

Complaint

88 F.T.C.

IN THE MATTER OF

FURNITURE CORPORATION OF AMERICA, T/A
FURNITURE LEASING OF AMERICA, INC.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT*Docket C-2849. Complaint, Oct. 26, 1976 — Decision, Oct. 26, 1976*

Consent order requiring a Miami, Fla., furniture leasing company, among other things to cease failing to maintain adequate records; and to follow prescribed procedures to locate and make proper refunds to past and present eligible customers.

*Appearances*For the Commission: *Francis X. McDonough, Jr.*For the respondent: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Furniture Corporation of America, a corporation, doing business as Furniture Leasing of America, Inc., hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Furniture Corporation of America, doing business as Furniture Leasing of America, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts with its principal office and place of business located at 2400 N.W. 72nd Ave., Miami, Florida.

PAR. 2. Respondent Furniture Corporation of America, doing business as Furniture Leasing of America, Inc., is now and for some time past, has been engaged in the advertising for lease and the leasing of furniture and related accessories, which when leased are transported to consumers located in various States of the United States. Thus, respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in said furniture and related accessories in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

Respondent has established and operates a number of branches for

the purpose of leasing furniture and related accessories in the States of Massachusetts, Connecticut and Florida.

PAR. 3. Respondent Furniture Corporation of America, doing business as Furniture Leasing of America, Inc., at all times mentioned herein, has been, and now is, in substantial competition in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, with individuals, firms and corporations engaged in the leasing of furniture and related accessories of the same kind and nature as those leased by respondent.

PAR. 4. In the ordinary course and conduct of its business, respondent requires its customers to deposit money with it to ensure that such customers fully perform all of the terms, conditions and covenants contained in respondent's lease agreement and to ensure that the leased items are returned to respondent in the same condition in which such items were delivered to its customers, ordinary wear excepted. Upon termination of a customer's lease, respondent determines whether the customer has fully performed all of the terms, conditions and covenants contained in the lease agreement and whether such leased items are returned in the same condition respondent delivered them. After making this determination, respondent transmits this information to its principal place of business where the information is recorded in the customer's file and dollar assessments or charges are made in those instances where the customer fails fully to perform the terms, conditions and covenants of the lease agreement or fails to return the leased items in the same condition respondent delivered them.

Such assessments necessitate deductions from the deposited money which in turn result in a determination that respondent will either retain the full amount or a portion of the customer's deposited money. If no assessment is made, respondent's records indicate that the customer's deposited money may be returned.

PAR. 5. When a customer, who is determined by the respondent to be eligible for return of his deposited money does not specifically request the return of the deposit and does not within a designated period of time supply respondent with a current address to which the deposit may be mailed, the respondent clears the customer's lease deposit from the customer's account by a bookkeeping entry. In such case, respondent does not return or refund any portion of the outstanding lease deposit to the customer. Respondent thus absorbs into its operating income the outstanding amounts of such lease deposits due its customers.

Respondent at no time informs or attempts to inform its customers that they have returnable deposits due. Respondent at no time voluntarily returns returnable deposited money unless specifically requested by its customers nor in any way notifies such customers that

their deposits will be returned on demand. Respondent, Furniture Corporation of America, doing business as Furniture Leasing of America, Inc., through such acts and practices has failed to return substantial dollar amounts of lease deposits to its customers in a substantial number of instances.

PAR. 6. By failure to notify its customers that they have returnable deposits due them; by requiring that their customers specifically request the return of such deposits before respondent will return the outstanding amounts of the deposits; by failing to return such outstanding lease deposits to its customers and by absorbing such deposits into its own operating income, respondent caused a substantial number of its customers to be deprived of substantial sums of money rightfully theirs, therefore, the acts and practices described in Paragraph Five above were and are unfair.

PAR. 7. The acts and practices of respondent set forth in Paragraphs Five and Six above, were and are all to the prejudice and injury of the public and constituted and now constitute, unfair acts and practices, in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it has reason to believe that the respondent has violated the said Act, 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 sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its

complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Furniture Corporation of America is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its principal office and place of business located at 2400 N.W. 72nd Ave., Miami, Florida. Such corporation does business as Furniture Leasing of America, Inc.

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

ORDER

It is ordered, That respondent Furniture Corporation of America, a corporation, doing business as Furniture Leasing of America, Inc., its successors and assigns, and its officers, and its representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the handling of customers' money deposited as a condition precedent to or in conjunction with the signing of a consumer lease agreement incident to the leasing of furniture, related accessories or any other personal property, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Failing to determine, prior to the negotiation of a lease agreement with two or more legally unrelated lessees, which person will be designated by the joint lessees to be the recipient of the information relating to the lessees' returnable deposit in the event that respondent is obligated to return any portion of the deposit to such customers.

2. Failing to incorporate the following language into respondent's "Lease Pickup Form":

It is imperative that you obtain the lessee's forwarding address for a Deposit Refund. If lessee is not sure of the address, ask if we can send the refund care of a friend or relative. If you cannot obtain an address, send the lessee Form A and so note below:

Street Apt.

City State Zip Code

If "care of," specify who

If above not available, Form A Sent
on -----.

3. Failing to complete the appropriate portion of the addition to respondent's "Lease Pickup Form," as it is described in Paragraph 2.

4. Failing to send to each customer, or designated lessee in instances where a designation as provided for in Paragraph 1 has been made, from whom respondent has failed to obtain an address to which the lessee's returnable deposit is to be sent, within three (3) business days after the lessee notifies respondent that it may pick up its furniture, and related accessories, the following notice and detachable postage paid business reply postcard:

FORM A

Dear Lessee:

We have scheduled the pickup of your furniture as requested. It is important that you inform us of an address to which we can send your Deposit, if we find you are entitled to it being refunded.

If you are not sure of your forwarding address, we would be happy to send it care of a friend or relative.

Please fill in the form below, tear along the perforated line and mail it to us. The postage is prepaid.

Thank you for your assistance.

FURNITURE LEASING OF AMERICA, INC.

DEPOSIT REFUND REQUEST

LESSEE: _____

LEASE AGREEMENT NUMBER: _____

SEND REFUND TO: _____

Street Apt. No.

