sawmills is approximately 190 people.

*Timber.* Approximately 200,000M bd. ft. per year of hemlock and spruce logs for the pulpmill and sawmill operations are taken from the Tongass National Forest under a Forest Service allotment program through purchases at periodic sales conducted by the Forest Service. Approximately 5,000,000M bd. ft. remain to be logged in the allotment. A small volume of logs is available from fee lands and private owners. Logging is performed by company and contract personnel. The timber division employs 75 people.

APPENDIX 2

LOUISIANA-PACIFIC CORPORATION PLANTS AND MILLS JUNE 30, 1972

[Figures in thousands]

	Rated capacity	1971 production
<b>Fir plywood plants (3/4" rough—3 shifts):</b>		
Samoa, Calif. (sq. ft.)	127,000	137,280
<b>Southern pine plywood (3/4" rough—3 shifts):</b>		
Corrigan, Tex.	162,000	
New Waverly, Tex.	162,000	54,950
Urania, La.	175,000	184,600
Total (sq. ft.)	499,000	239,550
<b>West Coast sawmills redwood specialty:</b>		
Big Lagoon, Calif.	46,000	40,695
Carlotta, Calif.	63,000	57,800
Cloverdale, Calif.	(1)	(1)
Eureka, Calif.	(1)	(1)
Healdsburg, Calif.	(1)	(1)
Samoa, Calif.	105,000	97,040
Total (bd. ft.)	214,000	195,535
<b>Fir and western pine:</b>		
Alder Point, Calif.	42,000	40,350
Calpella, Calif.	(1)	(1)
Chilco, Idaho	31,000	29,165
Covelo, Calif.	49,000	47,235
Dinsmore, Calif.	42,000	34,100
Ione, Wash.	32,000	28,365
Moyie Springs, Idaho	42,000	33,885
Orrville, Calif.	96,000	79,045
Pilot Rock, Oreg.	58,000	54,805
Post Falls, Idaho	31,000	36,640
Potter Valley, Calif.	33,000	23,950
Priest River, Idaho	34,000	31,530
Sandpoint, Idaho	(1)	(1)
Ukiah, Calif.	54,000	51,790
Walla Walla, Wash.	20,000	21,245
Total (bd. ft.)	564,000	515,105



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## LOUISIANA-PACIFIC CORPORATION PLANTS AND MILLS JUNE 30, 1972—Continued

	Rated capacity	1971 production
Spruce and hemlock:		
Ketchikan, Alaska (50 percent ownership) .....	100,000	76,010
Metlakatla, Alaska (50 percent ownership) .....	60,000	10,705
Total (bd. ft.) .....	160,000	86,715
Stud mills:		
Fort Bragg, Calif. ....	56,000	51,830
Samoa, Calif. ....	60,000	44,520
Willits, Calif. ....	64,000	55,925
Total (bd. ft.) .....	180,000	152,275
Southern pine sawmills:		
DeQuincy, La. (Chip-N-Saw) .....	36,000	
Jasper, Tex. ....	42,000	39,675
Kountze, Tex. ....	20,000	18,745
New Waverly, Tex. (Chip-N-Saw) .....	31,200	18,855
Total (bd. ft.) .....	129,200	77,275
Southern Pine stud mills:		
New Waverly, Tex. (bd. ft.) .....	15,600	
Particleboard plants:		
Urania, La. (sq. ft.) .....	72,000	91,680
Wood treating plants:		
Urania, La. (cu. ft.) .....	1,600	1,285
Pulp plants:		
Ketchikan, Alaska—dissolving pulp (50 percent ownership) .....	225	210.91
Samoa, Calif.—kraft pulp .....	210	171.99
Total (tons) .....	435	382.90
Kitchen cabinets, aluminum and wood door and window plants:		
Caldwell, Ohio .....		
Norton, Ohio (2 plants) .....		
Ottawa, Ohio .....		
Orrville, Ohio .....		
Winesburg, Ohio .....		

<sup>1</sup> Remanufacturing.<sup>2</sup> 1 shift.

## LOUISIANA-PACIFIC CORPORATION 1972-1973 PLANT ADDITIONS JUNE 30, 1972

	Millions	Approximate completion
Particleboard plants:		
Corrigan, Tex. (Sq. ft. ¾") .....	90	March 1973.
Pine sawmills:		
Carthage, Tex. (Chip-N-Saw) (Bd. ft.) .....	33	Second quarter 1973.
West coast stud mills:		
Moyie Springs, Idaho (Bd. ft.) .....	60	November 1972.

## Complaint

IN THE MATTER OF

MICA, INC., ET AL.

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

*Docket C-2334. Complaint, Dec. 29, 1972—Decision, Dec. 29, 1972.*

Consent order requiring a Chatsworth, Georgia, manufacturer and seller of carpets and rugs, among other things to cease manufacturing for sale, selling, importing, or distributing any product, fabric, or related material which fails to conform to an applicable standard of flammability or regulation issued under the provisions of the Flammable Fabrics Act, amended.

## COMPLAINT

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

PARAGRAPH 1. Respondent Mica, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia. Respondent Willis Holt is an officer of the said corporate respondent. He formulates, directs, and controls the acts, practices, and policies of the said corporation.

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

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

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Among such products mentioned hereinabove were carpets and rugs Style "Gypsy" or "Rebel" subject to Department of Commerce Standard for the Surface Flammability of Carpets and Rugs (DOC FF 1-70).

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

## DECISION AND ORDER

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

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

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

1. Respondent Mica, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia.

Respondent Willis Holt is an officer of the said corporation. He formulates, directs, and controls the acts, practices and policies of the said corporation.

Respondents are engaged in the manufacture and sale of carpets and rugs, with the office and principal place of business of respondents located at Chatsworth, Georgia.

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

ORDER

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

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

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

*It is further ordered,* That respondents herein shall, within ten (10) days after service upon them of this order, file with the Commission a special report in writing setting forth the respondents' intentions as to compliance with this order. This special report shall also advise the Commission fully and specifically concerning (1) the identity of the products which gave rise to the complaint, (2) the identity of the purchasers of said products, (3) the amount of said products on hand and in the channels of commerce, (4) any action taken and any further actions proposed to be taken to notify customers of the flammability of said products and effect the recall of said

products from customers, and of the results thereof, (5) any disposition of said products since April 4, 1972, and (6) any action taken or proposed to be taken to bring said products into conformance with the applicable standard of flammability under the Flammable Fabrics Act, as amended, or to destroy said products, and the results of such actions. Respondents will submit with their report, a complete description of each style of carpet or rug currently in inventory or production. Upon request, respondents will forward to the Commission for testing a sample of any such carpet or rug.

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

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

*It is further ordered,* That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business or employment in which he is engaged as well as a description of his duties and responsibilities.

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

INTERLOCUTORY, VACATING, AND  
MISCELLANEOUS ORDERS

ITT CONTINENTAL BAKING COMPANY

*Docket 7880. Order, Aug. 1, 1972.*

Order denying respondent's motion to set aside Show Cause Order and assigning case to hearing examiner to consider whether Commission's order of May 11, 1962 [60 F.T.C. 1183], should be modified and set aside.

ORDER DIRECTING HEARING FOR RECEIPT OF EVIDENCE

The Commission on April 27, 1972, issued a show cause order to the above-named corporation, as successor of Continental Baking Company, the original respondent to a final order issued in this matter on May 11, 1962 [60 F.T.C. 1183], in a proceeding brought under Section 7 of the Clayton Act. The show cause order directed the corporation to show cause why the proceeding should not be reopened for the purpose of modifying Section 3 of the order, which had prohibited respondent for a period of ten years from acquiring any concern engaged in the production and sale of bread and bread-type rolls without Commission approval, by extending the prohibition for an additional five years.

In the show cause order it was asserted, among other things, that industry-wide concentration in the production and sale of bread and bread-type rolls has increased since the issuance of the cease and desist order and that ITT Continental Baking Company (hereafter referred to as respondent) contributed to the increased concentration by reason of various asset acquisitions despite the Commission's order and citing the fact that a United States District Court found respondent's predecessor to have violated the order on two occasions.

Respondent has filed an "Answer and Motion to Set Aside Show Cause Order" and counsel supporting the Show Cause Order have filed a response to said Answer.

In its Answer, respondent argues that since the order of May 11, 1962, was a consent order, the Commission lacks authority to alter it without the consent of the other party. It also argues that since Section 3 of the order expired by its own terms on May 11, 1972, it cannot be reopened and extended.

We cannot agree. Section 11(b) of the Clayton Act authorizes the Commission to reopen and alter, modify or set aside in whole or in part an order issued under that Act whenever in the opinion of the Commission "conditions of fact or law have so changed as to require

such action or if the public interest shall so require." The parties' Agreement Containing the Consent Order in this matter states that the order entered "may be altered, modified or set aside in the manner provided for other orders." We do not believe that it can be seriously contested that the Commission has authority to reopen and extend a consent order where a proper showing of need thereof is made, just as a court may so extend the terms of an antitrust consent decree where good cause is shown by the Government. See *Chrysler Corp. v. United States*, 316 U.S. 556 (1942).

On the other hand, we cannot agree with Commission counsel's argument that "a violation of the final order prohibiting acquisitions is, in and of itself, \* \* \* a sufficient basis for modification of the order." The proposed modification of the order in this matter, if adopted, is not to serve as a penalty but as a remedial measure to ensure that the purpose of the original order has been effectuated. In this connection, respondent has controverted a number of statements of fact asserted in the Show Cause Order in support of the need for, and public interest in, reopening and extending Section 3 of the order. The Commission is of the opinion that the public interest will be served by referring this matter to a hearing examiner, as provided in Section 3.72(b)(3) of its Rules of Practice, for evidentiary hearings on this issue. Accordingly,

*It is ordered*, That respondent's motion to set aside the Show Cause Order at this time, or in the alternative for a further hearing on matters of law set forth in its Answer, be and it hereby is, denied.

*It is further ordered*, That this matter be assigned to a hearing examiner, pursuant to Section 3.72(b)(3) of the Commission's Rules of Practice, for the purpose of receiving evidence in support of and in opposition to the question of whether the public interest requires that this proceeding be reopened and the Commission's order of May 11, 1962, be altered, modified, or set aside in accordance with the Commission's Order to Show Cause herein dated April 27, 1972.

Commissioner MacIntyre concurring in the result.

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**FOOD FAIR STORES, INC., ET AL.** Docket 8786  
**H. C. BOHACK CO., INC., ET AL.** Docket 8787  
**JEWEL COMPANIES, INC., ET AL.** Docket 8788  
**BORMAN FOOD STORES, INC., ET AL.** Docket 8789  
**FIRST NATIONAL STORES, INC., ET AL.** Docket 8790

Order, August 1, 1972.

Order vacating initial decisions in these cases and remanding matters to the hearing examiners for further proceedings.

**ORDER VACATING INITIAL DECISIONS**

All respondents, except P & R Brokerage Co. and Frank V. Con-dello, have filed with the Commission "motions" seeking to vacate and set aside the initial decisions issued by the hearing examiners in these matters.

The Commission's Rules of Practice do not provide for a motion to vacate an initial decision. Therefore, respondents' requests, in the form presented, have no procedural standing and are improper. The Commission, however, has decided to treat respondents' "motions" as appeals from the initial decisions, and its ruling will be on that basis. For this reason, it is unnecessary to rule on the pending requests by respondents in *Food Fair Stores, Inc. et al.* and *H. C. Bohack Co., Inc., et al.* for extensions of time to file appeal briefs.

The Commission is of the opinion that in the matters of *Jewel Companies, Inc., et al.*, *Borman Food Stores, Inc., et al.*, and *First National Food Stores, Inc., et al.* the hearing examiner's ruling that respondents are in default is proper, and the hearing examiner is commended for his action. The Commission believes that a very close question exists as to whether respondents were in default in the matters of *Food Fair Stores, Inc., et al.* and *H. C. Bohack Co., Inc., et al.*

However, these matters are not purely private controversies and there are involved serious considerations of public interest. Therefore, a full exploration of the factual background and questioned practices is desirable properly to protect the public interest. More importantly, although we discount the argument made by the three respondents based upon the alleged ambiguity in our rules, it is true that our rules are not categorically specific in the respect



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relevant here. Indeed, we wish to make clear at this time that the provision of Section 3.12(a) of the Commission rules which permits respondents ten days after service of an order denying a motion for a more definite statement in which to file their answers does not apply to motions for a more definite statement which are denied as untimely filed and the rule will henceforth so be interpreted. To hold otherwise would enable respondents to file answers any time they wish merely by preceding the answer with an untimely motion for a more definite statement. In these circumstances, being mindful that the complaints in these matters issued three years ago in 1969 and of the delays that have ensued thereafter, the Commission concludes that the public interest will be best served by avoiding the time-consuming appeals that would almost inevitably follow the imposition of default orders; we remand these matters, therefore, to the hearing examiners for further expeditious proceedings.

*It is ordered*, That the initial decisions in Docket No. 8786, Docket No. 8787, Docket No. 8788, Docket No. 8789, and Docket No. 8790 be, and they hereby are, vacated and set aside, and the matters are remanded to the hearing examiners for further proceedings.

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### CROWN CENTRAL PETROLEUM CORPORATION

*Docket 8851. Order, Oct. 4, 1972—Memorandum Opinion, Feb. 12, 1973.*

Order and memorandum opinion denying complaint counsel's application for interlocutory review of the administrative law judge's order requiring the disclosure of Commission records.

#### ORDER DENYING APPLICATION FOR INTERLOCUTORY REVIEW

This matter is before the Commission upon complaint counsel's application for interlocutory review dated September 26, 1972 of the administrative law judge's order of September 20, 1972 requiring the disclosure of Commission records and respondent's motion for emergency disposition dated September 29, 1972.

The Commission had determined to deny complaint counsel's application for interlocutory review for reasons which will be set forth in an opinion which will follow this order.\* Accordingly,

*It is ordered*, That complaint counsel's application for interlocutory review be, and it hereby is, denied.

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\*The opinion was issued by the Commission on February 12, 1973, and is reported herein immediately following the interlocutory order and entitled Memorandum Opinion on Order Denying Application for Interlocutory Review.

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MEMORANDUM OPINION ON ORDER DENYING APPLICATION FOR  
INTERLOCUTORY REVIEW

FEBRUARY 12, 1973

By order of October 4, 1972, we denied complaint counsel's application for interlocutory review of a September 20, 1972, order of the administrative law judge directing disclosure of certain Commission records and we indicated that our reasons for denial would be set forth in a subsequent memorandum opinion.

The factual background of the application for review is as follows: on August 11, 1972, respondent moved under Rule 3.36 of the Commission's Rules of Practice for issuance of a subpoena *duces tecum* directing production of seven categories of documents from the Commission's files. The proposed specifications of the subpoena were appended to respondent's motion. Complaint counsel, on August 18, 1972, filed their opposition to the motion indicating their objections as to each of the proposed specifications. By order of August 25, 1972, the administrative law judge granted respondent's motion as to proposed specification 1; granted, in part, respondent's motion as to proposed specification 2; denied respondent's motion as to the balance of the demands; and instructed respondent to prepare and submit to the judge for issuance a subpoena conforming to the order. Complaint counsel did not appeal the ruling. Thereafter, on September 7, 1972, the judge issued a subpoena *duces tecum* which had been prepared by respondent pursuant to the August 25 ruling.

On September 13, 1972, complaint counsel moved to limit the September 7 subpoena on essentially the same grounds as they had asserted in their August 18 opposition. By order of September 20, 1972, the administrative law judge denied this motion ruling that it was inappropriate with respect to a subpoena issued under Rule 3.36. It was from this order that complaint counsel sought application for review under Rule 3.23(a) of the Commission's Rules.

The question raised by complaint counsel's application for review is whether the September 7 subpoena was properly subject to challenge by complaint counsel's September 13 motion to limit or quash. We hold that it was not.

Rule 3.36 provides that application for Commission records must be made in the form of a motion filed in accordance with Rule 3.22. The latter rule allows complaint counsel to answer the motion. Complaint counsel filed an answer in opposition, thereby joining the issue as to whether or not the subpoena should issue, and, if it should, what the scope of the subpoena should be. And, pursuant to the authority

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conferred by Rule 3.36(c), the administrative law judge ruled on the motion, granting it in part and denying it in part.

Complaint counsel argue that an appeal could not have been taken from the ruling since the subpoena contemplated to be issued by the ruling did not actually exist on August 25, but became available only after the time for appeal had elapsed. They contend, in other words, that they had no way of knowing from the ruling what the specifications of the subpoena would be, and, hence, whether or not they would want to seek an appeal.

The August 25 ruling, in our view, left no uncertainty as to what categories of documents the administrative law judge had ordered produced; and the September 7 subpoena simply effectuated the clear import of the ruling. Had the ruling been deficient or ambiguous in any respect, complaint counsel could have moved for clarification under Rule 3.22. Complaint counsel did not so move. Their failure to do so suggests that they understood what documents were being subpoenaed by the ruling. Moreover, complaint counsel's September 13 motion did not allege that the specifications of the September 7 subpoena deviated materially from the proposed specifications ruled upon by the judge's August 25 ruling.

In short, it seemed clear from the papers before us that no dispute, in fact, existed concerning what documents were directed for production under the August 25 ruling, that complaint counsel's September 13 motion was simply an attempt to revisit issues previously ruled upon by the judge and that interlocutory review, if desired by complaint counsel, should have been sought from the August 25 ruling. Accordingly, we denied complaint counsel's application for interlocutory review and an appropriate order was entered.