City State Zip Code

If refund is to be sent care of another, give their name:

THANK YOU FOR YOUR COOPERATION.

Furniture Leasing of America, Inc.
 Post Office Box 480225
 Miami, Florida 33148 (305) 592-5590

5. Failing to perform the following steps, no later than thirty (30) business days after the expiration of the lease agreement, after determining that a customer has fully performed the terms, conditions and covenants contained in the lease agreement and has returned to respondent all leased items in the same condition in which they were delivered, ordinary wear excepted, and is thus due either a full or a partial return of the deposit:

a. Determine whether the customer's file contains an address to which a returnable deposit is to be forwarded. If so respondent shall forward a check in the appropriate amount to the customer or his designee at the address given. If not, respondent is to perform those steps detailed in Paragraphs 5b and 5c below.

b. Determine the name and address of the customer's parents, present employer and a listed personal reference of the customer from data set forth in the customer's credit application filed by the customer incident to the consummation of the lease agreement. Forward the notice, entitled "We Need Your Help" and described below, to the parents of the customer, if their name and address is available in the customer's file, or both the present employer and one personal reference of the customer listed in the customer's file.

WE NEED YOUR HELP

The individual listed below recently rented furniture from Furniture Leasing of America and is due the return of a money deposit which will be sent to him/her as soon as we can determine his/her correct address and/or telephone number.

If you know his/her address and/or telephone number, please complete the following, tear along the perforated line and mail to us. The postage is prepaid.

Thank you for your help.

FURNITURE LEASING OF AMERICA, INC.

* * * * *

Lessee

Street Apt.

City State Zip Code

Area Code Telephone Number

c. Send an envelope containing the "WE NEED YOUR HELP" notice, described in Paragraph 5b, to the customer's current address, as it appears in the customer's file, requesting an address correction, on the envelope, from the United States Postal Service.

d. If the customer's telephone number is received from any source, respondent shall use it to attempt to contact the customer and determine the customer's forwarding address.

e. If the customer's forwarding address is received from any source, respondent shall refund the appropriate amount of the deposit to the customer at the forwarding address.

f. If no address or telephone number, or information which would directly lead to the discovery of the address or telephone number of the customer, is received within ninety (90) days after the termination of the customer's lease, the customer's lease file or a complete summary thereof, including a notation of the specific amount of money due the customer, will be maintained by respondent for a period of 3 years from the date the lease terminated, during which period of time any request by the customer for the return of the deposit due will be immediately honored. At the end of the 3 year period, the relevant state law will govern the appropriate disposition of customers' deposited money.

6. Failing to keep adequate records which may be inspected by Commission staff members, upon reasonable notice, which (1) substantiate that respondent is following the procedures specified in Paragraphs 1 through 5 of this order and (2) readily disclose the disposition of each customer's deposit and reasons therefor.

It is further ordered, That respondent will refund all returnable deposits to customers whose leases terminated on or after January 1, 1973 and which have not been refunded as of the effective date of this order. Respondent, in refunding the above-described money, will follow the procedures detailed in Paragraph 5 of this order. Respondent will fully comply with the provisions of this paragraph no later than three (3) months after the effective date of this order.

It is further ordered, That respondent, after the effective date of this order, shall include a copy of this order in each of its training manuals, and require each present and future employee who is or becomes

charged with implementing any portion of this order to read a copy of this order and to sign a statement acknowledging that they have read this order.

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 other change in the corporation which may affect compliance obligations arising out of the order.

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

Commissioner Dole did not participate by reason of absence.

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IN THE MATTER OF
RSR CORPORATION

Docket 8959. Interlocutory Order, Nov. 2, 1976

In Camera treatment of listed information withdrawn to the extent that it may appear in publicly available portion of any decision the Commission may issue in this matter.

Appearances

For the Commission: *Annthalia Lingos, K. Keith Thurman, and James C. Egan, Jr.*

For the respondent: *Robert L. Wald, Wald, Harkrader & Ross, Washington, D.C.; and Merrill L. Hartman, Hewett, Johnson, Swanson & Barbee, Dallas, Tex.*

ORDER WITHDRAWING *In Camera* TREATMENT

On July 28, 1976, the Commission ordered the parties to show cause why certain information to which the administrative law judge (ALJ) had accorded *in camera* treatment at the trial of this matter should not be placed on the public record [88 F.T.C. 206]. This information included market share figures for RSR and Quemetco in 1971 and 1972, lead production figures for RSR and Quemetco in 1971 and 1972, and information concerning the distances to which various RSR and Quemetco plants shipped their output during 1971 and 1972.

By response of August 12, 1976, respondent has indicated that it would not object to publication of market share figures or production figures, but it would object to the making public

the second sentence of *in camera* finding 217, the second sentence of *in camera* finding 218, and shipping distance figures derived from CX 69-77 and CX 79 showing average plant shipping distance, percentage of plant production shipped to various states, and percentage of plant production shipped various distances, on the ground that disclosure of such data may assist competitors in determining the identity of some of RSR's customers.

One reason for the requirement that proceedings of this sort be decided "on the record" is to permit the public to evaluate the fairness and wisdom with which the decisions of public agencies have been made, and to permit affected parties to draw guidance from those decisions in determining their future conduct. This consideration mandates that to the maximum extent possible, information of relevance to the Commission's determination be made part of the record available for public inspection. At the same time, *in camera* treatment of certain relevant information may be appropriate where

the prospective injury from disclosure outweighs the public interest in full knowledge. In the course of a trial an administrative law judge may be required to balance these competing interests on scores of occasions, as the parties seek *in camera* treatment for various exhibits. The granting of such treatment, however, cannot bind the Commission to withhold information from the public record indefinitely where no justification therefor exists.

In this case, we have concluded that the public interest requires that certain of the information accorded *in camera* treatment by the ALJ be made part of the public record. As to some of this, *e.g.*, market shares of the competing parties, surely the most fundamental sort of information in any merger case, respondent does not object.

With respect to shipping distance information, we note that in their presentation of this case both sides devoted extensive discussion to the issue of how far secondary lead recyclers can and do ship their output to customers. Respondent contended that this question is of great importance in the definition of an appropriate market within which to evaluate the challenged merger, and the ALJ devoted numerous findings to the issue. The Commission has determined that disclosure of certain aggregated data revealing average plant shipping distances, percentages of plant production shipped to certain states, and percentages of the production of various plants shipped various distances is important to a full public understanding of the points at issue between the parties in this case and before the Commission for resolution.

The Commission has further concluded that disclosure of such information is most unlikely to result in injury of the slightest sort to respondent, in view of its age (4-5 years), and in view of its aggregated character which would render extremely speculative any inferences to be drawn therefrom by competitors as to the customers of RSR. The Commission further notes that the public transcript already contains numerous references to identified customers of respondent, and respondent has not objected to public disclosure of the ALJ's *in camera* finding I.D. 223, which mentions numerous particular customers and plants to which RSR and Quemetco did or did not ship lead in 1971 and 1972. In light of this it does not appear that respondent itself anticipates any real injury from the proposed disclosure.

Under the circumstances, the Commission has determined that the public interest weighs overwhelmingly in favor of disclosure of the aforementioned information to the extent it is relevant to the Commission's decision in this matter.

Accordingly, the Commission hereby affords notice to the parties that, effective ten days from the date of service of this order, *in camera* treatment of the indicated information will be withdrawn, to the

extent that it may appear in the publicly available portion of any decision the Commission issues in this matter. Therefore:

It is ordered, That, effective ten days from the date of service of this order, *in camera* treatment of the following information be, and it hereby is, withdrawn, to the extent that it may appear in the publicly available portion of any decision the Commission may issue in this matter:

(1) Information contained in *in camera* findings of the ALJ Nos. 246-248, 256-258, including tonnage figures for RSR and Quem- etco derived from CX 64, but not tonnage figures for other companies;

(2) Information contained in *in camera* findings of the ALJ 217-218 and 223, as well as other aggregated shipping distance figures derivable from CX 65, 69-77, 79, including average plant shipping distance, percentage of plant production shipped to various states, and percentage of plant production shipped various distances, stated in terms of ranges, *e.g.*, (0-100 miles).

Commissioner Dole did not participate by reason of absence.

IN THE MATTER OF

HERBERT R. GIBSON, SR., D/B/A THE GIBSON TRADE
SHOW, ET AL.

Docket 9016. Interlocutory Order, Nov. 2, 1976

Denial of petition for reconsideration of Commission's order denying motion to withdraw matter from adjudication for settlement purposes.

Appearances

For the Commission: *John J. Hemrick* and *Andre Trawick, Jr.*

For the respondents: *Bardwell D. Odum*, Dallas, Tex., *David A. Donohoe*, *Akin, Gump, Strauss, Hauer & Feld*, Wash., D.C., and *John M. Gillis*, *Gillis, Rogers & Taylor*, Dallas, Tex.

ORDER DENYING PETITION FOR RECONSIDERATION

Respondents Herbert R. Gibson, Sr. and Belva Gibson petition for reconsideration of the Commission's order of September 21, 1976, denying their motion to withdraw this matter from adjudication for settlement purposes. They ask that the Commission await a decision by the administrative law judge on their Motion to Recommend Commission Acceptance of the Proposed Consent Order before determining whether there is a sufficient likelihood of settlement to warrant a withdrawal from adjudication.

The instant petition must be denied since it does not set forth "new questions raised by the decision * * * upon which the petitioner had no opportunity to argue before the Commission" as required by Section 3.55 of the Rules of Practice. The Commission has, however, reviewed respondents' Motion to Recommend, the accompanying memorandum, and complaint counsel's answer and adheres to its view that there is not a "likelihood of settlement." Rules of Practice, Section 3.25(b).

In their September 29 answering memorandum, complaint counsel argue that a combination of remedies consisting of "the Gibson Trade Show being required to go out of business or operate non-profit * * * is essential to adequately protect the public interest." The Commission would be willing to consider alternative consensual relief to those remedies, if it can be devised, in view of respondents' representations in their June 24 memorandum that they are willing to agree to "a guarantee (under pain of substantial monetary penalties) that there will be a high, impenetrable wall between the business of respondent

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H.R. Gibson, Sr. and that of the licensor and licensees of Gibson Discount Centers.”¹ We are not satisfied that respondent’s present proposal accomplishes such a separation, however, and as noted by the administrative law judge in his certification, other deficiencies in the proposed agreement make it clear that there is no present likelihood of settlement. Accordingly,

It is ordered, That the aforesaid petition be, and it hereby is, denied. Commissioner Dole did not participate by reason of absence.

¹ For example, the statutory prohibition in Section 2(c) of Robinson-Patman speaks in relevant part of “an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of” the buyer. 15 U.S.C. § 13(c).

IN THE MATTER OF
USLIFE CREDIT CORPORATION, ET AL.

Docket 9057. Interlocutory Order, Nov. 2, 1976

Rejection of ALJ's certification of question whether testimony of certain witnesses should have been stricken on basis of complaint counsel's inability to produce certain interview notes.

Appearances

For the Commission: *Michael E. K. Mpras* and *Robert L. Patterson*.
For the respondents: *Bill Norton* for Uslife, Schaumburg, Illinois; *Tony Davey* for Uslife, New York City; and *Edward W. Keane, Bruce E. Clark, Sullivan & Cromwell*, New York City.

ORDER REJECTING CERTIFICATION

The administrative law judge has certified to the Commission the question whether the testimony of certain witnesses should have been stricken on the basis of complaint counsel's inability to comply with the ALJ's order requiring the production of certain interview notes. The Commission has concluded, however, particularly in the absence of an application for review, that the certification of this issue is unnecessary and is accordingly rejected. The ALJ may proceed to render an initial decision in this matter and the parties are free to raise the question of exclusion of evidence on appeal to the Commission. Since the Commission may consider the ruling on appeal and, if it concludes the ALJ improperly excluded the evidence, make other findings as are appropriate, the certification does not present the type of "controlling question of law or policy" which merits interlocutory consideration under Section 3.23(b) of the Rules of Practice.