#### ITT CONTINENTAL BAKING COMPANY

*Docket 7880. Order, Oct. 13, 1972.*

Order denying respondent's motion for reconsideration of provisions of a 1962 order [60 F.T.C. 1183].

#### ORDER DENYING MOTION TO RECONSIDER

By order dated August 1, 1972 [page 1021 herein], the Commission directed that this matter be assigned to a hearing examiner for the purpose of receiving evidence on the question of whether the proceeding should be reopened and the provision of the Commission's order of May 11, 1962, prohibiting certain acquisition for a period of ten

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years be extended for an additional five years. By motion filed September 28, 1972, respondent, ITT Continental Baking Company requests the Commission to reconsider its order directing hearings, contending that in recent conferences Commission counsel have asserted a new ground not encompassed by the Commission's original show cause order or its order setting the matter for hearings.

Pursuant to our direction, this matter is now before Administrative Law Judge Allard for adjudication pursuant to Part 3 of the Rules of Practice. Section 3.22 provides that when a proceeding is before an administrative law judge all motions therein (with one exception not applicable here) shall in the first instance be presented to him. Although the respondent denominates its motion as one of "reconsideration" of our prior order directing hearings, it deals with a question of whether some of the evidence which Commission counsel may introduce in the hearings is within the scope of the pleadings, in this case the order to show cause. This type of issue is one that is commonly dealt with by administrative law judges during proceedings before them, and any motion raising this question should be addressed to the administrative law judge before whom this case is pending.

Accordingly, for the reasons stated herein, respondent's motion for reconsideration, dated September 28, 1972, is denied. It is so ordered.

#### LOVE TELEVISION & STEREO RENTAL, INC., ET AL.

*Docket C-2245. Order, Oct. 19, 1972.*

Order granting in part respondents' requests for copies of responses to their Petition for Modification of Order in Docket C-2245.

#### ORDER GRANTING IN PART AND DENYING IN PART REQUEST FOR COPIES OF RESPONSES TO PETITION, REQUEST TO SUBMIT WRITTEN BRIEF AND REQUEST TO PREVENT ORAL ARGUMENTS

This matter is before the Commission upon the motion of respondents Love Television and Stereo Rental, Inc., et al. filed September 11, 1972, in which respondents requested that it attorneys for the Commission or any other party submits to the Commission any opinion or recommendation adverse to their Petition for Modification of the Order in Docket No. C-2245, filed August 7, 1972, that they be furnished with a copy of said opinion or recommendation. Respondents also requested that they be allowed to respond to said opinions or recommendations by written brief, and that they be permitted to present their case by oral argument before the Commission.

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On September 6, 1972, the staff of the Commission filed with the Commission an answer to respondents' petition. The Commission has determined that, pursuant to Section 4.7 of the Commission's Rules of Practice, respondents shall receive a copy of any opinion or recommendation adverse to their petition of August 7, 1972, which is submitted either by a person who is not employed by the Commission or an attorney of the Commission who performs any investigative or prosecuting function in connection with the proceeding. Therefore, respondents should be furnished with a copy of the answer to their petition. The Commission has also determined that respondents' petition of August 7, 1972, and the answer thereto contain sufficient information to enable the Commission to render an informed decision on the issues raised therein and that the submission of further responses or the presentation of oral argument are unnecessary. Accordingly, *It is ordered*, That respondents be furnished with a copy of the answer to respondents' Petition for Modification of the Order in Docket No. C-2245.

*It is further ordered*, That respondents' requests to submit a written brief and to present oral argument be, and they hereby are, denied.

THE HEARST CORPORATION, ET AL.

Docket 8832. Order, Oct. 30, 1972.

Order dealing with question of re-employment of administrative law judge who is scheduled to retire prior to his completion of this case.

ORDER DISPOSING OF CERTIFICATION OF MOTION

Before the Commission is a certification by Administrative Law Judge Goodhope of a motion by respondents requesting the Commission to determine and recommend to the President that the public interest requires the temporary re-employment of Administrative Law Judge John B. Poindexter for purposes of completion of the trial and rendition of an initial decision in this matter. In support of their motion respondents show that commencing on April 11, 1972, twenty-two days of hearings have been held in four cities and some fifty-five witnesses called by complaint counsel have testified. Additional hearings are to be scheduled with complaint counsel and respondent calling additional witnesses.

On September 21, 1972, the Acting Director, Office of Administrative Law Judges, issued an order substituting Administrative Law Judge Andrew C. Goodhope for Judge Poindexter. The latter will

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reach mandatory retirement age in November 1972 and under the Civil Service Retirement Act will automatically be separated from Federal Service on the last day of that month. It appears the hearings cannot be concluded by that time.

Respondents move in the alternative for an order striking the present record and directing *de novo* hearings, contending that credibility of witnesses will be an issue in this case, and that one hearing officer should observe all the witnesses.

In their answer, complaint counsel join the respondents' request that Administrative Law Judge Poindexter be reemployed for the purpose, but do not agree that *de novo* hearings is the only other available option.

As to respondents' motion that the Commission determine and recommend to the President that the public interest requires the temporary re-employment of Administrative Law Judge Poindexter, the question of requesting extension of employment of a hearing officer is not within the scope of the Commission's adjudicatory powers, but is an administrative decision that lies solely within the authority of the Chairman of the Federal Trade Commission. Reorganization Act of 1949, 63 Stat. 203, as amended, and Reorganization Plan No. 8 of 1950, 64 Stat. 1264. As indicated in previous interlocutory orders in this case, the Chairman is not participating in any adjudicative aspects of this proceeding. However, in his role as head of administrative operations of this agency, he has informed the Commission that it is his policy not to seek extensions of employment beyond the compulsory retirement age of employees under his supervision, including hearing officers, and that no such extension or re-employment will be sought in this instance.

In his certification of the above motion, Administrative Law Judge Goodhope indicated that "under controlling authorities" respondents' alternative motion to strike the record and commence *de novo* hearings would have to be granted should Judge Poindexter's employment not be extended. Complaint counsel, as an alternative, urged that Judge Poindexter could be requested to submit a report to the new administrative law judge including his assessment of the credibility of witnesses whom he saw and heard. Administrative Law Judge Goodhope did not comment on this proposed alternative, but cited *Gamble-Skogmo, Inc. v. Federal Trade Commission*, 211 F. 2d 106 (8th Cir. 1954) and 2 Davis, *Adm. Law Treatise*, § 11.18, p. 113, as "controlling" and as requiring *de novo* hearings.

However, we do not read the decision in *Gamble-Skogmo* as automatically foreclosing other possible alternatives. In that case, the one

hearing examiner who heard all the witnesses retired and the initial decision was prepared by his successor who did not hear any of the witnesses and who had not received a report from the first examiner as to his assessment of the credibility of those witnesses who gave conflicting testimony. The case stands for the proposition that where credibility evaluation of witnesses constitutes an important aspect of the case, demeanor evidence should be preserved. 2 Davis, *Adm. Law Treatise* § 11.18; *Appalachia Power Co. v. F.P.C.*, 328 F. 2d 237 (4th Cir. 1960). But as Professor Davis has suggested, this can be accomplished by having the first hearing officer make a report on the credibility of witnesses he has heard prior to the time he becomes unavailable to the agency. 2 Davis, *Adm. Law Treatise*, p. 113.<sup>1</sup>

As to questions of credibility that may arise should respondents call witnesses whose testimony directly conflicts with the testimony given by witnesses who have already testified, respondents can always be given the opportunity to have the latter witnesses recalled so that the new administrative law judge can also observe their demeanor while on the witness stand. See *George McKibbin & Son*, 56 F.T.C. 1645 (1959).<sup>2</sup>

We think the administrative law judge, in ruling on the respondents' alternative motion, should consider whether these alternative procedures would be appropriate in the circumstances of this case. In making such a determination, he should feel free to consult with Administrative Law Judge Poindexter, as well as hearing from the parties.

The matter is remanded for further proceedings. It is so ordered.

Without the participation of Chairman Kirkpatrick and with Commissioner MacIntyre agreeing only to the result of the remand for further proceedings.

<sup>1</sup> It is not unprecedented for more than one hearing officer to each file reports on the part of a case in which each presided. See Note, "Replacing Finders of Fact—Judge, Juror, Administrative Hearing Officer," 68 Col. L. Rev. 1317, 1334 n. 97 (1968) ("It is common practice in the ICC to have different examiners hear the evidence offered by different parties"); Davis, *Adm. Law Treatise*, 1970 Supp., p. 431.

<sup>2</sup> In the *McKibbin* case, the Commission reviewed the holding in *Gamble-Skogmo*, and stated:

"This case cannot be considered as authority for respondents' broad position that a trial *de novo* must be granted whenever the credibility of witnesses who have testified before the original hearing examiner is in issue. \* \* \* [I]t is believed that in most instances the parties' procedural rights would be fully protected if the witnesses who have given conflicting testimony are recalled solely for the purpose of cross-examination."

The Commission upheld the hearing examiner's denial of a motion for a trial *de novo*.

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## UNITED BRANDS COMPANY

*Docket 8835. Order, Oct. 30, 1972.*

Order denying the request of a nonparty to proceeding permission to file interlocutory appeal from a ruling of the administrative law judge denying said party's request for *in camera* treatment of exhibits.

**ORDER DENYING REQUEST FOR PERMISSION TO FILE INTERLOCUTORY APPEAL**

This matter is before the Commission upon the application of the Garin Company (hereinafter "Garin"), a nonparty to the proceeding, to file an interlocutory appeal from a ruling of the administrative law judge denying Garin's request for *in camera* treatment of respondent's Exhibit 31 (hereinafter "RX 31"). This exhibit contains information submitted by Garin pursuant to a subpoena issued upon respondent's request. Although the administrative law judge denied Garin's request for *in camera* treatment, he did order that RX 31 shall remain *in camera* pending further order by him or the Commission. Also, he ruled that the denial of *in camera* treatment presented a reviewable question under Section 3.23(b) of the Commission's Rules of Practice.

The Commission has determined that it can review the administrative law judge's decision denying *in camera* treatment for RX 31 after he renders his initial decision and the Commission has before it the entire record, which includes the papers Garin has filed in support of its appeal. If RX 31 remains *in camera* until the Commission can so review the administrative law judge's denial of *in camera* treatment, Garin's remedy will be adequate. The Commission has, therefore, determined that the denial of *in camera* treatment is not an appropriate matter for an interlocutory appeal. Accordingly,

*It is ordered*, That Garin's application to file an interlocutory appeal be, and it hereby is, denied.

*It is further ordered*, That RX 31 remain *in camera* until the Commission orders otherwise.

**KELLOGG COMPANY, ET AL.**

*Docket 8833. Order, Nov. 1, 1972*

Order denying applications of General Foods Corporation and the Quaker Oats Company for review of order denying their motions to be dropped as parties.

**ORDER DENYING APPLICATIONS OF GENERAL FOODS CORPORATION AND THE QUAKER OATS COMPANY FOR REVIEW OF ORDER DENYING THEIR MOTIONS TO BE DROPPED AS PARTIES**

This matter is before the Commission on the applications of General Foods Corporation and the Quaker Oats Company for review of the



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administrative law judge's order denying their motions to be dropped as parties to this proceeding and the opposition by complaint counsel thereto.

The Commission has determined that applicants have failed to demonstrate any error in the administrative law judge's order. Applicants will not be denied a fair hearing by their joinder as parties in one adjudicative proceeding, and joinder is proper in this proceeding as a matter of law and policy. Therefore,

*It is ordered,* That the applications of General Foods Corporation and the Quaker Oats Company for review of the administrative law judge's order denying their motions to be dropped as parties be, and hereby are, denied.

Without the concurrence of Commissioner MacIntyre.

### FIRESTONE TIRE AND RUBBER COMPANY

Docket 8818. Order, Nov. 3, 1972.

Order directing the payment by the Commission to intervenor S.O.U.P., Inc., those of its costs identified in its Bill of Costs for which proper substantiation is submitted.

#### ORDER OF THE COMMISSION

This matter is before the Commission on a motion by intervenor S.O.U.P., Inc. (hereafter S.O.U.P.), filed with the Secretary September 6, 1972, that the Commission pay its Bill of Costs.

Whereas the Commission had previously granted S.O.U.P.'s motion for limited intervention in the proceedings and thereupon granted S.O.U.P.'s request to proceed *in forma pauperis* for the purpose of filing briefs and documents, and whereas the Comptroller General has advised the Commission that the payment of intervenors' costs is within the discretion of the Commission, and the Commission having determined that payment of S.O.U.P.'s expenses would be a proper exercise of that discretion:

*It is ordered,* That intervenor S.O.U.P. shall be paid by the Commission those of its costs identified in its Bill of Costs for which it submits proper substantiation.

Commissioners MacIntyre and Dennison not concurring.

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## GROLIER, INCORPORATED, ET AL.

*Docket 8879. Order, Nov. 3, 1972.*

Respondents' motion to dismiss the complaint for failure to join indispensable parties denied.

## ORDER DENYING MOTION TO DISMISS

This matter is before the Commission upon the certification of October 26, 1972 by the administrative law judge of respondents' motion to dismiss the complaint filed June 9, 1972 and complaint counsel's answer in opposition thereto filed June 20, 1972.

The certification relates to respondents' contention that the order as proposed would affect the contractual rights of third parties and, absent their joinder as indispensable parties, the complaint should be dismissed. Only recently did the Commission have the occasion to consider a similar contention in the "soft drink bottling company" cases: *Docket Nos. 8853-57 and 8859; Coca-Cola Company v. F.T.C.*, 342 F. Supp. 670 (N.D. Ga. 1972) (dismissed for lack of subject matter jurisdiction, appeal pending); *Pepsico Inc. v. F.T.C.*, 343 F. Supp. 396 (S.D. N.Y. 1972) (dismissed for lack of subject matter jurisdiction appeal pending); *Seven-Up v. F.T.C.*, 349 F. Supp. 551 (E.D. Mo. 1972) (dismissed for lack of subject matter jurisdiction). In those cases the Commission reviewed the precedents applicable to this issue and concluded that third parties whose contractual rights will be affected by the issuance of an order to cease and desist are not necessarily indispensable parties to the proceeding from which such an order may issue. *Crush International Ltd*, Docket No. 8853, Order Ruling on Motions to Dismiss for Failure to Join Indispensable Parties, March 23, 1972, 3 CCH TRADE REG. REP. ¶ 19,954. Based on the authorities set out in *Crush International*, the instant motion will be denied. Accordingly,

*It is ordered*, That respondents' motion to dismiss the complaint for failure to join indispensable parties be, and it hereby is, denied.

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## JEWEL COMPANIES, INC., ET AL.

*Docket 8788. Order, Nov. 10, 1972.*

Order denying motion to dismiss as to certain respondents; granting application for review of judge's grant for issuance of subpoena; setting aside the said grant, and quashing the subpoena.

ORDER RULING ON ADMINISTRATIVE LAW JUDGE'S CERTIFICATION FILED  
OCTOBER 10, 1972 AND COMPLAINT COUNSEL'S APPLICATION  
FOR REVIEW FILED OCTOBER 3, 1972

This matter is before the Commission on two separate requests: (1) the administrative law judge's certification filed October 10, 1972, of the motion of respondents Jack Stires, Inc., a corporation, and John C. Stires II, individually and as an officer of Jack Stires, Inc., to dismiss the complaint as to them; and (2) complaint counsel's application for review, filed October 3, 1972, of the order of the administrative law judge of September 26, 1972, granting the application of respondent Jewel Companies, Inc., for the issuance of a subpoena for the production of certain Commission records. Respondent Jewel Companies, Inc., on October 18, 1972, filed an answer in opposition to complaint counsel's application for review.<sup>1</sup>

## I

## The Motion to Dismiss

On September 12, 1972, respondents Jack Stires, Inc., and John C. Stires II filed with the administrative law judge a motion to dismiss the complaint as to them on the grounds that Jack Stires, Inc., was merged into another corporation, Parker Farms, Inc., in 1969, and that thereafter Jack Stires, Inc., ceased to exist;<sup>2</sup> further, that John C. Stires II has retired, and did retire prior to the merger, from the fruit and vegetable brokerage business and has no intentions of re-entering such business in the future.<sup>3</sup>

<sup>1</sup> Additionally, complaint counsel, on October 25, 1972, filed a supplemental memorandum of law in connection with their application for review.

<sup>2</sup> In his affidavit John C. Stires II states in part that on September 22, 1969, an agreement of merger was filed with the Corporation Commission of the State of Arizona, pursuant to which Jack Stires, Inc., was merged into Parker Farms, Inc.; that a copy of the agreement was filed with the Secretary of the State of California on October 3, 1969, and as of these dates Jack Stires, Inc., ceased to exist.

<sup>3</sup> In his affidavit John C. Stires II states in part that he ceased engaging in fruit and vegetable brokerage transactions several months prior to the dissolution of Jack Stires, Inc., and has not been directly or indirectly engaged in such business since that time. He further states that he has no intention of ever being engaged in the fruit and vegetable or food brokerage business in the future and that his retirement from the brokerage business was the result of business and commercial considerations and was in no way related to the instant proceeding.

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Complaint counsel filed an answer to the motion, in which they dispute the claims of the moving respondents and assert that a number of circumstances, such as the continued use of the family name in a new entity styled Stires Bros., Inc., the fact that such new business operates out of the same address as that of Jack Stires, Inc., and other factors, show that in essence the Stires brokerage business is a continuing affair.

The moving respondents replied to complaint counsel's answer on October 4, 1972, and submitted an additional affidavit by John C. Stires III. In this answer they represent that there is no relationship between the new corporation, Stires Brothers, Inc., and the moving respondents.<sup>4</sup>

The administrative law judge, in his certification, recommends that the motion be granted.<sup>5</sup> He believes the situation is similar to that in *Borman Food Stores, Inc.*, Docket No. 8789, wherein the Commission, by an order issued August 3, 1972 [p. 201 herein] dismissed the complaint as to certain of the respondents, Frank V. Condello and P & R Brokerage Co. In the opinion of the administrative law judge, the moving respondents have made a showing that they are out of the brokerage business, that they have been out of it for three years, and, finally, that there is no reasonable expectation they will reenter.

We disagree with the administrative law judge's conclusions and his recommendation on this question. There is a substantial dispute here on questions of fact which we do not believe can be disposed of on the basis of affidavits and counsel's representations. First, there is the question whether or not Stires Brothers, Inc., is a continuation of the old firm. Complaint counsel contend that it is, and the representations made in affidavits and otherwise are inadequate to resolve the issue. There are also the questions of whether or not John C. Stires II has gone out of the fruit and vegetable brokerage business and will not return to it. These questions are not necessarily resolved by an affidavit of discontinuance since such, without more, may not be sufficient to warrant dismissal as to an individual. See, for example, *Lester S. Cotherman v. Federal Trade Commission*, 417 F.2d 587 (5th Cir. 1969). The *Borman* case, relied on by the administrative law

<sup>4</sup> The affiant, John C. Stires III, states that Stires Brothers, Inc., is operated by the son and by the brother of John C. Stires II, the named individual respondent, and that while Stires Brothers, Inc., engages in the fruit and vegetable brokerage business there are significant differences in the buyers and sellers with which it deals compared with those with which Jack Stires, Inc., dealt. This affiant further states that there is no other connection between the new business and the moving respondents and that the address is the same because such is the former residence of John C. Stires II, who sold it to his brother, Buel Stires, an officer in the new business, Stires Brothers, Inc.

<sup>5</sup> The administrative law judge certified the matter because he believed the motion was addressed to the Commission's administrative discretion.

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judge, does not constitute a precedent for dismissal here. That case is quite different on the facts. The Commission dismissed as to the individual Frank C. Condello and as to the brokerage partnership, P. & R. Brokerage Co., of which he was the sole operator, on the basis of a showing that Mr. Condello planned to retire because he was in ill health, over seventy years of age and under strain caused by the litigation and several deaths in his family. No showing has been made here of any circumstances of similar significance.

In summary, we do not believe that the questions raised here should be decided on a partial record. Accordingly, we will deny the motion to dismiss the complaint as to Jack Stires, Inc., a corporation, and John C. Stires II, an individual.

## II Complaint Counsel's Application for Review

The second question before the Commission is complaint counsel's application for review of the administrative law judge's order granting respondent Jewel Companies, Inc.'s application for issuance of a subpoena requiring the production of certain records in the Commission's files for the purpose of discovery. The documents sought include internal communications, minutes and records concerning the Commission's decision to issue a complaint against respondents herein and complaints against others engaged in the fruit and vegetable brokerage business.

More specifically, the demand covers documents, among others, as follows: memoranda, communications and minutes relating to a motion filed May 23, 1969, entitled "Motion To Refrain From Issuing Proposed Complaints In Shipping Point Broker Cases;" the minute or related document concerning the decision to issue complaints as described in a communication from the Secretary of the Commission to "Respondent" dated March 24, 1969; the minute or minutes relating to the determination to issue the complaint against "Respondent;" communications or memoranda relating to recommendations to issue complaints as a result of the investigation by the Commission of the fruit and vegetable brokerage practices; communications with trade associations, legislators and others with regard to issuance of designated complaints; certain minutes and communications relating to the matter of Jack Herzog & Co.; memoranda showing the Commission's policy to consider or not to consider the public interest in connection with decisions to issue the complaints; and other described documents.

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The administrative law judge, in his order of September 26, 1972, granting respondent Jewel Companies' request for production, asserted that the relief sought by the respondent in this instance and that sought and obtained in a United States District Court, *Jewel Companies, Inc. v. Federal Trade Commission*, Civil No. 69-C-1673 (D.C.N.D. Ill., motion for production of documents granted August 15, 1969),<sup>6</sup> are the same. He concluded that the government had its full day in court on the issue of production of the Commission's records, that it had lost, and that it cannot now, under the doctrine of collateral estoppel, attack the order issued by the court.

Complaint counsel, in their petition for review, argue that respondent Jewel Companies, Inc. has not made the showing required by Commission rule Section 3.36. They also contend that the district court order in the *Jewel Companies, Inc.* case, *supra*, relied on by the administrative law judge is not binding because the order therein for production "never became finalized, and was never put in issue, and directly determined by a Court of competent jurisdiction" (complaint counsel's application, page 6). Complaint counsel, in their supplemental memorandum, argue that *res judicata* and related doctrines accord finality only to a valid final judgment and that the unappealed interlocutory order in this case is not entitled to *res judicata* effect.

In an adjudicative proceeding an application for subpoenas for confidential documents of the Commission must be made under Commission rule Section 3.36. This rule requires, among other things, a showing of general relevancy of the material or information and the reasonableness of the scope of the request and a showing that the material or information is not available from other sources. Respondents have not adequately complied with the requirements of this rule.

The claim of respondent Jewel Companies, Inc., that the district court action (*Jewel Companies, Inc., supra*) in effect remanded the respondents to the administrative proceedings for the production of the documents and a preliminary adjudication of the jurisdictional and statutory issues being litigated (see page 5, application for issuance of subpoena filed August 14, 1972) is rejected. The collateral action in

<sup>6</sup>The citations and the history of this litigation are as follows: The District Court for the Northern District of Illinois on November 28, 1969, found that there was no basis at law to support a motion to dismiss complaint, and that the court had jurisdiction of the subject matter and the parties. The court certified the question to the court of appeals and leave was granted to appeal; *Jewel Companies, Inc. v. Federal Trade Commission*, Civil No. 69-C-1673 (D.C.N.D. Ill.); *Jewel Companies, Inc., et al. v. Federal Trade Commission*, 432 F. 2d 1155 (7th Cir. 1970); on remand from circuit court, *Jewel Companies, Inc. v. Federal Trade Commission*, No. 69-C-1673 (D.C.N.D. Ill., decision and order August 17, 1972); *Jewel Companies, Inc. v. Federal Trade Commission, appeal docketed*, No. 72-1382 (7th Cir.).\*

\*Judgment in favor of the Commission entered March 15, 1973.

the district court does not require the production here sought. Upon the appeal of the district court decision, the Circuit Court of Appeals for the Seventh Circuit held that the district court had no jurisdiction over three of the four claims made by respondents and, with regard to the remaining claim, that is, the assertion that Commissioner MacIntyre did not properly exercise his statutory discretion in voting for the issuance of the complaint, the appeals court remanded to the district court for further proceedings, stating that the remaining question was inherently a legal one and did not involve factual considerations. *Jewel Companies, Inc., et al. v. Federal Trade Commission*, 432 F. 2d 1155, 1159 (2d Cir. 1970). The district court, in its decision and order on remand, also found that there was no further factual issue to be decided and held that Commissioner MacIntyre voted properly by exercising his discretion in favor of issuance of the complaint. *Jewel Companies, Inc. v. Federal Trade Commission*, No. 69-C-1673 (D.C.N.D. Ill., March 17, 1972). Thus, all issues were decided in the Commission's favor (one is on appeal, but it involves no factual determination) and there is no basis for the claim that the matter was remanded to the Commission for the production of the documents.

Moreover, there is no other support for *Jewel Companies'* position that the result of the court adjudication was to remand the matter to the Commission for the resolving of the issues at the administrative level. Of the claims made by the respondents in their collateral action it appears that the documents here sought could have relevance possibly only to two of them—that is, the claim as to Commissioner MacIntyre's exercise of his discretion and the claim the Commission did not make a finding that the issuance of the complaint was in the public interest. The former claim was found by the courts not to involve a factual issue; the latter, we think, was disposed of by the circuit court where it holds there is nothing in the language of Sections 2(c) and 11 of the Clayton Act, as compared with Section 2(a) of that Act and Section 5 of the Federal Trade Commission Act, which requires a finding that the issuance of the complaint be in the public interest. The court further stated that the plaintiffs there were attempting to interfere with the discretion of the Commission in issuing its complaint and the courts have no jurisdiction to decide such inherently prosecutorial decisions.

The case of *George H. Lee Co. v. Federal Trade Commission*, 113 F. 2d 583 (8th Cir. 1940), relied on by the administrative law judge to support his position of collateral estoppel, is not controlling here. In that case a district court, in a separate libel suit, prior to the Commission action had resolved the basic issue of the alleged falsity of

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that respondent's advertising. Later, the court of appeals on review of the Commission's case held the Commission could not, on an issue settled by a court of competent jurisdiction, reach a contrary conclusion. The Commission here is not going contrary to an issue finally settled by a court. Thus, the *Lee* case is clearly distinguishable.

The records sought, to the extent they exist, would cover confidential internal memoranda and papers of the Commission, including those which relate to the mental processes of the Commissioners. The courts have not generally allowed any such inquiry. In *Sterling Drug, Inc. v. Federal Trade Commission*, 450 F.2d 698 (D.C. Cir. 1971), the court held that the granting of discovery, if ever, for this kind of internal document would be an extraordinary step, not a routine one. Respondent Jewel Companies, Inc., has failed entirely to justify any such extraordinary step in this proceeding. In the collateral suit, *Jewel Companies, Inc., supra* (decision and order dated March 17, 1972), the district court held that for the court to inquire into a Commissioner's reasoning or state of mind, beyond Mr. MacIntyre's statement, is not only unnecessary but also unjustified. Accordingly, we hold the administrative law judge was in error in applying the doctrine of collateral estoppel and directing discovery of the Commission documents requested by respondent Jewel Companies, Inc. We will set aside his order.

*It is ordered*, That the motion to dismiss the complaint as to Jack Stires, Inc., a corporation, and John C. Stires II, an individual, certified to the Commission by the administrative law judge on October 10, 1972, be, and it hereby is, denied.

*It is further ordered*, That complaint counsel's application for review of the administrative law judge's order granting respondent Jewel Companies, Inc.'s application for issuance of a subpoena, filed October 3, 1972, be, and it hereby is, granted.

*It is further ordered*, That the administrative law judge's order filed September 26, 1972, granting application for subpoena requiring the production of documents, papers and other materials in the records of the Federal Trade Commission, be, and it hereby is, vacated and set aside.

*It is further ordered*, That the subpoena *duces tecum* issued by the administrative law judge October 5, 1972, in connection with this matter, addressed to the Secretary of the Commission, Charles A. Tobin, returnable November 7, 1972, be, and it hereby is, quashed.



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## FROZEN FOOD FORUM, INC., ET AL.

*Docket 8890. Order, Nov. 10, 1972.*

Upon its own motion, the Commission quashes four subpoenas after determining that validity of the Aug. 15, 1968 order is not relevant to admissibility of said evidence or any discovery by complaint counsel that might flow from such evidence.

## ORDER QUASHING SUBPOENAS

This matter is before the Commission upon its own motion. On September 29, 1972, administrative law judge William K. Jackson granted respondents' application for the issuance of subpoenas *duces tecum* to certain past and present employees of the Commission, and on October 12, 1972, subpoenas were issued pursuant to that order. Judge Jackson stated in his order that the purpose of the subpoenas is to obtain documents which relate to the participation or nonparticipation of members of the Commission and the Secretary in the issuance of the order of the Commission, dated August 15, 1968, denying motions to quash subpoenas issued July 18, 1968. His order is apparently based upon his ruling at the pretrial hearing that the "validity of said Order [of August 15, 1968] raised threshold factual questions that had to be resolved by him before he could rule on the admissibility of the evidence so obtained or any discovery by complaint counsel that might flow from such evidence."

The Commission has determined that the validity of the order of August 15, 1968, is not relevant to the admissibility of said evidence or any discovery by complaint counsel that might flow from such evidence, and, therefore, the subpoenas issued pursuant to the administrative law judge's order of September 29, 1972 should be quashed. Accordingly,

*It is ordered,* That the subpoenas issued by Administrative Law Judge William K. Jackson to Charles A. Tobin; Joseph W. Shea; Doris Neuman (correctly spelled Naumann); and John Doe, whose initials are C.T.A., an employee in the Office of the Secretary of the Federal Trade Commission, be, and they here are, quashed.

Commissioner Dennison not participating in this action.

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## GEORGIA-PACIFIC CORPORATION

*Docket 8843. Order, Nov. 21, 1972.*

Order denying motions to intervene, and receiving such motions as comments and as briefs *amicus curiae* in connection with Commission's consideration of the settlement proposal.

ORDER DENYING MOTIONS TO INTERVENE AND RECEIVING MOTIONS AS COMMENTS AND AS BRIEFS *Amicus Curiae*

This matter is before the Commission upon the filing of two motions to intervene. Southeastern Lumber Manufacturers Association (Southeastern) on November 10, 1972 filed a motion to intervene in this proceeding pursuant to Section 3.14 of the Commission's Rules of Practice and Section 5(b) of the Federal Trade Commission Act. It seeks intervention for the purpose of expressing its views on the proposed settlement in the proceeding certified to the Commission by the administrative law judge on November 7, 1972. Complaint counsel on November 17, 1972 and the respondent on November 16, 1972 filed answers to Southeastern's motion to intervene.

The second motion to intervene was filed November 17, 1972 by the following corporations: Forest Sales Corporation, Greensboro Lumber Company, Burt Lumber Company, McCormick Wood Products, Inc., E. F. Cox Lumber Company, J. F. White & Sons, Inc., Culpepper Lumber Company, Wisham Hall Lumber Company, and Union Point Lumber Company. These corporations seek to intervene in this matter in accordance with Section 5(b) of the Federal Trade Commission Act and Section 3.14 of the Commission's Rules of Practice for the following stated purposes: "to raise the inadequacies of the relief set forth in the proposed settlement with respect to the Southeast in light of the activities of G-P there and the initial relief sought" (page 12, motion to intervene).

The Commission has determined, upon application made, that it is appropriate to withdraw this matter from adjudication for the purpose of considering a settlement by a consent order pursuant to Section 2.34(d) of the Commission's Rules of Practice, and the Commission is issuing simultaneously with this order an order to that effect. Since the purpose of Southeastern and of the other above-listed corporations in their motions to intervene is to comment on the proposed settlement, their motions will be received as comments and treated as *amicus curiae* briefs in connection with the Commission's consideration of the settlement proposal. The Commission, if it subsequently provisionally accepts the proposed settlement, will, while the matter is on the public record pursuant to Section 2.34(b) of the rules, further consider any

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additional comments which Southeastern and the corporations listed may choose to make.

Finally, in the event the Commission does not approve the proposed settlement and the matter is returned for further adjudication, Southeastern and the listed corporations may renew their motions to intervene. In these circumstances these motions will be denied. Accordingly,

*It is ordered*, That the motion to intervene filed by Southeastern Lumber Manufacturers Association and the motion to intervene filed by Forest Sales Corporation, Greensboro Lumber Company, Burt Lumber Company, McCormick Wood Products, Inc., E. F. Cox Lumber Company, J. F. White & Sons, Inc., Culpepper Lumber Company, Wisham Hall Lumber Company, and Union Point Lumber Company, corporations, be, and they hereby are denied without prejudice to Southeastern and to the corporations to renew these motions in the event this matter, at some time in the future, is returned to adjudication.

*It is further ordered*, That such motions to intervene be, and they hereby are, received as comments and as briefs *amicus curiae* in this proceeding.

Without the concurrence of Commissioner Jones as to the provisions of this order dealing with the issues of intervention raised by these motions.

#### FROZEN FOOD FORUM, INC., ET AL.

*Docket 8890. Order, Nov. 24, 1972.*

Order rejecting (1) respondents' motion to dismiss complaint counsel's application for review of administrative law judge's order granting an application for issuance of subpoenas; (2) respondents' motion for consideration prior to any consideration of complaint counsel's application; and (3) respondents' request for a hearing and oral argument on their motion to dismiss.

#### ORDER REJECTING MOTIONS

On September 29, 1972, the administrative law judge issued an order granting respondents' application for the issuance of certain subpoenas in the above-captioned proceeding, and on October 17, 1972, complaint counsel filed an application for review of said order. On October 25, 1972, respondents filed a motion requesting the Commission to dismiss complaint counsel's application for review as untimely, and on November 2, 1972, respondents filed a motion requesting that prior to any consideration of complaint counsel's application for review, the Commission rule upon respondents' motion to dismiss said application. On

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November 9, 1972, respondents filed an additional request for a hearing and oral argument on their motion to dismiss. The Commission, recognizing that complaint counsel's application for review as untimely, considered the administrative law judge's order of September 29, 1972, upon its own motion, pursuant to Section 3.23 (a) of the Commission's Rules of Practice. The Commission has determined that respondents' motion to dismiss the application for review and the related motions filed November 2, 1972, and November 9, 1972, have been rendered moot by the Commission's review of said order upon its own motion, and it is therefore unnecessary to consider said motions. Accordingly, *It is ordered*, That respondents' motion to dismiss, filed October 25, 1972, be, and it hereby is, rejected. *It is further ordered*, That respondents' request, filed November 2, 1972, that its motion of October 25, 1972, be considered prior to any consideration of complaint counsel's application for review, be, and it hereby is, rejected. *It is further ordered*, That respondents' request, filed November 9, 1972, for a hearing and oral argument on its motion of October 25, 1972, be, and it hereby is, rejected. Commissioner Dennison not participating.