It is so ordered.

Commissioner Dole did not participate by reason of absence.

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IN THE MATTER OF

PANDE, CAMERON & CO. OF NEW YORK, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-2850. Complaint, Nov. 3, 1976—Decision, Nov. 3, 1976*

Consent order requiring a New York City importer and distributor of handmade rugs and carpets, among other things to cease enforcing and fixing established resale prices for its products. Further, respondent is prohibited from suggesting resale prices for the next three years and thereafter to indicate that any resale or retail price shown on pricing material is suggested or approximate only.

*Appearances*For the Commission: *Harold F. Moody.*For the respondent: *Edward G. Seitz, Gasperine & Savage, New York City.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Pande, Cameron & Co. of New York, Inc., a corporation, and more particularly described and referred to hereinafter as respondent, has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. §45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Pande, Cameron & Co. of New York, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 295 Fifth Ave., New York, New York.

PAR. 2. Respondent has been and is now engaged in the importation, distribution and sale of handmade rugs and carpets. Respondent distributes and sells these products to retail dealers. In fiscal year 1974, the gross sales of the respondent were in excess of \$5,000,000.

PAR. 3. Respondent distributes and sells its products to retail dealers (hereinafter referred to as dealers) in the continental United States through salespersons and sales representatives who act under the direction and control and carry out the policies of respondent.

PAR. 4. In the course and conduct of its business as aforesaid, respondent causes and has caused, handmade rugs and carpets to be

shipped from the State in which they are warehoused to purchasers in other States. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 5. Except to the extent that competition has been hindered, frustrated, lessened and eliminated by the acts and practices alleged in this complaint, respondent has been and is in substantial competition in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended, with other persons, firms and corporations engaged in the importation, distribution and sale of handmade rugs and carpets.

PAR. 6. In the course and conduct of its business as aforesaid, respondent, in combination, agreement, or understanding with some of its dealers, or with the cooperation or acquiescence of others of its dealers has engaged in a course of action to unlawfully fix, establish, stabilize or maintain the suggested retail prices at which its products are resold. In furtherance of said course of action, respondent has engaged in, and is now engaging in, the following acts and practices, among others:

(a) Establishing agreements, understandings, or arrangements with its dealers, as a condition precedent to the granting or retention of a dealership, that such dealers will maintain its suggested retail prices;

(b) Informing certain of its dealers, by direct and indirect means, that respondent expects and requires such suggested retail prices, or such dealerships will be terminated;

(c) Obtaining from its dealers, cooperation and assistance in identifying and reporting dealers who advertise, or offer to sell, or sell said products at prices lower than its suggested retail prices;

(d) Encouraging salespersons, sales representatives, and other employees or agents of respondent to secure and report information identifying dealers who advertise, offer to sell or sell respondent's products at prices below the retail prices suggested by respondent;

(e) Threatening to terminate certain dealers who fail or refuse to observe and maintain respondent's suggested retail prices, or who advertise respondent's products at retail prices below the prices suggested by respondent; and

(f) Regularly furnishing dealers with price lists and supplements thereto containing suggested retail prices for respondent's products.

PAR. 7. By means of the aforesaid acts and practices, and more, respondent, in combination, agreement, or understanding with certain of its dealers and with the acquiescence of other of its dealers, has established, maintained and pursued a course of action to fix and

maintain suggested retail prices at which respondent's products will be resold.

PAR. 8. The aforesaid acts and practices of respondent have had the effect of hindering, lessening, restricting, restraining and eliminating competition in the resale and distribution of said products, and, thus, are to the prejudice and injury of the public, and constitute unfair methods of competition and unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Pande, Cameron & Co. of New York, Inc. (Pande) is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business at 295 Park Ave., New York, New York.

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

ORDER

I

It is ordered, That respondent Pande, Cameron & Co. of New York, Inc., a corporation, its successors and assigns, and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the importation, distribution, offering for sale and sale of handmade rugs and carpets and other products in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Establishing, maintaining or enforcing any contract, agreement, understanding or arrangement entered into with any distributor or retail dealer in respondent's products (hereinafter distributors and retail dealers are referred to as "dealers") fixing, establishing, maintaining or enforcing the suggested retail prices at which respondent's products are to be resold.

2. Requiring any dealer or prospective dealer to enter into any oral or written agreement or understanding that such dealer or prospective dealer will adhere to any resale price for respondent's products as a condition to receiving or retaining its dealership.

3. Requesting or requiring any dealer or prospective dealer, either directly or indirectly, to report any dealer, person or firm who does not adhere to the retail price suggested by respondent for any of said products, or acting on reports so obtained by refusing or threatening to refuse sales to any dealer, person or firm so reported;

4. Refusing to sell or threatening to refuse to sell to any dealer or prospective dealer who desires to engage in the sale of respondent's products for the reason that such dealer will not enter into an understanding or agreement with respondent to advertise or sell said products at respondent's suggested retail price.

5. Securing or attempting to secure any promises or assurances from dealers or prospective dealers regarding the prices at which such dealers will advertise or sell respondent's products, or requesting or requiring any dealer or prospective dealer to obtain approval from respondent for prices offered by said dealers in advertisements for respondent's products.

6. Terminating, threatening, intimidating, coercing, delaying shipments, or taking any other action to prevent or hinder the sale of respondent's products by a dealer because said dealer has advertised or sold, is advertising or selling, or is suspected of advertising or selling such products at other than prices that respondent may deem to be appropriate or has approved.

7. Requiring from dealers charged with price cutting or failure to adhere to suggested retail prices, promises or assurances of the observance of respondent's suggested retail prices as a condition precedent to future sales to said dealers.

8. Directing or requiring respondent's salesmen, or any other agents, representatives, or employees, directly or indirectly, to report dealers who do not adhere to such suggested retail prices, or to act on such reports by refusing or threatening to refuse sales to dealers so reported.

9. Publishing, disseminating, circulating or providing by any other means, any suggested retail price, unless it is clearly and conspicuously stated on each page of any pricelist, book, tag, advertising or promotional material or other document that the price is "suggested" and that the dealer is free to sell at whatever price he chooses.