### JAMES CARPETS, INC., ET AL.

Docket 8876. Order and opinion, Nov. 29, 1972.

Order and opinion granting complaint counsel's motion to amend complaint to include a charge that respondents have violated Sec. 8(b) of the Flammable Fabrics Act in that they have furnished false guaranties on products covered by the Act.

#### OPINION OF THE COMMISSION

This matter is before the Commission pursuant to the certification of September 26, 1972, by the administrative law judge of complaint counsel's motion of August 21, 1972, to amend the administrative complaint. The complaint charges respondents with violations of the Flammable Fabrics Act, 15 U.S.C. § 1191 *et seq.*, in that respondents have been engaged in the manufacturing for sale, sale and offering for sale, in commerce, and the introduction, delivery for introduction, and transportation, in commerce, of products which fail to conform to an applicable standard or regulation issued or amended under the provisions of the Flammable Fabrics Act.

Complaint counsel's motion of August 21, 1972, requests the amend-

ment of the administrative complaint to include a charge to the effect that respondents have violated Section 8(b) of the Flammable Fabrics Act, 15 U.S.C. § 1197, in that respondents have furnished false guaranties with respect to products covered by the Act. The proposed amendment to the administrative complaints provides as follows:

**PARAGRAPH THREE:** Respondents in violation of Section 8(b) of the Flammable Fabrics Act, as amended, have furnished false guaranties to the effect that reasonable and representative tests made in accordance with standards issued or amended under Section 4 of the Flammable Fabrics Act, as amended, show that products covered by such [guaranties] conform to an applicable flammability standard issued or amended under the provisions of Section 4 of the Act. There was reason for respondents to believe the products falsely guaranteed might be introduced, sold or transported in commerce.

Among the products falsely guaranteed were carpets subject to the Standard for Surface Flammability of Carpets and Rugs—DOC FF 1-70.

On September 1, 1972, respondents opposed the motion to amend the administrative complaint by arguing that "such an amendment would not facilitate determination of the merits of this controversy, and [that] the proposed amendment is not reasonably within the scope of the original complaint." Respondents argue, in essence, that the administrative law judge may allow an amendment to the administrative complaint only in limited instances in which the amendment does not raise new or different matters or practices. Citing Section 3.15 of the Commission's Rules of Practice, 16 C.F.R. § 3.15,<sup>1</sup> respondents suggest that complaint counsel must demonstrate that the allegations in the requested amendment to the complaint are "reasonably within the scope of the original complaint."

The administrative law judge concluded in his certification of September 26, 1972, that it did "not appear that the allegations of this new paragraph proposed as an amendment to the original complaint are reasonably within the scope of the original complaint." The judge therefore certified the motion to amend to the Commission in accord-

<sup>1</sup> Section 3.15 of the Commission's Rules of Practice provides, in pertinent part, as follows:

§ 3.15 *Amendments and supplemental pleadings.*—(a) *Amendments.*—(1) *By leave.*—If and whenever determination of a controversy on the merits will be facilitated thereby, the hearing examiner may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, allow appropriate amendments to pleadings or notice of hearing: *Provided, however,* That a motion for amendment of a complaint or notice may be allowed by the hearing examiner only if the amendment is reasonably within the scope of the original complaint or notice. Motions for other amendments of complaints or notices shall be certified to the Commission. [16 C.F.R. § 3.15.]

ance with Section 3.15 of the Rules of Practice. We find that the action of the judge in this regard was proper in all respects.<sup>2</sup>

It is, of course, well-established that the Commission may grant a motion to amend an administrative complaint. *Forster Manufacturing Co., Inc. v. Federal Trade Commission*, 335 F. 2d 47 (1st Cir. 1964). Further, the Commission itself is not restricted to granting such a motion "only if the amendment is reasonably within the scope of the original complaint or notice." In *Exquisite Form Brassiere, Inc. v. Federal Trade Commission*, 301 F. 2d 499 (D.C. Cir. 1961), the court affirmed the amending of the complaint to include a second count after evidence adduced at trial formed a basis for such count. The court found no error since ample time had been given for answer and preparation of a defense, and concluded that "[a]mendments to conform pleadings to proof are commonplace in judicial proceedings, and the action here, in an adjudicatory, or quasi-judicial, proceeding, was of that general character." *Id.* at 501. Indeed, the *James Carpets* matter before the Commission is *a fortiori* to *Exquisite Form Brassiere* in that the amendment in the latter case was allowed *after* complaint counsel had completed his case-in-chief with regard to the original charge in the complaint. Conversely, the *James Carpets* matter is at the pre-trial stage.

In *Vacu-Matic Carburetor Co. v. Federal Trade Commission*, 157 F. 2d 711 (7th Cir. 1946), the court rejected the contention that petitioner therein had been denied a fair hearing due to the amendment of the administrative complaint by the Commission after considerable testimony had been taken under the original complaint. The court affirmed the action of the Commission notwithstanding the fact "that the Commission by its amended complaint changed its theory and confronted petitioner with a different issue from that contained in the original complaint." *Id.* at 713. Thus, respondents' argument to the effect that the amendment to the complaint "would add [to the original complaint] an entirely new and unrelated count"<sup>3</sup> is unpersuasive at the Commission level when considered in light of *Vacu-Matic Carburetor* as well as *Exquisite Form Brassiere*.

<sup>2</sup> Respondents have failed to perceive the genuine issue before the Commission with regard to complaint counsel's motion to amend the complaint. Respondents rely on *Standard Camera Corp.*, 63 F.T.C. 1238 (1963), *Capitol Records Distrib. Corp.*, 58 F.T.C. 1170 (1961), and *Food Fair Stores, Inc.*, 53 F.T.C. 1274 (1957), to demonstrate the limitation on the administrative law judge's authority to allow amendment of the administrative complaint. However, since the judge did not allow such amendment, but rather certified the matter to the Commission pursuant to Section 3.15 of the Rules of Practice, 16 C.F.R. § 3.15, the judge's authority to allow amendment of the complaint is not in question here, and the above-cited precedents are, accordingly, inapposite.

<sup>3</sup> See Rejoinder to Reply to Opposition to Amend Complaint, at 3, filed by respondents on September 21, 1972.

Respondents here will be adequately apprised of the charges laid against them and will not be surprised by the amendment to the administrative complaint. It does not appear to us that the amending of the complaint at this stage of the proceeding will deprive respondents of the opportunity to answer the charges therein or to present a defense thereto. Thus, the requirements of a fair hearing will be fully satisfied. See *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 349-50 (1938); *Colgate-Palmolive Co. v. Federal Trade Commission*, 310 F.2d 89, 91-92 (1st Cir. 1962). We note that the extension to respondents of these procedural safeguards is facilitated by the fact that the *James Carpets* matter is, as previously noted, presently at the pre-trial stage.

Accordingly, we grant complaint counsel's motion to amend the complaint filed on August 21, 1972. Our order granting said motion is issuing herewith.

#### ORDER GRANTING MOTION TO AMEND COMPLAINT

This matter is before the Commission pursuant to the certification of September 26, 1972, by the administrative law judge of complaint counsel's motion of August 21, 1972, to amend the administrative complaint. The complaint charges respondents with violations of the Flammable Fabrics Act, 15 U.S.C. § 1191 *et seq.*, in that respondents have been engaged in the manufacturing for sale, sale and offering for sale, in commerce, and the introduction, delivery for introduction, and transportation, in commerce, of products which fail to conform to an applicable standard or regulation issued or amended under the provisions of the Flammable Fabrics Act.

Complaint counsel's motion of August 21, 1972, requests the amendment of the administrative complaint to include a charge to the effect that respondents have violated Section 8(b) of the Flammable Fabrics Act, 15 U.S.C. § 1197, in that respondents have furnished false guaranties with respect to products covered by the Act.

The Commission has determined that the amendment to the administrative complaint sought by complaint counsel would be appropriate for the reasons stated in the accompanying opinion. Accordingly,

*It is ordered*, That complaint counsel's motion to amend the administrative complaint in the above-styled matter be, and it hereby is, granted.

*It is further ordered*, That the administrative complaint be amended by redesignating Paragraph Three as Paragraph Four, and by adding to the complaint a new Paragraph Three to read as follows:

PARAGRAPH THREE: Respondents in violation of Section

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8(b) of the Flammable Fabrics Act, as amended, have furnished false guaranties to the effect that reasonable and representative tests made in accordance with standards issued or amended under Section 4 of the Flammable Fabrics Act, as amended, show that products covered by such guaranties conform to an applicable flammability standard issued or amended under the provisions of Section 4 of the Act. There was reason for respondents to believe the products falsely guaranteed might be introduced, sold or transported in commerce.

Among the products falsely guaranteed were carpets subject to the Standard for Surface Flammability of Carpets and Rugs—DOC FF 1-70.

Commissioner MacIntyre not concurring.

#### PEPSICO, INC.

Docket 8903. Order, Dec. 1, 1972.

Order withdrawing case from adjudication, until further action as the Commission may deem appropriate, for purpose of negotiating a consent settlement.

#### SEPARATE DISSENTING STATEMENT

By JONES, *Commissioner*:

I dissent from the Commission's decision to withdraw this matter from adjudication for the purpose of considering a proposed settlement offer submitted to us by respondent.

I dissent because the Commission's action was made *ex parte* without permitting complaint counsel to file a response to the respondent's application. In effect, respondent's request is a motion presented to us under Rule 2.34(d). Under the usual practice of the Commission, withdrawals of matters from adjudication are never acted upon until the Commission has heard from the other party to the law suit—in this case complaint counsel—on the record as to their position with respect to the request.

The views of both parties in an adjudicatory proceeding on the issues raised in a motion presented by one of them is a fundamental prerequisite for rational decision making.

Here the issue presented by respondent's request is whether under our rules as interpreted by our practice, respondent's settlement offer presented a sufficient basis for settlement to constitute the exceptional and unusual circumstances required by the rule in order to support a request to withdraw a matter from adjudication. Nothing under our rules prevents the parties from discussing settlement of a case. Indeed,



the recently announced Georgia-Pacific settlement proffer was negotiated entirely while the matter was in adjudication. The only reason, therefore, to withdraw a matter from adjudication is when the settlement proposal presented to the Commission for consideration is either sufficiently close to the notice order or has been recommended by both parties to warrant the Commission's consideration of it. There is no suggestion that the PepsiCo proposal is in that status. Indeed the Commission expressly disavows taking this view of the proposal.

So far as I am aware, there were no special time pressures which compelled the Commission to act with such haste and deprive complaint counsel of its right to respond to respondent's motion and to deprive itself of the views of the other party to this case as to whether there was any basis or compelling reason to take this matter out of adjudication at this time. I am, therefore, compelled to dissent from the Commission's action in directing such withdrawal.

#### ORDER WITHDRAWING MATTER FROM ADJUDICATION

The Commission has before it a letter, dated November 22, 1972, from the attorneys for PepsiCo, Inc., requesting either (1) that this matter be withdrawn from adjudication pursuant to Section 2.34(d) of the Commission's Rules of Practice for the purpose of negotiating a settlement by the entry of a consent order or (2) that the Commission accept a hold separate proposal by PepsiCo pending final disposition of the matter.

Prior to formal issuance of the complaint on November 15, 1972, PepsiCo was not given the usual notice pursuant to Section 2.31 of the Commission's rules of the Commission's intention to issue the complaint and was denied the opportunity, therefore, to dispose of the proceeding through the negotiation under Part II of a consent order. At that point, the time, the nature of the proceeding and the public interest, a majority of the Commission decided, warranted the immediate issuance of the complaint under Part III of the Commission's Rules of Practice in order to permit the Commission to seek an order under the All Writs Act to protect the existence of the Rheingold Corp. as an independent competitor and to prohibit PepsiCo from interfering with the business activity of Rheingold.

Immediately after the Part III complaint was issued, however, a proposal was made to the Commission by PepsiCo that the company would take no steps to assume or exercise actual control of Rheingold or to make any change in the corporate structure, board of directors or management of Rheingold before December 4, 1972; PepsiCo further proposed that after December 4, 1972, it would give the Commission

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at least ten days advance written notice of any action on the company's part to assume or exercise actual control of Rheingold or to make any changes in Rheingold's corporate structure, board of directors or management. In exchange for these commitments, the Commission was asked not to file any action seeking to have a court order PepsiCo to hold separate all or part of Rheingold until on or after December 4, 1972. On November 16, 1972, the Commission accepted this proposal which was contained in a letter agreement of the same date. In view of these exceptional and unusual circumstances, the immediate need for issuance of the Part III complaint has been obviated and it now seems appropriate to grant respondent's request under Section 2.34(d) of the Commission's rules for withdrawal of the matter from adjudication so as to provide the opportunity for negotiations looking to settlement by the entry of a consent order.

Withdrawal of this matter from adjudication, however, should not be construed as reflecting Commission approval at this time of the proposal for informal settlement by November 22, 1972, now before us. Any decision to accept or reject settlement by the entry of a consent order can be made only in light of all relevant facts and circumstances. Withdrawal should also not be interpreted as modifying in any way the letter agreement of November 16, 1972. The Commission, moreover, specifically reserves the right at any time to return this matter to formal adjudicative status in the event that such action is deemed necessary in the public interest. Accordingly,

*It is ordered,* That the matter be, and it hereby is, withdrawn from adjudication, until such further action as the Commission may deem appropriate, for the purpose of negotiating a settlement by entry of a consent order.

Commissioner Jones dissenting per attached statement.

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B & L BUILDING MODERNIZATION CORPORATION, ET AL.

*Docket C-2065. Order, Dec. 1, 1972.*

Respondent's petition to reopen proceedings denied on the ground that there are no changed conditions of fact or law nor that the public interest requires reopening these proceedings.

ORDER DENYING PETITION TO REOPEN

On February 14, 1972, respondents petitioned the Commission to reopen the proceedings which lead to a cease and desist order entered October 14, 1971. Such reopening is pursuant to Subpart H of Part 3 of the Commission's Rules of Practice. Section 3.72(b) of such Subpart

provides that the Commission may reopen such proceedings where there are changed conditions of fact or law or the public interest requires such action.

Respondents premised their petition on the assertion that seven of the affirmative order provisions prohibit violations for which the respondents never engaged. Secondly, respondents assert that the Commission has been enjoined from enforcing the rescission provision of Section 226.9 of Regulation Z.\*

Finally, respondents claim that a Commission's holder-in-due-course provision is redundant with the New York State Law.

The Commission finds respondents petition not well taken and it is, therefore, denied. With respect to the respondents contention that seven of the order provisions were not previously violated, this fact, assuming it to be true, is totally unrelated to the issue to be resolved in the petition to reopen, *i.e.* where there are changed conditions of fact or law requiring reopening of the order. Additionally, it has long been recognized that the Commission has authority to impose such order provisions as will not only correct existing violations of law, but will appropriately and reasonably block other avenues of violation. *Federal Trade Commission v. Ruberoid Company*, 343 U.S. 470, 473 (1952).

With respect to the *Freed* case, it should be pointed out that that court enjoined the Federal Trade Commission from enforcing the rescission provisions only with respect to the plaintiffs therein. See, *e.g.*, *Fabbis, Inc.*, Docket No. 8833 (October 30, 1972 [p. 678 herein]).

Finally, the mere fact that New York has a statute which precludes holder-in-due-course status in home improvement credit transactions in no way precludes the Federal Trade Commission from acting in this field.

Therefore, the Commission finds that there are no changed conditions of fact or law nor that the public interest requires reopening these procedures and,

*It is ordered*, That the respondents petition be and is hereby denied.

\**N.C. Freed Company, Inc. v. Federal Reserve Board and the Federal Trade Commission*, Civil No. 1970-40 (N.D.N.Y. 1971).

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## ASH GROVE CEMENT COMPANY

*Docket 8785. Order and opinion, Dec. 5, 1972.*

Order and opinion denying respondent's motion to dismiss the complaint for reasons expressed in prior order and opinion of Oct. 14, 1969. Case remanded to administrative law judge for further proceedings.

## ORDER AND OPINION DENYING MOTION TO DISMISS THE COMPLAINT

This matter is before the Commission upon the certification of the administrative law judge, filed August 31, 1972, of respondent's motion to dismiss the complaint, filed August 16, 1972. Complaint counsel, on August 28, 1972, filed an answer in opposition to respondent's motion. The motion was certified to the Commission pursuant to Section 3.22 (a) of the Commission's Rules of Practice.

In support of its motion respondent argues: first, that this proceeding is illegal because it is an attempt to implement and enforce the Commission's January 3, 1967, Statement of Enforcement Policy with Respect to Vertical Mergers in the Cement Industry which respondent claims is a "trade regulation rule" beyond the statutory authority of the Commission to promulgate; and, second, that by issuing this alleged "trade regulation rule" the Commission has prejudged the material issues and facts in this proceeding thereby rendering a fair trial herein impossible.