10. Threatening to withhold or withholding earned cooperative advertising credits or allowances from any dealer because said dealer advertises respondent's products at retail prices other than those which respondent deems appropriate or has approved.

II

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions and subsidiaries and to all officers, sales personnel, sales agents and sales representatives, and secure from each such entity or person a signed statement acknowledging receipt of said order.

III

It is further ordered, That respondent:

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

2. For a period of three (3) years from the date this order becomes final, establish and maintain a file of all records referring or relating to respondent's refusal during such period to sell its products to any dealer, which file shall contain a record of a communication to each such dealer explaining respondent's refusal to sell, and which file will be made available for Commission inspection on reasonable notice.

It is further ordered, That the respondent herein shall within sixty (60) days after service upon it of this order, file with the Commission a

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

Commissioner Dole did not participate by reason of absence.

Complaint

88 F.T.C.

IN THE MATTER OF

MEDALIST INDUSTRIES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-2851. Complaint, Nov. 9, 1976—Decision, Nov. 9, 1976*

Consent order requiring a Milwaukee, Wisc., manufacturer of industrial, athletic and leisure time products, among other things to cease enforcing and fixing established resale prices for its products. Further, respondent is prohibited from suggesting resale prices for the next three years and thereafter to indicate that any retail or resale price shown on pricing material is suggested or approximate only.

*Appearances*For the Commission: *David W. DiNardi.*For the respondents: *Richard T. O'Neil, Michael, Best & Friedrich*
Milwaukee, Wisc.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C. §41, *et seq.*) and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Medalist Industries, Inc., a corporation, and Allen-A Company, a corporation, and more particularly described and referred to hereinafter as respondents, have violated the provisions of Section 5 of the Federal Trade Commission Act (38 Stat. 719, as amended; 15 U.S.C. §45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Medalist Industries, Inc., is a corporation organized under the laws of the State of Wisconsin, with its principal office and place of business at 735 N. 5th St., Milwaukee, Wisconsin.

Respondent Allen-A Company (hereinafter sometimes referred to as Allen-A), a wholly-owned subsidiary of Medalist Industries, Inc., was organized as a Delaware corporation, with its office and principal place of business at 803 North Downing St., Piqua, Ohio.

PAR. 2. Respondent Medalist Industries, Inc. is a diversified manufacturer of industrial, athletic and leisure time products including athletic uniforms, gymnasium equipment, athletic training accessories, ski clothing, stylized, recreational tenniswear and other related items of wearing apparel. Respondent Medalist's annual volume of sales in calendar year 1973 was \$85.5 million.

Respondent Allen-A Company is engaged in the business of manufacturing, distributing and selling a wide variety of items of wearing apparel such as underskiwear, turtlenecks, stylized, recreational tenniswear, outerskiwear including parkas, ski pants and ski sweaters. Some of these items are sold under the name "Innsbruck." It distributes and sells to selected retail dealers located throughout the United States, who then resell to the general public.

Respondent Allen-A Company, under a license from Anba of Austria, is engaged in the business of manufacturing, distributing and selling fashion ski wear, stylized, recreational tenniswear, ski pants, parkas and other related items of wearing apparel. It distributes and sells these products under the name "Anba" to selected retail dealers located throughout the United States, who then resell to the general public.

PAR. 3. In the course and conduct of their business as aforesaid, respondents have been and are now engaged in commerce or their acts and practices affect commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, in that respondents have sold and caused and now cause said products to be shipped from the State in which they are manufactured or warehoused to other States of the United States for resale and distribution through selected retail dealers.

PAR. 4. In the course and conduct of their business in or affecting commerce, except to the extent that competition has been hampered or resurained by reason of the practices hereinafter alleged, respondents have been and are now in competition with other persons, firms and corporations engaged in the manufacture, sale and distribution of said products.

PAR. 5. Respondents, in combination, agreement, or understanding with certain of their authorized dealers, or with the cooperation or acquiescence of other of their dealers, have for the last several years been engaged in a planned course of action to fix, establish and maintain certain resale or retail prices at which said products are resold. In furtherance of said planned course of action, respondents have for the past several years engaged in the following acts or practices, among others:

- (a) Regularly furnishing their dealers with price lists and necessary supplements thereto containing certain resale or retail prices;
- (b) Establishing agreements, understandings, or arrangements with their dealers, one or more of whom are located in states which do not have fair trade laws, as a condition precedent to the granting of a dealership, that such dealers will maintain certain resale or retail prices;
- (c) Informing their dealers, by direct or indirect means, that

respondents expect and require such dealers to maintain and enforce certain resale or retail prices or such dealerships will be terminated;

(d) Permitting their dealers a maximum deviation of five cents from certain resale or retail prices on each item "in order to conform to store policy;"

(e) Requiring their dealers to agree not to sell or otherwise supply or furnish its products to anyone who is not an authorized dealer of the respondent;

(f) Soliciting and obtaining from their dealers cooperation and assistance in identifying and reporting any dealer who advertises, or offers to sell, or sells said products at prices lower than certain resale or retail prices, or the maximum five cents deviation; and

(g) Directing their salesmen, representatives and other employees to secure and report information identifying any dealer who fails to adhere to and maintain certain resale or retail prices, or the maximum five cents deviation, for said products.

PAR. 6. By means of such acts and practices, including but not limited to the foregoing, respondents, in combination, agreement, or understanding with certain of their authorized dealers and with the acquiescence of other of their authorized dealers, have established, maintained and pursued a planned course of action to fix and maintain certain resale or retail prices at which said products will be resold.

PAR. 7. The aforesaid acts and practices of respondents have been and are now having the effect of hampering and restraining competition in the resale and distribution of said products, and constitute unfair methods of competition in or affecting commerce, all in derogation of the public interest and in violation of Section 5 of the Federal Trade Commission Act, as amended.

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 Boston Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorney 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 Act, and that complaint should issue stating its charges in that respect, having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Medalist Industries, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin, with its office and principal place of business at 735 N. 5th St., Milwaukee, Wisconsin.

Respondent Allen-A Company (Allen-A) is a wholly-owned subsidiary of Medalist Industries, Inc., and was organized as a corporation under the laws of the State of Delaware. Its office and principal place of business is located at 803 North Downing St., Piqua, Ohio.