Respondent's first argument rests upon its assertion that our January 3, 1967, statement of Policy is a trade regulation rule. This assertion is incorrect. In an earlier interlocutory opinion and order, issued February 6, 1967, in *Lehigh Portland Cement Company*, Docket No. 8680, *Marquette Cement Manufacturing Company*, Docket No. 8685, and *Mississippi River Fuel Corporation*, Docket No. 8657, 71 F.T.C. 1618, we clearly indicated that that Statement of Policy does not have the effect of a trade regulation rule, but is simply a guide intended to instruct the Commission's staff and industry members with respect to the enforcement intentions of the Commission. As we stated:

The Statement sets forth certain criteria which will be followed by the Commission in identifying those vertical acquisitions in the cement industry which will receive the Commission's immediate attention and, if the facts should so warrant, will result in the issuance of complaints challenging their legality. These criteria have been promulgated as part of a general *enforcement* policy for the guidance of the staff and of industry members and their counsel, who might otherwise be uncertain of the Commission's enforcement intentions in this area. The Statement pointedly emphasizes, however, that "the issues in any proceeding instituted by the Commission will be decided on the merits of that case." \* \* \*

\* \* \* \* \*

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The Commission reiterates that the respondents in these cases have in no way been prejudiced by the Statement of Enforcement Policy issued on January 3, 1967. In each case the burden of proving the allegations of the complaint remains with complaint counsel, and has in no degree been shifted to the respondents. In each case, adjudication by the hearing examiner and the Commission will be made on the record, in accordance with the Administrative Procedure Act. In each case, the hearing afforded the respondents will be full and fair, in the same measure as if no Statement of Enforcement Policy had been issued. If the Commission's expertise has been enlarged as a result of the general inquiry conducted by it in connection with formulating the Statement of Enforcement Policy, that fact neither prejudices the respondents' rights nor constitutes any reason for dismissing these proceedings. Respondents are entitled to have their cases adjudicated by Commissioners with open minds, not empty ones. \* \* \* (71 F.T.C. 1619, 1621-22).

We see no reason to dwell upon respondent's second contention—alleged prejudgment on the part of the Commission because of the January 3, 1967 Statement of Policy. It already has been before us once before. *Ash Grove Cement Company*, Docket No. 8785 (opinion and order, October 14, 1969 [76 F.T.C. 1076]). Respondent ought not to have been permitted to raise it again. And, it certainly should not have been certified to the Commission. Respondent's argument is rejected for the reasons expressed in our previous opinion. Accordingly,

*It is ordered*, That respondent's motion to dismiss the complaint be, and it hereby is, denied.

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

Commissioner MacIntyre concurring in the result.

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### AMERICAN GENERAL INSURANCE COMPANY

*Docket 8847. Order and opinions, Dec. 5, 1972.*

Order and opinion vacating the initial decision and remanding the case for further proceedings.

#### STATEMENT

By MACINTYRE, *Commissioner*:

It is my view that the decision of the majority certainly should have provided for the receipt of further information, hearings and consideration by the parties, the administrative law judge and the Commission respecting applicable state laws and their implementation as they would relate to an acquisition or merger such as the one involved here. I would be in concurrence with the decision of the majority to that extent. The sole and threshold question before us at this time is one of jurisdiction.

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## Statement

The question as to whether the Federal Trade Commission has jurisdiction so as to permit it to enforce Section 7 of the Clayton Act, as amended (15 U.S.C. § 18), can be answered only after considering another Act of the Congress, the McCarran-Ferguson Act (15 U.S.C. §§ 1011-1015, March 9, 1945, c. 20, §§ 1 & 2, 59 Stat. 33, and July 25, 1947, c. 326, 61 Stat. 448), and the state regulation of insurance business as that regulation relates to acquisitions and mergers. The administrative law judge, in his initial decision filed in this case March 7, 1972, quite ably and clearly set forth and analyzed those applicable provisions of federal and state law and what various states have done toward implementing applicable state law.

It is clear that Congress through its action has intended and provided that no federal law, outside of that dealing specifically with the business of insurance and the Sherman Act, so far as it relates to boycott, coercion or intimidation, shall be construed as applicable to the business of insurance to the extent that such business is regulated by state law. Here respondent, American General Insurance Company, a multiple-line property-liability and life insurance company domiciled in the State of Texas, on or before July 1, 1969, merged with Fidelity and Deposit Company of Maryland, a property-liability insurance company specializing in the writing of fidelity and surety bonds, which was domiciled in the State of Maryland. On June 17, 1971, the Federal Trade Commission issued its complaint alleging this merger to be in violation of Section 7 of the Clayton Act, as amended, for the reason that the alleged effect of the merger "may be substantially to lessen competition or to tend to create a monopoly in the business of underwriting fidelity and surety bonds in the United States and in various state and other geographic markets \* \* \*."

Prior thereto, the State of Maryland enacted legislation, the purpose of which is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the McCarran-Ferguson Act. Also, the State of Texas enacted similar legislation under the terms of which any merger of insurance companies tending to prevent or lessen competition would be illegal. In view of these statutory provisions, the respondent submitted to the Insurance Commissioners of the States of Texas and Maryland the question as to whether they would approve the proposed merger of the American General Insurance Company and the Fidelity and Deposit Company of Maryland. The Insurance Commissioners of those two states after hearings issued their orders approving the proposed merger. Thereupon, the merger was consummated. Those actions of the States of Texas and Maryland and their Insurance Commissioners are in accord

with laws enacted in the past two and one-half years by approximately 32 states which have adopted in one form or another, the Model Insurance Acquisitions and Mergers Act sponsored by the National Association of Insurance Commissioners. Moreover, as in Maryland, respondent, American General Insurance Company, disclosed to the Texas Insurance Commissioner and to the Insurance Commissioners in each of the other 48 states in which it was licensed, the terms of its proposed merger with Fidelity and Deposit. All of these states maintain continuing state supervision of the merged company and the competitive effects thereof as provided by their state laws regulating the business of insurance.

There is no determination and it does not appear from the record before us that a determination can be made whether the merger involved here is in violation of the law of any state. Likewise, there is no determination, if indeed the evidence of record would permit one, which I doubt, that any state is unable to deal with the problem here through the exercise of its licensing powers. Moreover, it is unclear from the opinion of the majority in this case and the record before us whether any "merger activity" involving this merger has taken place outside the territorial limits of the States of Texas and Maryland. In raising that question, I hasten to distinguish the term "merger activity" from the term "effects of the merger." I do this because it seems to me that in our consideration of the problem before us, we should draw a distinction between the activity of disseminating false and misleading advertising such as was involved in the *Travelers* case, 362 U.S. 293 (1960), where the "activity" of disseminating false and misleading advertising occurred throughout various states from the "activity" of price fixing such as occurred in the *Southeastern Underwriters* case, 322 U.S. 533 (1944). In the latter, the price fixing "activity" occurred in what appears to be but perhaps a few states. However, the effects of the activity encompassed the area of various additional states. If we were to make this distinction we would be in a better position to determine whether the situation in the case before us is more analogous to the situation which was involved in the *Southeastern Underwriters* case with respect to antitrust policies than was the *Travelers* case with respect to application of laws and policies against false and misleading advertising by a mail order insurance business in interstate commerce.

Perhaps what I am trying to say is simply this: We should know and judge whether the situation before us for decision is one within our jurisdiction because (1) the "activity" complained of is extra-territorially beyond the reach of the states within which such "activity"

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occurred or whether (2) it is within our jurisdiction on the basis of such activities "effects" in various additional states beyond those where the activities occurred.

The decision of the Commission also has not clearly demonstrated that Congress has not provided for this distinction through its enactment of the McCarran-Ferguson Act. Further, the Commission's decision fails to draw a distinction between the legal effects of "activities" and "effects" of the merger here so as to demonstrate that aspects comparable in the *Southeastern* case are not relevant. I am troubled because the decision of the Commission in this case has not answered these questions. We need to have satisfactory answers by the Commission and the courts so as to permit the pursuit and the effectuation of an antitrust policy consistent with the Congressional intent.

## OPINION OF THE COMMISSION

BY DENNISON, *Commissioner*:

This matter is before the Commission on appeal by counsel supporting the complaint from the initial decision of the administrative law judge dismissing the matter for want of jurisdiction.

On June 17, 1971, the Federal Trade Commission, after careful consideration and deliberation, found (1) it had reason to believe the respondent had violated Section 7 of the Clayton Act, as amended (15 U.S.C. 18), by its merger with Fidelity and Deposit Company of Maryland; (2) it had jurisdiction to proceed against the respondent; and (3) that such proceeding was in the public interest. By his decision, filed March 7, 1972, the administrative law judge found, without benefit of admissions or evidence, the Commission lacked jurisdiction to rule on this merger because of the McCarran-Ferguson Insurance Regulation Act (15 U.S.C. 1011-15) (hereinafter referred to as the McCarran Act).

The issue of this appeal is succinctly stated as: Does the McCarran Act bar all Commission action where there exists state regulation? The resolution of this issue turns on either of two touchstones: (1) the extraterritorial concern of a state's insurance matters, and (2) the meaning of the term "business of insurance" as employed by the Congress.

## THE MCCARRAN-FERGUSON ACT

The McCarran Act was a reaction to the *South-Eastern Underwriters* case<sup>1</sup> which reversed earlier case law<sup>2</sup> and held that insurance

<sup>1</sup> *United States v. South-Eastern Underwriters Ass'n.*, 322 U.S. 533 (1944).

<sup>2</sup> *Paul v. Virginia*, 8 Wall. 168 (1869).



transactions were subject to Federal regulation under the commerce clause. The subject of the *South-Eastern Underwriters* litigation was the antitrust implications of the rate-making combinations prevalent in the insurance industry. The year following the Supreme Court decision Congress passed the McCarran Act which provides that after January 1, 1948, the Federal Trade Commission Act shall apply to the business of insurance "to the extent that such business is not regulated by State law."<sup>3</sup>

Therefore, it would seem that for the statute to become operative in a given situation, affirmative findings on the following questions need be made: (1) whether the particular business is that of insurance, *i.e.*, whether the industry acts as a risk bearer for a premium,<sup>4</sup> (2) whether the business activity challenged relates to the act of risk bearing, (3) whether the state has regulatory authority to govern the challenged activity, and (4) whether the state's regulation is adequate.

There is no question the respondent and the acquired company are insurance companies and that fact is acknowledged.<sup>5</sup>

#### THE BUSINESS OF INSURANCE

The second issue is whether the challenged activity (the merger) relates to the "business of insurance." Section 2(b) of the McCarran Act preempts Federal jurisdiction only to the extent that the business of insurance is regulated by state law. In *Securities and Exchange Commission v. National Securities, Inc., et al.*,<sup>6</sup> the Supreme Court focused upon the question of what encompassed the "business of insurance" as used in Section 2(b). In that action the SEC brought suit against the defendant-insurance company alleging violation of Section 10(b) of the Securities Act of 1934 in connection with fraudulent misrepresentations in proxy statements sent to shareholders. The defendant questioned the SEC's jurisdiction citing the McCarran Act and noting the fact the Arizona Director of Insurance had approved the merger. The Supreme Court, reversing the circuit court, held that:

The McCarran-Ferguson Act was an attempt to turn back the clock, to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation. As the House Report makes clear, "[i]t [was] not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the Southeastern Underwriters Association case." HR Rep No. 143, 79th Cong. 1st Sess, 3 (1945).

<sup>3</sup> Section 2(b) of the Act.

<sup>4</sup> *Epmeier v. United States*, 199 F. 2d 508, 510 (1952).

<sup>5</sup> Count 2 of the complaint; Initial Decision, Findings 1 and 2.

<sup>6</sup> 393 U.S. 453 (1969).

Given this history, the language of the statute takes on a different coloration. The statute did not purport to make the States supreme in regulating all the activities of insurance companies; its language refers not to the persons or companies who are subject to state regulation, but to laws "regulating the business of insurance." Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the "business of insurance does the statute apply." Certainly the fixing of rates is part of this business; that is what South-Eastern Underwriters was all about. The selling and advertising of policies, *FTC v National Casualty Co.* 357 US 560 (1958), and the licensing of companies and their agents, cf. *Robertson v. California*, 328 US 440 (1946), are also within the scope of the statute. Congress was concerned with the type of state regulation that centers around the contract of insurance, the transaction which *Paul v. Virginia* held was not "commerce." The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the "business of insurance."<sup>7</sup>

The Court has defined the Congressional use of the term "business" as explicitly meaning the *activity* or *practice* of the companies comprising the insurance industry which centers around the contract of insurance.<sup>8</sup> Since the challenged merger does not affect the contractual relationship of the companies to their insureds, it is not a part of the "business of insurance" as that term has been interpreted.

Respondent argues, however, that the merger is one of the "other activities of insurance companies that relates so closely to their status as reliable insurers" that it too must be considered a part of the business (practice) of insurance. Two factors are relevant to this point. First, the merger prohibited by the Clayton Act is not so closely related to the business of insurance as to affect its reliability, *vis-a-vis* its policyholders. The thrust of Section 7 is concerned with the interests of the public at large in the protection and preservation of competition (not with the more limited interest of policyholders in the security of their investment). If the financial strength of one of the merged companies was so precarious as to jeopardize the policyholders of the other, the state concern for the protection of policyholders would be exclusive. Second, neither the Clayton Act nor the Commission's actions in any way interfere with a state's regulatory scheme. The existence of the Clayton Act or the Federal agency do not preclude Maryland or Texas from protecting the private interests of the

<sup>7</sup> *Id.* at 459-60.

<sup>8</sup> Note, *Insurance Mergers and the Clayton Act*, 78 Yale L.J. 1404, 1411 (1969).

respondent's policyholders. "The paramount federal interest \* \* \* [in halting economic concentration] is in this situation perfectly compatible with the paramount state interest in protecting policyholders."<sup>9</sup>

The enterprise aspect of the "business of insurance" has often been distinguished from the activity aspects. For example, in the trademark area, notwithstanding the McCarran-Ferguson Act and the fact the Texas Board of Insurance Commissioners had authority to prevent infringing trade names, the circuit courts held the Federal Trademark Act (15 U.S.C. §§ 1051-1127)<sup>10</sup> was controlling.<sup>10</sup>

Consequently, we find that the business of insurance for which regulation by a state may preempt Federal jurisdiction does not include mergers or other combinations of enterprises engaged in the activity of selling insurance.

#### LIMITATIONS ON STATE REGULATION

The Commission has previously reviewed the jurisdictional perimeters of state action under the McCarran Act. In an earlier case, the Commission stated:

In the judgment of the [administrative law judge] the Commission's jurisdiction over the commercial activities of insurance companies is contingent upon an absence of State regulatory legislation. Implicit in that view is the proposition that the sum of jurisdiction—State and Federal—over commerce is no more than the aggregate of the several State jurisdictions. We need scarcely point out that such a concept not only neglects the exclusive Federal jurisdiction over commerce among the States, conferred by Section 3 of Article 1 of the Constitution of the United States, but is inconsistent with the fundamental constitutional doctrine of the separation of State and Federal powers.<sup>11</sup>

"No regulation of the proposed acquisition \* \* \* under [state] statutes can be adequate or effective because of territorial limitations of [the state's] regulation."<sup>12</sup> This finding by the district court in a Section 7 case concisely denotes the limits of the McCarran Act.

In the case now under consideration neither Texas nor Maryland (the home states of the acquiring and acquired companies) are in a position to determine the implications or impact of this merger on the national competitive condition of the insurance industry. Indeed, it is possible for an approving state's interest to be contrary either to the national interests or to problems in the insurance industry nationally.

<sup>9</sup> *S.E.C. v. National Securities*, 393 U.S. at 463.

<sup>10</sup> *Sears, Roebuck & Co. v. All States Life Ins. Co.*, 246 F. 2d 161 (5th Cir. 1957), cert. denied, 355 U.S. 894. See also, *United States v. Sylvania*, 192 F. 2d 96 (7th Cir. 1951), cert. denied, 342 U.S. 943 (federal mail fraud statute).

<sup>11</sup> *The American Hospital & Life Insurance Company*, 52 F.T.C. 1100, 1109 (1956).

<sup>12</sup> *Maryland Casualty Co. v. American General Insurance Co.*, 1964 Trade Cases ¶ 71,188 (D.D.C. 1964).

In determining the interest the states were to preempt under the McCarran Act, the legislative history makes clear Congress did not intend one state, even the insurance company's home state, to control those aspects of its business which affects many states or an industry as a whole. Senator Ferguson, one of the sponsors, stated: "This bill would not permit such an agreement, because no State law could allow a monopoly to exist outside the State."<sup>13</sup> This position is logical; the interests of a single state are more parochial and those considerations of the national competitive condition of the insurance industry may be considered as somewhat irrelevant by a particular state. The Supreme Court in a Commission matter appears to embrace this limited application of the Act.<sup>14</sup>

While not a merger case, the *Travelers'* Court drew into question the nationwide competitive situation of an industry. *Travelers* concerned the advertising practices of a mail order insurance company sending advertisements to all parts of the country. The facts indicated that *Travelers* was licensed in the States of Virginia and Nebraska, and that Nebraska's insurance law prohibited unfair and deceptive practices in their conduct of the business of insurance in "any other state, territory \* \* \* country or district." The court of appeals reversed the Commission's cease-and-desist order, finding the McCarran Act had preempted Federal jurisdiction.<sup>15</sup> The Supreme Court in reversing that decision stated:

[W]e are asked to hold that the McCarran-Ferguson Act operates to oust the Commission of jurisdiction by reason of a single State's attempted regulation of its domiciliary's extraterritorial activities. But we cannot believe that this kind of law of a single State takes from the residents of every other State the protection of the Federal Trade Commission Act. In our opinion the State regulation which Congress provided should operate to displace this federal law means regulation by the State in which the deception *is practiced and has its impact* (emphasis added).<sup>16</sup>

Since, in the case before us the alleged illegal restraint "is practiced and has its impact" in every state; upon the competitive status of the industry as a whole, the regulation by Texas and Maryland cannot deny the protection of the Clayton Act and the Federal Trade Commission to citizens of the other forty-eight states. The consideration of this merger by the regulators of insurance in Texas and Maryland, no matter how thorough,<sup>17</sup> is insufficient to protect all citizens of this country from the evil which may result from the merger of two national

<sup>13</sup> 91:2 Cong. Rec. 1481 (1945) (Remarks of Senator Ferguson).

<sup>14</sup> *Federal Trade Commission v. Travelers Health Assoc.*, 362 U.S. 293 (1960).

<sup>15</sup> 262 F. 2d 241 (8th Cir. 1959).

<sup>16</sup> *Id.* at 296.

<sup>17</sup> 362 U.S. at 297-98.

insurance companies. We therefore not only find that neither Texas nor Maryland have regulations effectively reviewing the effects of insurance mergers on the industry as a whole, but find it impossible for any state to have such regulation.

#### CONCLUSION

Immunity from the antitrust laws is not lightly implied.<sup>18</sup> The only antitrust immunity found in the McCarran Act is section 2(d) which provides that they shall not be applicable to the extent that the insurance business is regulated by state law. The Commission is bound to carefully scrutinize any alleged exemption or immunity to the laws it is charged to enforce. Should the illegal activity fall without the exemption or immunity, the Commission not only can, but must act. Here the McCarran Act does not give, nor was it intended to give, the immunity asserted by respondent and found by the administrative law judge. As the Supreme Court noted in reviewing the limited immunity provided by the McCarran Act:

It suffices to say that even the most cursory reading of the legislative history of this enactment makes it clear that its exclusive purpose was to counteract any adverse effect that this Court's decision in *United States v. South-Eastern Underwriters Assoc.*, 322 U.S. 533, might be found to have on State regulation of insurance.<sup>19</sup>

The merger activity complained of in this Section 7 matter was not one of the "adverse effects" of the *South-Eastern Underwriters* case. Consequently, we find that neither the language of the statute nor the legislative history indicate that the Commission has been preempted from challenging this merger.<sup>20</sup> Accordingly, the initial decision is reversed. An appropriate order remanding this matter to the administrative law judge for further hearings not inconsistent with the above accompanies this opinion.

#### ORDER VACATING INITIAL DECISION AND REMANDING CASE TO ADMINISTRATIVE LAW JUDGE

This matter having come on to be heard upon the appeal of counsel supporting the complaint from the administrative law judge's initial decision filed March 7, 1972; and

<sup>18</sup> *United States v. Philadelphia National Bank*, 374 U.S. 321, 348 (1963).

<sup>19</sup> *Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 413 (1954).

<sup>20</sup> Inasmuch as we found that (1) merger activity was not a part of the business of insurance, as that term is used in the McCarran Act, and (2) state regulation could not have extraterritorial effect, it is unnecessary for us to determine the efficacy or adequacy of the state regulatory agencies herein involved. See, *Ohio AFL-CIO v. Insurance Rating Board*, 451 F. 2d 1178 (6th Cir. 1971), *cert. denied*, 409 U.S. 917 (1972).

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The Commission, for the reasons stated in the accompanying opinion, having determined that said initial decision should be vacated and the case remanded to the administrative law judge;

*It is ordered*, That the aforesaid initial decision be vacated and set aside.

*It is further ordered*, That this case be remanded to the administrative law judge for further proceedings not inconsistent with the views expressed in the aforesaid opinion; That after such proceedings have been terminated the administrative law judge shall forthwith make and file a new initial decision based on the record as then constituted.

Chairman Kirkpatrick not participating. Commissioner Dixon concurs only in that section of the opinion entitled "Limitations on State Regulation," and for that reason, concurs in the order vacating the initial decision and remanding the case to the administrative law judge. Commissioner MacIntyre's position is that the decision of the majority certainly should have provided for the receipt of further information, hearings and consideration by the parties, the administrative law judge and the Commission respecting applicable state laws and their implementation as they would relate to an acquisition or merger such as the one involved here. He would concur with the decision of the majority to that extent and for the reasons set forth in his separate statement.

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JAMES CARPETS, INC., ET AL.

*Docket 8876. Order and opinion, Dec. 11, 1972*

Order and opinion denying interlocutory appeal of denial of respondents' motion to stay complaint counsel from communicating with respondents' customers.

OPINION OF THE COMMISSION

This case is on an interlocutory appeal from an administrative law judge's order dated August 8, 1972, denying respondents' motion to stay complaint counsel from communicating with respondents' customers pending conclusion of this case before the Commission. The administrative law judge found that the letters sent by complaint counsel to respondents' customers, which respondents complain of, are entirely in accordance with the enforcement procedures prescribed in the Commission's policy for enforcement of the Flammable Fabrics Act (36 Fed. Reg. 21544 (1971)). In our opinion, complaint counsel's letters to respondents' customers not only comply with the Commission's enforcement policy but are necessary in order for the Commis-

sion to effectively carry out its responsibilities under the Flammable Fabrics Act to protect the public against carpeting which may be dangerously flammable.

Respondents object to complaint counsel's stating in these letters that Commission's laboratory has conducted tests which disclose that styles of carpeting which are involved in this proceeding do not meet the applicable standard under the Flammable Fabrics Act. Respondents do not contend that such tests were not conducted or that they did not have the results indicated. Accordingly, complaint counsel should be allowed to inform respondents' customers of these tests, in order to alert them that the continued sale of the carpeting may violate the law.

Respondents also complain of complaint counsel's statement in these letters that the sale of the carpeting "is a violation of the Flammable Fabrics Act." We believe that this statement purports to reflect only the opinion of the complaint counsel since the letters are signed by complaint counsel in his capacity as complaint counsel.

#### ORDER DENYING INTERLOCUTORY APPEAL

Respondents having filed an interlocutory appeal from the order of the administrative law judge dated August 8, 1972, denying respondents' motion to stay complaint counsel from communicating with respondents' customers; and

The Commission having considered said appeal and the reply of complaint counsel in opposition thereto and having determined for the reasons stated in the accompanying opinion that the appeal should be denied:

*It is ordered*, That respondents' appeal from the administrative law judge's order dated August 8, 1972, be and it is hereby denied.

#### JAMES CARPETS, INC., ET AL.

*Docket 8876. Order, Dec. 18, 1972.*

Order denying recommendation of administrative law judge that Commission seek enforcement of subpoena issued to third party and returning matter to the administrative law judge for further consideration of such action as may be deemed appropriate in the circumstances.

#### ORDER

The administrative law judge having issued on July 6, 1972, a subpoena *duces tecum* to Cornelius C. Setter, president of Independent Textile Testing Services, Inc. (hereafter referred to as "Independ-

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ent"), and on July 27, 1972, having issued an order denying a motion by Independent to quash said subpoena *duces tecum*; and,

The administrative law judge having certified to the Commission the refusal of Independent to comply with said subpoena *duces tecum* in accordance with the administrative law judge's order of July 27, 1972, and having recommended that the Commission seek court enforcement of said subpoena; and,

The Commission having reviewed the papers referred to in the administrative law judge's certification, namely, the motion to quash filed by Independent, the administrative law judge's order of July 27, 1972, denying said motion to quash, the motion of Independent under Section 3.23 (b) of the Commission's Rules of Practice for a determination allowing an appeal of the administrative law judge's order, the administrative law judge's order of August 16, 1972, denying Independent's request for a determination, and Independent's letter dated September 14, 1972, advising complaint counsel that Independent will not voluntarily comply with the administrative law judge's order of July 27, 1972; and,

The Commission having determined that consideration should also be made as to whether the material sought in the subpoena could not be obtained as expeditiously from respondents:

*It is ordered,* That the recommendation of the administrative law judge that the Commission seek enforcement of the subpoena *duces tecum* issued to Cornelius C. Setter, president of Independent Textile Testing Service, Inc., on July 6, 1972, be, and it hereby is, denied without prejudice.

*It is further ordered,* That the matter is returned to the administrative law judge for further consideration or such action as may be deemed appropriate in the circumstances.



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ADVISORY OPINIONS WITH REQUESTS THEREFOR\*

*Rescission of Advisory Opinion*

**No. 88. Three-way Promotional Plan Set Up by Radio Station and Financed by Participating Retailers and Their Suppliers.**

The Commission has reconsidered and rescinded the subject advisory opinion appearing at 70 F.T.C. 1869. (File No. 633 7022, released July 7, 1972.)

**Product information disclosure on jewelry—"18K H.G.E." stamped alone and together with a tag bearing the words "18K Heavy Gold Electroplate." (File No. 723 7007)**

*Opinion Letter*

AUGUST 18, 1972.

DEAR Mr. WINDMAN:

This is in response to your letter request dated April 21, 1972, for an advisory opinion.

You requested the Commission's views regarding the propriety of using "18K H.G.E." alone stamped on a piece of jewelry, and, alternatively, such use if a tag were attached bearing the words "18K Heavy Gold Electroplate." It is the Commission's understanding that, in con-

\*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.

In the case of requests for advice concerning proposed mergers, the requests together with supporting materials are placed on the public record as soon after they are received as circumstances permit, except for information for which confidential classification has been requested, with a showing therefor, and which the Commission, with due regard to statutory restrictions, its rules, and the public interest, has determined should not be made public. Any advice given under Section 1.3 of the Commission's Rules of Practice concerning proposed mergers, together with a statement of supporting reasons, are published when given.

formity with Rule 22C (3) of the Trade Practice Rules for the Jewelry Industry amended November 17, 1959 (16 C.F.R. 23), the jewelry so represented would be covered throughout with a minimum thickness of 100/1,000,000 of fine gold.

The Commission is of the opinion that use of "18K H.G.E." alone on a piece of jewelry electroplated with gold would raise questions under Section 5 of the Federal Trade Commission Act because purchasers probably would be misled as to the meaning of the description due to use of the abbreviation.

The Commission cannot accept your suggestion that no quality disclosure need be made if the disclosure can only be made by abbreviation. The Commission favors disclosure by manufacturers and retailers of significant information regarding consumer products in order to assist prospective purchasers in making informed purchasing decisions. If the surface of the jewelry is large enough to contain a full disclosure, use of a tag would be an unacceptable substitute for such disclosure on the item itself. On the other hand, if the surface of the jewelry is too small to contain a full disclosure, the maximum reasonable abbreviated disclosure should be set forth on the jewelry item and the full disclosure should be contained on a securely attached tag.

In some circumstances, the failure to make an adequate disclosure could raise a question as to whether Section 5 of the Federal Trade Commission Act had been violated.

By direction of the Commission.

*Letter of Request*

APRIL 21, 1972.

DEAR MR. TOBIN:

This is a request pursuant to Section 1.1 of the Commission's Procedures and Rules of Practice for an Advisory Opinion.

We have been requested by a member not presently engaged in the following practices to advise them as to the propriety of stamping "18K H. G. E." on items of jewelry manufactured for ultimate sale to consumers. The initials are abbreviations for the marking, "Heavy Gold Electroplate." We have been further requested to advise in the event abbreviations are found capable of deception, whether the above abbreviation together with a tag attached affirmatively disclosing the item is "18K Heavy Gold Electroplate" would avoid the possibility of deception.

The Commission in its Advisory Opinion to Parker Pen Company CCH ¶19,802 announced September 30, 1971 stated that abbreviation of the term "electroplate" or "electroplated" to indicate that an item

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is gold electroplate[d] would tend to mislead many consumers who would not know what the abbreviation signified and would, therefore, constitute an unfair and deceptive practice in commerce within the meaning of Section 5 of the Federal Trade Commission Act.

In said opinion, the Commission stated that various industry Guides dealing with the labeling of gold content suggest a policy against abbreviation of the term "electroplate." (See 16 C. F. R. §§ 23.22, 60.2, 202, 226), as well as the most recent Guides for the Watch Industry specifically forbid it (See 16 C. F. R. § 245.3(m)). Finally, in said Opinion, seven abbreviations of the term "electroplate" were found to be inappropriate.

The Commission in an Advisory Opinion issued to the Jewelers Vigilance Committee No. 703 7071 concerning the use of dual quality marks for the unabbreviated term "electroplated" stated in its February 16, 1970 letter:

It (the Commission) has concluded that it cannot give its approval to the proposed dual quality designation on the well-established principle that where a claim is capable of two interpretations, one of which is false, it would constitute a violation of Section 5 of the Federal Trade Commission Act.

Furthermore, in further response to this Advisory Opinion, the Commission stated on April 21, 1970 that the vast majority of consumers would be confused through the use of dual designations and if the Commission approves the use of dual designations, it would have to approve the use of triple, quadruple, etc., designations. The conclusion of said opinion was that the Commission could not approve the use of dual designations because "the use thereof would probably serve to confuse and deceive prospective purchasers in regard to the quality of the products being bought."

In light of the prohibitions against abbreviations found in the Guides and its affirmation by the Parker Pen opinion (*supra*), it may be improper to use the abbreviation, "18K H. G. E." Furthermore, it is believed if a tag were placed on abbreviated merchandise, the possibility of its removal in the line of distribution may circumvent the Guides and Opinions given by the Commission and serve to confuse and deceive prospective purchasers in regard to the quality of the products being bought.

Finally, if the Commission finds use of this abbreviation with a tag attached capable of deception, it is believed when proper stamping of jewelry is impossible without abbreviation, there should be no quality stamped. Those wishing to inform consumers of the quality should attach a tag conspicuously disclosing the quality without abbreviation. In this manner, if the tag were removed from the jewelry, no markings

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would appear; thus, no affirmative quality disclosure would be made conforming to the various Rules and Guides of the Commission.

We do not believe there is any current proceeding of the Commission or any other governmental authority which has officially been instituted which is in any way related to the subject matter of this request. We also do not know of any formal previous proceeding which dealt with this particular terminology.

Furthermore, I would be glad to come to Washington and supply any additional information or technical advice that might be necessary for the Commission to reach a decision on this matter.

Respectfully submitted,

/S/ JOEL A. WINDMAN,  
*General Counsel.*

**Legality Under the Fair Credit Reporting Act of a General Order To Be Signed by the Judges of the U.S. District Court for the District of South Carolina, Authorizing the Furnishing to Lawyers Credit Information Regarding Prospective Jurors Selected in the Charleston, S.C. Metropolitan Area. (File No. 733 7001)**

*Opinion Letter*

SEPTEMBER 21, 1972.

DEAR Mr. URICCHIO:

This is in reference to your letters of February 22 and July 29, 1972, addressed to Secretary of the Commission, in which you requested an advisory opinion on behalf of your client, the Credit Bureau of Greater Charleston, Inc., regarding the legality, under the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, of a general order to be signed by the judges of the United States District Court for the District of South Carolina, authorizing your client to furnish lawyers credit information with regard to prospective jurors selected in the Charleston, South Carolina, metropolitan area.

Your letters indicate that your client is a "consumer reporting agency" within the meaning of Section 603(f) of the Act and that the jury reports to be furnished by your client to attorneys include the addresses, employment history, general credit standings and general character of the prospective jurors and are "consumer reports" within the meaning of Section 603(d) of the Act.

The Commission has carefully considered your request and is of the opinion that a general order of the district court of the type you have described would not be an order of a court having jurisdiction to issue

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such an order within the meaning of Section 604(1) of the Act, and that, therefore, your client may not, consistent with the Act, furnish attorneys with consumer reports in response to such a general order.

With respect to the situation described in your letter of February 22, 1972, the Commission is of the opinion that investigation of prospective jurors by attorneys is not a "business transaction involving the consumer" within the meaning of Section 604(3) (E) of the Act, and, therefore, your client may not lawfully furnish consumer reports to attorneys for jury investigation under the Act, unless, of course, written instructions releasing their consumer reports are obtained from prospective jurors.

The Commission is mindful of the demand on the part of attorneys trying cases to be presented before a jury for a jury reporting service of the type your client proposes to provide. However, in view of the clear and specific statutory proscriptions and congressional policy declarations contained in the Act, the Commission feels constrained to reach a negative conclusion with respect to the course of action proposed by your client.

By direction of the Commission.

*Supplemental Letter Relative to the Request*

JULY 29, 1972.

DEAR MR. FELDEMAN:

You will recall that we spoke over the telephone the other day in connection with this matter and that we had several previous discussions. I wrote to you on February 22, 1972, requesting an opinion as to whether or not reports furnished by the Credit Bureau of Greater Charleston, Inc., to lawyers in connection with prospective jurors would violate any of the provisions of the Consumer Credit Protection Act.