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

I. *It is ordered*, That respondents Medalist Industries, Inc., and Allen-A Company, and their subsidiaries, divisions, affiliates, successors, assigns, officers, directors, agents, representatives and employees, directly or indirectly, or through any corporate or other device, in connection with the manufacturing, distribution, advertising, offering for sale, or sale of underskiwear, turtlenecks, stylized, recreational tenniswear, outerskiwear including parkas, ski pants, ski sweaters, or related products (hereinafter referred to in this order as "said products") in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended, shall forthwith cease and desist from:

A. Establishing, maintaining or enforcing any contract, agreement, understanding or arrangement fixing, establishing, maintaining, controlling, influencing or enforcing in any way or to any extent, directly or indirectly, the price at which any of said products is advertised, sold or offered for sale at retail.

B. Requiring any dealer or prospective dealer to enter into an oral or written agreement or understanding that such dealer or prospective

dealer will maintain any resale or retail price for any of said products as a condition of buying any of said products.

C. Requesting or requiring any dealer or prospective dealer, either directly or indirectly, to report any dealer, person or firm who does not adhere to any resale or retail price for any of said products, or acting on reports so obtained by refusing or threatening to refuse sales to any dealer, person or firm so reported.

D. Directing or requiring any of respondents' salesmen, or any other agent, representative, or employee, directly or indirectly, to report any dealer who does not adhere to any resale or retail price for any of said products, or to act on such reports by refusing or threatening to refuse sales to dealers so reported.

E. Threatening to terminate or terminating, either directly or indirectly, any dealer for failure to observe, maintain or advertise the respondents' suggested resale prices for said products.

F. Suggesting, for three (3) years from the date on which this order becomes final, any resale price whatsoever for any of said products, by pricelist, discount schedule, invoicing procedure, prepricing of commodities or their containers, or by any other means, to any reseller whose resale prices are not or cannot lawfully be controlled by respondents in the manner prescribed by law and this order.

G. Requiring, from any dealer charged with price cutting or failure to adhere to any resale or retail price, a promise or assurance to adhere to any resale or retail price for any of said products as a condition precedent to any future sales to said dealer.

H. After the expiration of the three-year period of time stipulated in order provision I (F) above, publishing, disseminating or circulating any pricelist, price book, price tag, advertising or promotional material, or other document indicating any resale or retail price without stating on each page of such list, book, tag, advertising or promotional material or other document that the price is suggested or approximate.

I. Requiring or inducing by any means, any dealer or prospective dealer to refrain, or to agree to refrain from reselling any of said products to any other dealer or distributor.

Provided, however, nothing hereinabove shall be construed to waive, limit or otherwise affect the right of respondents to enter into, establish, maintain and enforce in any lawful manner any price maintenance agreement excepted from the provisions of Section 5 of the Federal Trade Commission Act by virtue of the McGuire Act amendments to said Act.

II. *It is further ordered,* That the respondents shall within sixty (60) days after the service upon them of this order, mail a copy of this order

to each of their dealers of said products in the Commonwealth of Puerto Rico, the District of Columbia, and in those States which now, or during the five (5) year period of time following the service of this order, do not permit fair trade contracts, and, during the five (5) year period of time following the date of service of this order, to all future dealers in these jurisdictions at the time said dealers are opened as accounts, under cover of the letter annexed hereto as Exhibit A, and furnish the Commission proof of the mailing thereof.

III. *It is further ordered*, That respondents shall forthwith distribute a copy of this order to each of their operating divisions engaged in the manufacture, sale, marketing and distribution of said products and to all of their sales personnel connected with the sale, marketing, and distribution of said products and shall instruct each salesperson employed by them now or in the future to read this order and to be familiar with its provisions.

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

V. *It is further ordered*, That the respondents herein for a period of five (5) years from the date of this signing establish and maintain a file of all records referring or relating to respondents' refusal to sell said products to any dealer, which file shall contain a record of a communication to each such dealer explaining respondents' refusal to sell said products, and which file will be made available for Commission inspection on reasonable notice; and, annually, for a period of five (5) years from the date hereof, submit a report to the Federal Trade Commission listing the names and addresses of all dealers with whom respondents have refused to deal over the preceding year, a description of the reason for the refusal and the date of the refusal.

VI. *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.

Commissioner Dole did not participate by reason of absence.

EXHIBIT A

(Letterhead of Medalist-Allen-A-Company)

Dear Dealer:

Allen-A Company has entered into an agreement with the Federal Trade Commission

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relating to our distributional activities and pricing policy. A copy of the consent order entered into pursuant to that agreement is enclosed herewith.

Our parent company, Medalist Industries, Inc., is also a party to this consent agreement with the Federal Trade Commission, and the terms of the Agreement Containing the Consent Order to Cease and Desist and the Commission's Decision and Order are fully and equally applicable to our parent company, its subsidiaries and divisions.

Furthermore, we have entered into this agreement solely for the purpose of settling a dispute with the Commission, and the agreement and consent order is not to be construed as an admission that we have violated any of the laws administered by the Commission, or that any of the allegations in the complaint are true and correct. Instead, the order merely relates to our activities in the future.

In order that you may readily understand the terms of the consent order, we have set forth the essentials of the agreement with the Commission, although you must realize that the consent order itself is controlling rather than the following explanation of its provisions:

- (1) Our dealers in your area are free to set their own retail or resale prices for the products covered by the consent order.
- (2) We will not solicit, invite or encourage any dealer or any other person to report any dealer in your area not following any retail or resale price for any of said products, and, furthermore, will not act on any such reports sent to us.
- (3) We will not require or induce our dealers in your area to refrain from advertising said products at any price or from selling or offering said products at any price to any person.

Sincerely yours,

Alexander S. Flesh
Executive Vice-President
Allen-A Company

Enclosure

IN THE MATTER OF
HALEAKALA MOTORS, LTD.