I would like to modify my request for an opinion as to whether or not the Commission would approve of a general Order signed by the judges of the United States District Court for the District of South Carolina, authorizing the Credit Bureau of Greater Charleston, Inc., to furnish lawyers information with regard to prospective jurors selected in the area. As I stated to you over the telephone, the list of jurors are made public approximately ten (10) days before a term of Court begins. This gives the lawyers little, or no time to go out and make independent investigations of the background of the prospective jurors. We also have a peculiar situation in this State in that the voir dire examination is extremely limited. For example, a jury panel is empaneled and sworn in a period of approximately fifteen to forty-

five minutes from the time they are drawn out of the jury box. The voir dire examination of jurors is generally restricted in both Federal and State Courts in South Carolina, and the only questions generally asked, are, "whether or not any of the jurors are stockholders in the corporation", if there is a corporation involved, and "whether or not the prospective juror can give each of the parties a fair and impartial trial", and "whether or not any of the prospective jurors are related either by blood or marriage to either of the parties". In the Federal Court, the judge usually asks whether or not any of the jurors are or have been represented by any of the attorneys involved in the case pending at that time. The reports furnished by the Credit Bureau of Greater Charleston, Inc., in connection with the prospective jurors, were limited to attorneys at law, requesting the reports in the interest of clients having cases pending during that term of Court in which the reports were rendered. The population of Charleston County has grown and there are a number of people who periodically come to Charleston County from other states, which makes such reports necessary as an aid to the selection of fair and impartial jurors, particularly in view of the limited voir dire examination. For example, a prosecutor would not desire a juror who has a bad reputation in the community to sit as a juror in a criminal case. In addition, if a particular store or corporation were being sued, and a juror did business with that store or corporation, the party suing the corporation certainly could not receive a fair and impartial trial with a good customer of the defendant sitting on the jury.

Additionally, there are areas in Charleston County where the people are extremely clannish and it is almost impossible for lawyers to obtain information from neighbors or friends.

It is our view that the Consumer Credit Protection Act and the Fair Credit Reporting Act was intended to protect a consumer in order that he might not be deprived of credit or employment as a result of improper information. If the information were furnished to attorneys concerning a prospective juror, the prospective juror, of course, would not be deprived of any rights or credit. The reports would, of course, be limited to use by attorneys in connection with the selection of prospective jurors. Reports of this nature have been used by attorneys in Charleston County and in the District of South Carolina for some period of time. These reports have also been used by the United States Attorney's Office, the State Prosecutor's Office, defendants' lawyers, and lawyers representing both plaintiffs and defendants in civil suits. We feel that such reports are extremely necessary as an

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aid in selecting fair and impartial jurors, and that the ends of justice would be promoted thereby.

If necessary, the writer and several attorneys of the Charleston Bar, I am sure, would be willing to appear before the Commission in Washington, D.C., and testify, and explain in detail the necessity of such reports.

As you know, the matter is now pending before the judges of the United States District Court for the District of South Carolina, and we would like to have an opinion just as soon as possible.

With kind regards, I am,

Very truly yours,

/S/ PAUL N. URICCHIO, Jr.

*Letter of Request*

FEBRUARY 22, 1972.

GENTLEMEN:

I represent the Credit Bureau of Greater Charleston, Inc.

In this jurisdiction, the voir dire examination of jurors is limited in both the State and Federal Court, and for a great many years credit reports have been used by the vast majority of lawyers in and about the County of Charleston, for the purpose of obtaining information in connection with prospective jurors.

Without these reports, it is almost impossible to obtain information on prospective jurors during the limited period of time from the time the prospective juror is drawn until the time Court commences. In addition, there are a great many transit people in the area and it is extremely difficult to obtain information concerning this type of person. Credit reports on prospective jurors have been made available to attorneys representing both plaintiff and defendants, and to the United States Attorney's office, for a stated sum on each juror. These reports, for the most part, include the addresses, employment histories, and general credit standings of the prospective jurors, and information as to the juror's general character. The reports have been limited to attorneys at law requesting the reports, in the interest of clients, having cases pending, during the term of Court which the reports are rendered.

The Credit Bureau of Greater Charleston does not wish to be in violation of the Consumer Credit Protection Act, and pursuant to Rule 1.1 of the Federal Trade Commission, we are requesting that the Credit Bureau of Greater Charleston, Inc., be authorized to furnish such reports to attorneys for a stipulated fee, and we are further requesting that you furnish us an opinion as to whether or not the



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furnishing of said reports would be in violation of the Consumer Credit Protection Act.

We would appreciate hearing from you at the earliest possible date.

Very truly yours,

/S/ PAUL N. URICCHIO, Jr.

**Legality of Institute's By-Laws—Proposal To Establish Standards and Accreditation Procedures for the Purpose of Improving the Reliability of Field Interviewing Work Done in Consumer Research Projects. (File No. 703 7063)**

*Opinion Letter*

NOVEMBER 21, 1972.

DEAR MR. KINTNER:

This is in response to your letter request for an advisory opinion dated August 2, 1972, regarding the bylaws of the Market Research Institute (MRI).

In brief, MRI proposes to establish standards and accreditation procedures for the purpose of improving the reliability of field interviewing work done in consumer research projects. Manufacturers, retailers, advertising agencies, media representatives and market data researchers would comprise the membership of MRI; however, the Board of Directors probably would be controlled by the market research members. The objective of the association would be to raise the standards of reportage but not to discourage exercise of independent judgements and initiatives by market researchers. This objective would be accomplished by fostering, developing and encouraging use of techniques which would provide reliable and professionally responsible research data and information. Education, guidelines, standards, accreditation, publications and similar methods would be used to upgrade market research so that more reliable data would be gathered and reported.

Based on its understanding of the plan as it is outlined above and detailed in your letter, it is the Commission's opinion that putting the plan into effect, in and of itself, would not be violative of Commission administered law.

The Commission is of the view, however, that great care must be used in implementing the plan to avoid its becoming illegally coercive either on market data researchers or the users of information those researchers provide. Special care must be used to prevent the program

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being used to boycott, to establish a blacklist, or to intimidate particular researchers or any other association members.

Participation by members must be completely voluntary and membership in the association must be reasonably available to all eligible for such membership.

Lastly, you are advised that the Commission intends to examine the actual operation of the program after a reasonable period of time to determine whether anticompetitive effects have resulted from implementation of the plan.

By direction of the Commission:

*Letter of Request*

August 2, 1972.

DEAR MR. TOBIN:

On behalf of a group of clients identified at the close of this letter, we submit this request for advisory opinion pursuant to Rule 1.1 of the FTC Procedures and Rules of Practice. This advisory opinion request relates generally to the formation of a trade association, the Market Research Institute, and its proposed program of standards and accreditation for the field of consumer market research activities.

#### Earlier Requests for Advisory Opinion

On November 25, 1969, we submitted a request for advisory opinion on behalf of the same client group, but involving a different form of proposed bylaws and proposed standards, accompanied by extensive legal analysis supporting the request. The Commission, by letter of February 2, 1970, declined to issue an advisory opinion "because an informed decision cannot be made since the effects of the proposed plan cannot be predicted without an extensive investigation."

On April 20, 1970, a renewed request for advisory opinion was made. Guided by the Commission's comments and opinion rendered on an analogous program, FTC Advisory Opinion No. 350, our request embodied modified bylaws and standards assigned to stress more clearly the voluntary and nondiscriminatory purpose and operation of the Institute and its programs. At that time, extensive documentation was provided to stress the nature of the industry practices, problems and needs. That request was not granted by the Commission. In its letter of July 27, 1970, the Commission said that "no advisory opinion will be rendered thereon since the competitive effects of your clients' proposed program cannot be predicted."

Subsequent Commission Developments Forming the Basis of This Request

Since our last request was refused, the Commission clarified its position on standards making and certification in response to a request for advisory opinion from the American National Standards Institute (File No. 713-7002, March 8, 1971\*, FTC News Release, March 22, 1971) and at that time expressed its sympathy "to the growing interest in the development of plans for self-regulation which will avoid the strictures of the antitrust laws." Chairman Kirkpatrick publicly expressed his views on industry self-regulation in a speech before the New York State Bar Association on January 28, 1971 (FTC News Release, July 28, 1971). The former General Counsel Martin addressed this issue in a speech before the American National Standards Institute (FTC News Release, June 24, 1971). Executive Director Mezines dealt with the topic in a speech before the American Society of Association Executives on August 23, 1971. General Counsel Dietrich spoke to related issues in a speech before the International Law Section of the 1972 Mid-America World Trade Conference (FTC News Release, March 1, 1972). On April 20, 1972, the Commission appointed a task force on industry self-regulation (FTC News Release, April 20, 1972), and released its Preliminary Staff Study on Self-Regulation and Accreditation.

In summary, there has been growing public recognition by the Commission over the past year of the procompetitive role which standards may and can play in the United States economy, and a detailed articulation of the kinds of safeguards needed to comply with the letter and spirit of the federal antitrust laws.

In this climate of an enhanced Commission awareness of the procompetitive role of standards and accreditation, our client group has revised the bylaws of its proposed Institute with a view to meeting all conceivable objections reasonably capable of being met at the inception of any such program. The revised program on its face is designed to meet the necessary criteria described by Commission and individual Commission officials, for the reasons we elaborate below.

The Market Research Institute and its proposed program

In the consumer market research industry, the role of field personnel—interviewers and their supervisors—is one of surveying segments of the consumer public with respect to any particular market research program. This interviewing function is commonly contracted

\*See 78 F.T.C. 1628.

out to independent organizations or field personnel. A major problem area in this industry is the relative unreliability of the work in the field—ranging from improper interviewing to outright failure to conduct interviews at all, filling in falsified reports—and generally shoddy conduct which independent market research organizations and corporations with their own market research departments endeavor to minimize through post-survey verification practices. The extensive abuses which exist in field interviewing were documented in our letter request of April 20, 1970. A number of concerned manufacturer-retailers and market research interests determined that the most constructive way to deal with these problems was to help form an association of market research organizations and national manufacturers and retailers who rely on market research to test-market products and services together with representation from the Market Research Trade Association and communications media and advertising agencies. The purpose of this membership association would be to bring to the field of market research a level of standards, education, and accreditation which would upgrade the quality and reliability of the field activities which effective market research requires. In short, the membership organization and its purpose is one where competitive forces are distinctly secondary if existent at all.

Stated differently, the active members of the Institute, pursuant to the bylaws, are organizations which share a common interest in the quality and reliability of market research, an interest which benefits the consuming public to the extent that decisions to redesign or to add or drop products or services are based in no small measure on the accuracy of field survey activities.

This membership association provides the opportunity to publish and disseminate standards of performance which market researchers or industry clients may specify—or may not specify—as they wish. Field interviewers and the like may have an opportunity to be accredited. Educational programs and literature can be implemented to disseminate the best available know-how on the ways this category of work can be performed most effectively and efficiently. The entire field of market research stands to benefit from this proposed program.

However, before the commitment of time and expense to such an ambitious program, the client group desires the qualified approval of the program by the Commission with respect to the documentary basis of the membership association reflected in the proposed bylaws. This is the narrow scope of the advisory opinion request.

Antitrust safeguards built into the proposed bylaws provide a reasonable basis for a qualified, favorable advisory opinion.

The bylaws of the Market Research Institute (Appendix A) as now revised make a change in the Board of Directors "control" over the nonprofit organization. Whereas the prior submission of proposed bylaws provided for a Board of Directors weighed in favor of manufacturer-retailer users of market research services (manufacturer-retailers), the revised bylaws provide for greater representation on the Board of Directors by the outside industry members (market research organizational interests), as is the more conventional trade association practice. The number of members of the Board of Directors has been reduced from 19 to 11 (Art. IV § 4: 1) and the composition of the Board has been modified as follows:

Category	Board of directors under prior submission	Board of directors under present submission
Manufacturer-retailer members	11	3
Advertising agency members	2	1
Communications media members	2	1
Market research company members	3	5
Market Research Trade Association	1	1
Total	19	11

Comparable bylaw changes may now be effected by two-thirds of all active members (Art. X), rather than two-thirds of the manufacturer-retailer members.

We emphasize here the built-in antitrust safeguards of a membership association Board of Directors composed of industry competitors (market research companies) as well as customer-users of the industry service and organizations with in-house market research capability (manufacturers, retailers, advertising agencies, communications media) as constituting a composition which is highly favorable in assessing the antitrust safeguards capable of being built into a trade association organization. Trade associations presenting the greater area of antitrust responsibility are obviously those composed of competitors alone, whose actions could adversely affect customers or suppliers or intertype competition. Here the field survey interests are represented on the Board, together with organizations which engage in the commerce of market research, or which use the services of the industry.

A key section of the bylaws (Art. IX) deals topically with the safeguards which must be built into any standards/accreditation program of the Institute. These safeguards are designed to reflect the

most current areas of concern expressed by the Commission through its formal actions, as well as through informal expression by individual Commission members and staff. Specifically, the bylaws expressly provide safeguards to ensure that any standards/accreditation program is voluntary, is nondiscriminatory in its application to members and nonmembers, involves procedural public notice of proposed standards, with an opportunity to be heard, provides for reasonable fees and for procedural safeguards with respect to any form of remedial action for failure to comply, including the affirmative opportunity for arbitration.

#### Standards

The proposed standards (Appendix B) remain unchanged from the prior submission. While these standards reflect the current thinking on fairness and reasonableness of industry field practices designed to ensure truthful results and responsible survey techniques, nevertheless these proposed standards would not be implemented in all events until these proposed standards receive the publicity and opportunity for industry comment and response, pursuant to the bylaws (Art. IX § 9:1).

The program in its present form raises fundamental questions about the realistic availability of the advisory opinion procedure to proposed business conduct which includes the following considerations:

(a) generally comparable business conduct was the subject of a favorable, albeit qualified, Advisory Opinion No. 150;

(b) the underlying documents upon which a favorable advisory opinion is based in themselves contain the built-in limitations on business behavior which the Commission itself has espoused in its response to the American National Standards Institute, and through staff speeches and papers;

(c) any advisory opinion is limited by the nature of the proposal itself. The Commission need assume only that the program would be implemented and carried out as it is proposed;

(d) if the Commission refuses to give a favorable, though qualified advisory opinion on this program which, as presented, contains no antitrust defects or areas of antitrust vulnerability, then the advisory opinion program is illusory to the extent that, realistically, it is simply not available in the category of business conduct here in issue.

The issue, therefore, is whether the Commission is now willing, in light of the knowledge which it has accumulated involving trade association standards and accreditation to grant a qualified favorable advisory opinion confined to the program as presented, with built-in

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antitrust safeguards reflecting current knowledge of standards and accreditation. We submit the answer should be in the affirmative and an action to this effect is solicited.

Respectfully,

ARENT, FOX, KINTNER, PLOTKIN & KAHN.

By /S/ EARL W. KINTNER.

By /S/ JACK L. LAHR.

By /S/ RUTH P. ROLAND.

*Attorneys for a Manufacturers Marketing Research Group  
composed of:*

Beech-Nut, Inc.	Miles Laboratories, Inc.
Carter Products, Inc.	Mobil Oil Corporation
Chesebrough-Pond's Inc.	Noxell Corporation
Coca Cola Company, U.S.A.	Sears Roebuck & Company, Inc.
Johnson & Johnson	Scott Paper Company
S. C. Johnson & Son, Inc.	Warner-Lambert Pharmaceutical Co.
Kraft Foods Corporation	Xerox Corporation
Thomas J. Lipton Inc.	
The Mennen Company	

APPENDIX A

BYLAWS OF MARKET RESEARCH INSTITUTE

ARTICLE I. CORPORATION, OFFICES

1:1 The name of the corporation is MARKET RESEARCH INSTITUTE, and is a non-profit membership corporation.

1:2 The corporate offices of the Institute shall be established in such city or cities of the United States and elsewhere as the Board of Directors may from time to time determine.

ARTICLE II. PURPOSES AND OBJECTIVES

2:1 The purposes and objectives are: to foster, develop and encourage the development of reliable and professionally responsible consumer market research data and information through educational programs, guidelines, standards and criteria, publications and related activities, which will serve to foster and improve the quality and service of market research in the United States.

ARTICLE III. MEMBERSHIP

3:1 *Active Membership.* Business organizations including corporations, firms, or partnerships, engaged in (a) consumer goods or services manufacturing, supply or retailing activities, (b) market research organizations, (c) advertising agencies, (d) communications media, having a business interest in consumer market research are eligible for active membership in the applicable category (a)-(d) set forth above.

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3:2 *Associate Membership.* Corporations, organizations, firms and individuals which, though not engaged in consumer market research, are nevertheless interested in consumer survey education and training, shall be eligible for associate membership. This shall include entities and persons in federal, state or local government, public opinion research organizations and university level schools and personnel thereof.

3:3 *Active Member Representatives.* Each active member shall designate a person to be known as the active member representative who shall represent such active member in the affairs of the Institute. An active member representative shall be an official or employee of the active member and such designation shall remain in effect unless revoked by the active member or unless the active member is more than 90 days in arrears on membership dues.

3:4 *Voting.* Each active member representative in good standing shall be entitled to one vote in the affairs of the Institute as provided by these bylaws. Associate members are entitled to the same rights and privileges as active members, except for the right to vote.

3:5 *Membership Obligations.* Any party accepting membership in the Institute shall be deemed by doing so to have agreed to be bound by the bylaws and shall not represent compliance with Institute standards or accreditation unless this is a fact.

ARTICLE IV. BOARD OF DIRECTORS

4:1 *Members.* The Board of Directors shall be eleven in number composed of active member representatives in good standing elected from the following active membership categories by the active members of each respective category:

<i>Category:</i>	<i>Number</i>
Manufacturer-retailers -----	3
Advertising agencies -----	1
Communications media -----	1
Market research organizations -----	5

In addition, the Market Research Trade Association shall have the right to appoint one representative to the Board of Directors, which representative shall have the same rights and privileges as all other directors including the right to vote. In the event that such representative is not appointed following reasonable notice, the Board of Directors shall select a person employed as a supervisor of market research interviewers in lieu thereof and with the same rights and privileges.

4:2 *Election and Term.* The term of office for Directors representing active members in good standing shall be three years, until a successor is elected, except that during the initial election one manufacturer-retailer active member representative shall be elected, respectively for a term of one, two and three years and one market research organization active member representative shall be elected for a term of one year, two such members for two years and two such members for three years. No active member shall be represented on the Board of Directors for more than two consecutive terms.

4:3 *Meetings.* Meetings of the Board of Directors shall be held at least annually, at a time and place designated by the Board of Directors. Special meetings of the Board of Directors may be called by the Executive Secretary or by any three members of the Board.



4:4 *Notice.* Notice of the time, place and agenda of meetings of the Board of Directors shall be mailed to each Director at least 15 days in advance of the meeting date, except that by consent of a majority of the Directors, for good cause, special meetings may be held without 15 days notice.

4:5 *Quorum, Conduct of Business.* A quorum for the transaction of business shall be a majority of the Directors in office actually present at the meeting of the Board of Directors. There shall be no proxy votes at a Board of Directors meeting. In periods between meetings, the Board of Directors may take action pursuant to a mail referendum of all Directors.

4:6 *Interim Vacancies.* If the active member representative resigns, dies or otherwise withdraws from the Board of Directors following election thereto, then the active member so represented shall have the power to designate a successor active member to complete the unexpired term. If the active member so represented ceases to be in good standing, then that active member representative shall no longer be entitled to serve the remainder of the term. In such event, a vacancy shall arise which may be filled by the Board of Directors by an active member representative in the same category, subject, however, to ratification by the active members in that category at the next election.

#### ARTICLE V. CONVENTIONS

5:1 *Annual Conventions.* The Board of Directors shall set the time and place of an annual convention and provide timely notice to the membership thereof. At the annual convention, the members shall be provided an annual report of the activities and financial position of the Institute.

5:2 *Convention Voting.* At the annual convention, the active members in good standing shall be provided the opportunity to elect members of the Board of Directors, as provided herein. Each such active member shall be entitled to one vote through its designated active member representative.

5:3 *Nominations.* Prior to the annual convention the Board of Directors shall appoint a Nominating Committee of five persons, three from the Board of Directors, each in a different active member category, and two from the active membership not represented on the Board of Directors. The Nominating Committee shall select nominees for the Board of Directors pursuant to the bylaws and shall notify membership of its selection at least 60 days in advance of the annual convention.

For the first convention, this provision is suspended and the incorporators shall appoint a Nominating Committee generally consistent with the spirit and purpose of these bylaws which Nominating Committee shall select nominees for members of the initial Board of Directors.

5:4 *Additional Nominees.* Fifteen percent (15%) of the active members in each category shall, by petition, be entitled to have additional nominees for the Board of Directors placed on the ballot for vote at the annual convention, provided, however, that such petition must be presented to the Institute at least 10 days in advance of the annual convention.

5:5 Except as provided by these bylaws, the procedures for conduct of the business at the annual convention shall be in accordance with Roberts' Rules of Order, latest revision.

#### ARTICLE VI. MANAGEMENT

6:1 The responsibility and authority for management of the Institute shall vest with the Board of Directors.

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6:2 The Board of Directors may select an Executive Secretary who shall be responsible to the Board of Directors for the staff operations of the Institute. The terms and conditions of such employment shall be determined by the Board of Directors.

## ARTICLE VII. MEMBERSHIP DUES AND STANDING

7:1 The Board of Directors shall have the power to set the annual or special dues for the membership, and the terms for loss of good standing for failure to pay membership dues.

## ARTICLE VIII. PUBLICATIONS, EDUCATIONAL PROGRAMS

8:1 The Institute may publish periodicals, literature and educational materials relating to the Institute and market research affairs in the manner and form prescribed by the Board of Directors.

8:2 The Institute may arrange and conduct educational programs, seminars and workshops on market research affairs in the manner and form prescribed by the Board of Directors.

## ARTICLE IX. STANDARDS, ACCREDITATION

9:1 The institute shall have the power to develop, establish, and implement reasonable standards and accreditation procedures relating to consumer market survey and research practices and procedures subject to the following conditions and limitations:

(a) Prior to implementing any proposed standards or accreditation procedures there shall be provided reasonable public notice of proposals with respect thereto and an opportunity for interested persons to present their views.

(b) Standards and accreditation shall be voluntary, nondiscriminatory, available to nonmembers as well as members, and no charges or fees incurred thereby shall operate unreasonably to foreclose the opportunity of interested parties, otherwise qualified, to secure the benefits thereof.

(c) Standards shall be kept current and adequately upgraded to allow for industry and scientific advances and innovation.

(d) Audit programs aimed at fostering and monitoring compliance with standards and accreditation shall be fair, reasonable and nondiscriminatory.

(e) Prior to any warning, suspension, deaccreditation or other action for failure to abide by standards, the party so charged shall be given a statement of the grounds for such action, together with an opportunity to be heard. Any action taken by the Institute with respect thereto shall include a notification of the party of the basis and reasons therefor. At the option of the party so charged the party shall be afforded a reasonable opportunity to have the merits of the charge adjudicated by compulsory arbitration by the American Arbitration Association in accordance with the rules thereof.

9:2 The Board of Directors shall have the power to delegate to a Standards and Accreditations Committee the implementation of this program on terms and conditions consistent with the bylaws hereof.

## ARTICLE X. AMENDMENTS

10:1 These bylaws may be amended by the following procedures:

(a) By a vote of two-thirds of the Board of Directors provided, however, that such amendment shall thereafter be subject to ratification by two-thirds vote of the active membership at the next annual convention, the membership to be provided 30 days advance notice of such amendment to be ratified.

(b) Upon petition by 15% of the active membership received by the Institute at least 60 days in advance of the annual convention, a proposed bylaw amendment shall be publicized to the membership at least 30 days in advance of the annual convention and enacted by two-thirds vote of the active membership.

## APPENDIX B

## PROPOSED MARKETING RESEARCH INSTITUTE MINIMUM STANDARDS DEFINITIONS

*Client*

A manufacturer, advertising agency, publisher, broadcaster, retailer, etc., who contracts with outside independent companies to conduct some or all phases of individual market research studies.

*Research Company*

An independent company that contracts with clients for the performance of some or all phases of individual market research studies, including the sub-contracting of specific study phases.

*Field Supervisor*

Independent firms or individuals usually working in only single metropolitan areas to whom Research Companies and/or clients may sub-contract the execution of the data collection activities for individual studies.

*Interviewer*

Independent sub-contractors and/or employees of supervisors who collect raw data from respondents through personal, telephone or mail interviews.

*Verification, Validation*

The procedure for determining the accuracy of field interviews.

*Coding*

The procedure for evaluating the strength or weakness of the response of a person interviewed.

*Audit*

The procedure for evaluating a completed market research project to determine compliance with agreed standards, specifications and procedures.

1. *Market Research Study Specification Standards*

A. All of the objectives of a market research study should be clearly and carefully spelled out in writing at the outset or confirmed in writing.

B. All of the desired information requirements to be included in the questionnaire should be clearly and carefully spelled out in writing at the outset or confirmed in writing.

C. In carrying out A and B above, the following details of the type of sample to be utilized and its content should be indicated by the client:

Specific sample selection procedure to be employed.

Any special or unusual requirements for selection of specific respondents.

The universe of respondents to be interviewed and the specific subgroups with the desired number of interviews of each group.

The specific maximum number of callbacks to be utilized.

Anticipated incidence rates for both the total universe and specific subgroups.

The specific cities or areas to be included and the number of interviews in each, as well as a precise definition of the specific areas to be covered.

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D. The details of the methodology to be employed, including the method of interview on each phase of the study and the number of phases to be conducted, should be specified.

E. The probable length of the questionnaire and the approximate number of open-ended questions should be specified.

F. Final questionnaire should be approved by the client.

G. Specifications for pre-test should be spelled out and include the following:

Number

Where conducted

When conducted

With whom conducted

How conducted

How to be reported

H. Any unusual interviewer briefing requirements should be specified.

I. Any unusual validation requirements should be specified.

J. Any unusual tabulation specifications and statistical routines should be specified.

K. The specific type of report format should be indicated.

L. The cost of the study and the schedule of payment should be specified.

M. The desired timetable for scheduling and reporting of the study should be agreed upon including an indication of the necessity for a written or verbal presentation.

N. Any subsequent changes in any of the specifications should be provided in written form.

2. *Project Acknowledgment*

A. A written acknowledgment to proceed with the project should be provided to the research company.

3. *Written Instructions For The Field Supervisor*

A. Written instructions should be furnished to the Field Supervisor and a copy furnished to the client.

B. These instructions should contain, at a minimum, the name, number, and purpose of the study; sample specifications; quotas, verification requirements, editing requirements, schedule for return of completed questionnaires, emergency contacts; and description of allowable expenses.

C. Supervisor should not be informed of client's identity unless specifically authorized by the client.

4. *Written Instructions For The Interviewer*

A. Written instructions should be furnished to the Interviewer and a copy of these furnished to the client.

B. These instructions should contain, at a minimum, the name, number, and purpose of the study; sample specifications; quotas; explanation of the questionnaire and its handling (including probing instructions where necessary); time schedules and delivery requirements for completed questionnaires; and responsibilities to the Field Supervisor.

5. *Recruiting Field Supervisors*

In recruiting Field Supervisors, preference should be given to those subscribing to the applicable M.R.I. standards.

6. *Distribution of Material*

The client should allow the Research Company a reasonable length of time in planning so as to allow efficient distribution of materials, and the Research

Company, in turn, should allow a reasonable length of time for distribution to the field.

*7. Selection of Interviewers*

In the selection of Interviewers, preference should be given to those who have been certified as meeting applicable M.R.I. standards. Substitutes should be briefed on M.R.I. standards and they should agree to these standards by signature.

*8. Interviewer Briefing Sessions*

Interviewer briefing sessions must be held unless otherwise specified by the client of the Research Company. A report of these briefing sessions should be furnished to the Research Company and should include dates, times, names of interviewers in attendance, name of instructor, and whether conducted by telephone or in person. All interviewers must be properly briefed.

*9. Interviewing Standards*

A. Disclosures of the client's name by the interviewer in order to gain respondent cooperation or for any other reason is strictly prohibited unless specifically authorized by the client.

B. The amount of time required for the interview should not be misrepresented to the respondent.

C. Strict adherence to the sample design is required.

D. Questionnaires should be read as written and in the order in which questions are listed.

E. The entire questionnaire should be completed with the respondent. No incomplete questionnaire should be submitted without explanation nor should it be counted in the quota.

F. Completed questionnaires should be returned on schedule.

G. No interviews should be conducted with acquaintances, friends, neighbors, relatives, or anyone interviewed by the same interviewer in the past six months.

*10. Return of Material*

A. First day questionnaires should be forwarded to the Research Company by the fastest means within 24 hours.

B. The balance of the questionnaires should be returned on an agreed upon schedule that will permit timely validations.

*11. Validation Standards*

A. Verification certificates supplied by M.R.I. or embodying M.R.I. guidelines should be used.

B. Validation should be conducted by phone or in person.

C. Validation should be conducted only once with any particular respondent, and a notation made on the verification certificate.

D. A positive attitude should be used in validating.

E. Validating calls will not be made prior to 9 A.M. local time nor later than 9:30 P.M. local time on weekdays and Saturdays and Sundays. Sunday validating calls are not to be made prior to 11 A.M.

F. A minimum of 15% of each interviewer's work randomly selected over the active study period should be completely validated. A greater proportion of validating should be done wherever substantial discrepancies are found. A greater proportion will usually have to be attempted in order to achieve this percentage.

G. The specific responsibility for validation is to be agreed upon in writing between the client and Research Company.

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*12. Editing Standards*

A. Editing should be a separate function from coding; it is desirable but not essential to utilize different personnel than in coding.

B. The supervisor should check questionnaires for completeness. Client procedures should clarify whether or not and how the supervisor is to fill in missing answers. All supervisor corrections should be indicated in a different color pencil.

C. The Research Company should count and number all completed questionnaires and then sort by city and interviewer. All incomplete or special situation questionnaires should be kept in a separate group with a decision as to how to handle them as soon as possible.

D. Screening question(s) should be checked for proper qualification.

E. All questionnaires should be checked for completeness, consistency, and legibility.

F. Editing instructions for each study should be reviewed by the person responsible for the study.

G. Editing should be done in a different colored pencil than those already used in the questionnaire.

*13. Coding Standards*

A. The objectives of the study should be communicated to the coding supervisor before receiving completed questionnaires. These same objectives should be communicated to each code builder for the questions they are working on.

B. A minimum of 25% of all questionnaires should be sampled when building a code.

C. All codes to be utilized in a study should be approved by the coding supervisor and the person in the Research Company responsible for the study and/or the client, if he so desires.

D. A coding supervisor should be assigned to each project.

E. The code should be typed and explained to the coders. The coders should be given copies of all exhibit cards and other visual aids used in the project. All rotations or other variations of the questionnaire should be completely explained.

F. Batch or control slips should be assigned to batches of questionnaires. The batch sheets should have the question numbers listed and a place for the coder's initials and the check coder's initials next to each question.

G. The project should be organized so that certain coders only code certain questions or sections of the questionnaire.

H. The coding supervisor should have the responsibility of answering all the questions which arise during coding. Coders should be encouraged to ask questions when they are in doubt of the meaning of an answer or the way an answer should be coded.

I. Any changes or additions to the code must be communicated to all coders at once.

J. The code building and coding functions should be performed by people who have been properly trained in these endeavors.

K. 25% of all coding should be checked before work is tabulated.

L. A new coder should have 100% of her work checked.

M. Check coding should be done by simply recoding the questions and comparing the coder's work with the check coder's work.

N. If a coder has made consistent errors, 100% of the coder's work should be check coded.

O. The check coder should put her initials next to the coder's initials on the batch slip.

P. A 5% error in coding in each individual question by an individual coder should be the maximum allowable error.

14. *Keypunching/Card Cleaning*

A. A minimum of 25% of all cards should be key verified 100%. A record should be kept of the number and type of errors found when verifying the cards.

B. Keypunch operators should be experienced in working with marketing research data, or properly trained in that field.

C. Checks should be made to verify that:

a. Single columns have single punches

b. Skip patterns have been followed correctly

c. Logic checks are made to make sure that question sequence has been followed correctly.

D. If errors or inconsistencies are found when the cards are cleaned, the questionnaire should be referred to for corrections.

15. *Tabulating Standards*

A. All tabulating plans should be approved by the client and/or person in the Research Company responsible for the study prior to the start of tabulating.

B. The tabulating plan should include the following:

A list of all runs and cross runs with the qualifications for each run.

The specific base on which questions will be percentaged for each run.

Specific instructions for each question that is to be weighted should be provided.

C. If the tabulating is to be done using a card sorter, the following checks should be made:

Checks should be made on cards as they are sorted.

All hand calculations such as adding, subtracting, percentaging, should be doubled checked.

All typed tables are to be double checked for typographical errors.

D. If tabulating is to be done by a computer, program errors can be checked by taking a minimum sample of 15% of the cards, and comparing answers against the total sample for each question.

16. *Data Storage Standards*

A. The I.B.M. cards and/or tapes should be stored for a minimum of one year. The minimum for questionnaire storage should be 6 months.

At the end of the stated length of time, the Research Company should alert the client to the fact that the data will be destroyed unless the client elects to store the data himself, or pay the storage charge.

B. The Field File at the Research Company should include the following forms:

a. Contact Sheet

b. Briefing Session Form

c. Check-in Sheet

d. Interviewer Field Validation

e. Validation Questionnaire or Certificate

f. Interviewer Field Instructions

g. Supervisor Instructions

h. Sampling Instructions

i. Any Reports to M.R.I. on certified Interviewer's and/or certified Supervisor's noncompliance with standards.

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C. The Coding File at the Research Company should include the following forms :

- a. Coding Record Sheet
- b. Control Batch Coding Sheet
- c. Sampled responses used to build codes
- d. All codes
- e. "Other Mentions" list
- f. All correspondence with the Tabulating Company
- g. Editing Instructions
- h. Master Questionnaire
- i. Key Punch Control Sheets
- j. Cleaning Record (Computer) Sheet

17. *Reporting Standards*

In those cases where the Research Company supplies analysis and report writing services, a copy of the tabulations will also be supplied.

18. *Payments*

A. Payments for satisfactory work should not be delayed beyond two weeks from completion of the job or receipt of the invoice.

B. Payment to interviewers should be on an hourly basis rather than on a per interview basis.

19. *Auditing Standards*

A. The auditor should be a disinterested party with no financial relationships with the parties to the market research project being audited.

B. If the audit is not pursuant to an M.R.I. field investigation, the auditor should be compensated solely by the party requesting the audit, unless other arrangements are made in writing and disclosed to the other party to the transaction.

C. The auditor should maintain the details of the project being audited in confidence and disclose the results of his audit solely to the party requesting the audit unless the requesting party directs otherwise, or unless the audit is pursuant to an M.R.I. field investigation.

D. The auditor will review the documents relating to the market research project to determine conformance with the above M.R.I. standards, or such other standards as may have been specified by the client, as applicable, and shall prepare a written report of his findings.

E. If the services of an M.R.I. auditor are requested by a person or organization, the M.R.I. auditor will conduct an audit only in situations where the client has specified M.R.I. standards, to determine compliance therewith.



1. The first part of the document is a list of names and addresses.

2. The second part of the document is a list of names and addresses.

3. The third part of the document is a list of names and addresses.

4. The fourth part of the document is a list of names and addresses.

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