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

Docket C-2852. Complaint, Nov. 15, 1976—Decision, Nov. 15, 1976

Consent order requiring a Wailuku, Maui, Hawaii, automobile dealer, among other things, to cease altering any invoices or other documents containing manufacturer's suggested retail price information; misrepresenting suggested retail prices; and including on extension stickers, any charges not specifically itemized.

Appearances

For the Commission: *Charles S. Litzof.*

For the respondent: *James Krueger, Wailuku, Maui, Hawaii.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Haleakala Motors, Ltd., hereinafter referred to as "respondent," has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Haleakala Motors, Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Hawaii, with its office and principal place of business at Main and High Sts., Wailuku, Maui, Hawaii.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of new automobiles at retail.

PAR. 3. Respondent's volume of business is substantial and its acts and practices, as hereinafter set forth, are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. In the course and conduct of its business, respondent receives, and has received, "delivery order" invoices from its supplier, General Motors Corporation. Each such invoice relates to an automobile which is delivered by the manufacturer to respondent, for sale to consumers. Each such invoice itemizes the factory equipment contained on said automobile, and shows the manufacturer's suggested list price for the basic automobile and for each item of factory equipment, transportation charges, and the total manufacturer's suggested retail price. Such

invoice resembles closely the manufacturer's "Monronev Sticker" label, which must be affixed to new automobiles, pursuant to 15 U.S.C. §1231, *et seq.*

PAR. 5. In the course and conduct of its business, respondent alters, and has altered, such "delivery order" invoices by substantially increasing the basic price of the automobile, as shown on such invoice, by adding substantial charges to such invoice, and by altering the total manufacturer's suggested retail price shown on such invoice to reflect such increases and additions.

PAR. 6. In the course and conduct of its business, respondent receives, and has received, automobiles from its supplier which do not have the "Monronev Sticker" label affixed to them, in the manner provided for in 15 U.S.C. §1231, *et seq.* In such cases, respondent affixes, and has affixed, to said automobiles the altered "delivery order" invoices referred to in Paragraphs Four and Five. By said practice, respondent is representing, and has represented that the prices shown on said altered invoice are the manufacturer's suggested retail prices, when in fact said altered invoice prices substantially exceed the manufacturer's suggested retail prices. Therefore, said practice is, and was, false, misleading, unfair or deceptive.

PAR. 7. In the course and conduct of its business, respondent shows or gives, and has shown or has given, to prospective customers, the original or a copy of the altered invoices referred to in Paragraphs Four and Five. By said practice, respondent is representing, and has represented, that the prices shown on said altered invoices are the manufacturer's suggested retail prices, when in fact said altered invoice prices substantially exceed the manufacturer's suggested retail prices. Therefore, said practice is, and was, false, misleading, unfair or deceptive.

PAR. 8. In the course and conduct of its business, respondent is now, and has been, attaching "extension stickers" adjacent to the Monronev Sticker labels on the windows of new automobiles. Said extension stickers itemize charges additional to those charges itemized or accounted for on the Monronev Sticker labels.

A. By and through the use of said extension stickers, respondent represents, and has represented, that additional charges are incurred by it for "Ocean Freight, Tolls, Marine Insurance, and Dockside Handling. Local Service." In truth and in fact, respondent does not incur charges additional to those charges itemized or accounted for on the Monronev Sticker labels, for ocean freight, tolls, or marine insurance. Such charges are included in the Monronev Stickers as amounts charged to respondent for transportation to the location at which the automobile is

delivered to respondent (cf., 15 U.S.C. §1232(f)(3)). Therefore, said representation is, and was, false, misleading, unfair and deceptive.

B. By and through the use of said extension stickers, respondent represents, and has represented, that the only additional charges respondent imposes are for "ocean freight, tolls, marine insurance and dockside handling. Local service." In truth and in fact, respondent imposes further additional charges by means of said extension stickers, for items not specifically itemized thereon, such as advertising costs and interest expense. Therefore, said representation is, and was, false, misleading, unfair and deceptive.

PAR. 9. Respondent has been at all times relevant hereto in substantial competition with others in the sale of new automobiles in or affecting commerce.

PAR. 10. The acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition and unfair or deceptive acts and practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereto with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Haleakala Motors, Ltd. is a corporation organized,

existing and doing business under and by virtue of the laws of the State of Hawaii, with its office and principal place of business located at Main and High Sts., Wailuku, Maui, Hawaii.

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

ORDER

It is ordered, That respondent Haleakala Motors, Ltd., a corporation, its successors and assigns, and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of new automobiles in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Altering in any manner, invoices, stickers, or other original documents or copies thereof, which contain manufacturer's suggested retail price information, where such price has been established by a manufacturer pursuant to 15 U.S.C. §1231, *et seq.*, except for relabeling as provided in 15 U.S.C. §1233(c).

2. Contradicting or negating, orally or in writing, directly or by implication, any information disclosed by a manufacturer pursuant to 15 U.S.C. §1232.

3. Misrepresenting, orally or in writing, directly or by implication, that respondent has incurred charges attributable to a new automobile which are in addition to those itemized, or accounted for, on the Monroney Sticker label for such automobile.

4. Including in the amounts contained in any representation of charges imposed by respondent in addition to those charges itemized or accounted for on the Monroney Sticker label, any amounts not attributable to a specifically-itemized additional imposed charge.

It is further ordered, That respondent 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 said corporation which may affect compliance obligations arising out of this order.

It is further ordered, That respondent forthwith distribute a copy of this order to each of its operating divisions, and to all present and future employees engaged in the advertising, offering for sale, or sale of new automobiles.

Commissioner Dole did not participate.

IN THE MATTER OF

FORD MOTOR COMPANY, ET AL. — DOCKET 9073

GENERAL MOTORS CORPORATION, ET AL. — DOCKET
9074

Interlocutory Order, Nov. 16, 1976

Denial of (1) consolidated motions to stay portions of ALJ's orders of October 29 and November 2, 1976, requiring immediate action pending interlocutory appeal and Commission review of those orders; and (2) consolidated application for intervention and for disclosure of names of NADA members subpoenaed.

Appearances — Docket 9073

For the Commission: *Sharon S. Armstrong, Randall H. Brook, Barry E. Barnes, David R. Pender and Ronald G. Sims.*

For the respondents: *Robert L. Wald, Carleton A. Harkrader and Gloria P. Stewart, Wald, Harkrader & Ross, Washington, D.C.; Weil, Gotshal & Manges, New York City and Washington, D.C.; Mike Esler, Hoessler, Stamer & Esler, Portland, Ore.; David R. Larrony, Dearborn, Mich.; and Basil Mezines, Stein, Mitchell & Mezines, Washington, D.C., for the Intervenor, National Automobile Dealers Association.*

Appearances — Docket 9074

For the Commission: *Gregory L. Colvin, Sharon S. Armstrong, Sarah J. Hughes, Randall H. Brook and Ronald G. Sims.*

For the respondents: *James P. Melican, Jr. and Robert C. Weinbaum, Detroit, Mich.; John J. Higgins, New York City; Ira M. Millstein and Carl D. Lobell, Weil, Gotshal & Manges, New York City; Robert C. St. Louis and Charles E. Siljeg, Aiken, St. Louis & Siljeg, Seattle, Wash.; Howard Daniels, Weil, Gotshal & Manges, Washington, D.C.; and Basil Mezines, Stein, Mitchell & Mezines, Washington, D.C., for the Intervenor, National Automobile Dealers Association.*

ORDER DENYING CONSOLIDATED MOTIONS FOR STAY OF ORDERS
PENDING INTERLOCUTORY APPEAL AND FOR PERMISSION TO
INTERVENE

This matter is before us upon the applications of the National Automobile Dealers Association ("NADA") and four named dealers¹ acting on behalf of themselves and all other similarly situated NADA dealers, requesting an emergency stay of certain portions of the

¹ Brandy Ford, Inc., Fuller Ford Co., Inc., Berry Pontiac - GMC, Inc., and M&O Chevrolet Co.

administrative law judge's orders of October 29 and November 2, 1976, pending interlocutory appeal and Commission review of those orders.

On October 22 and 26, 1976, counsel for NADA filed consolidated motions for: permission to intervene for the purpose of filing motions to quash or limit subpoenas issued to a number of Ford and General Motors dealers; disclosure of the names of NADA members subpoenaed; an extension of time on behalf of NADA to move to quash or limit; and an extension of time on behalf of the four named dealers to move to quash or limit.

The administrative law judge's order of October 29, 1976, denied all motions filed on behalf of NADA, and his order of November 2, 1976, denied the motion on behalf of the four named dealers. The order of October 29, 1976, required NADA to "inform those dealers [who had failed timely to file motions to quash or limit] about this order immediately on its receipt," and required the subpoenaed dealers to "immediately file motions to quash or limit the subpoenas if they wish to challenge them." The order of November 2, 1976, directed the four named dealers to "file motions to limit or quash the subpoenas duces tecum served on them immediately upon notification of this order."

A consolidated motion for a stay of those portions of the administrative law judge's orders requiring immediate action, pending interlocutory appeal, was filed by counsel for NADA and the four named dealers on November 4, 1976. That motion was denied by the administrative law judge on the same day.

On November 5, 1976, counsel for NADA and the four named dealers filed the consolidated motion for a stay now before the Commission. As with the motion filed with the administrative law judge on November 4, 1976, this motion seeks to stay the portions of the law judge's orders requiring immediate action. On November 10, 1976, complaint counsel filed a reply to this motion for a stay.

Finally, a consolidated application for review of the administrative law judge's ruling on NADA's motion for permission to intervene and for disclosure of the names of NADA members subpoenaed was filed by NADA on November 8, 1976.

The basis for NADA's intervention motion is that the subpoenas directed to its member dealers raise issues as to which NADA has an interest not adequately represented by any of the named parties. Issues specified by NADA include the burden and expense of compliance with the subpoenas, public disclosure of confidential business records, and characterization of those records in the administrative proceeding.

In denying the intervention motion, the administrative law judge observed that the subpoenaed dealers can adequately represent their own interests by filing their own motions to quash or limit if they

believe the subpoenas are burdensome. He determined that intervention would complicate rather than simplify the issues raised by the subpoenas, due to the likely variations in response among the subpoenaed dealers.

As we stated in our order of July 13, 1976, affirming the orders of the administrative law judge granting limited intervention to NADA in this proceeding, the factors to be considered in determining whether justification exists to warrant intervention are the interests of the applicant, the applicant's potential contribution to the proceeding, the detriment to the public interest resulting from unduly complicating and prolonging the proceeding, and whether the applicant desires to raise substantial issues of law or fact which would not otherwise be properly raised or argued. See *Heublein, Inc.*, 82 F.T.C. 1826, 1829 (1973); *Firestone Tire & Rubber Co.*, 77 F.T.C. 1666, 1669 (1970).

Based upon our review of the pleadings filed by counsel for NADA and the four named dealers and by complaint counsel, we agree with the administrative law judge's determination that intervention by NADA to represent all subpoenaed member dealers is unwarranted and unnecessary. Those dealers who desire to challenge the subpoenas can adequately represent their own interests by filing motions to quash or limit pursuant to Rule 3.34(b) of the Commission's Rules of Practice. Any dealers who wish to utilize the services of NADA's legal counsel for responding to the subpoenas or otherwise may do so. However, we see no need for either the subpoenaed parties or the legal counsel of their choice to intervene in this proceeding for the purpose of raising legal issues regarding the third party subpoenas. Furthermore, the administrative law judge has determined that intervention by NADA to represent all subpoenaed member dealers would complicate rather than simplify the issues raised by the subpoenas. We cannot say this is in error. It does appear likely that dealers' responses to the subpoenas will not be identical; to the extent that there are variations in response, the responses will have to be individually considered by the law judge. As to issues concerning the burden and expense of compliance with the subpoenas and disclosure of business records of NADA members, the Commission's Rules of Practice charge the administrative law judge with responsibility for supervising discovery proceedings, issuing discovery orders and subpoenas, and determining the adequacy of subpoena returns. These Rules fully permit the subpoenaed dealers to move to quash or limit the subpoenas and to request *in camera* treatment for documents produced. The administrative law judge is in the best position to determine whether the subpoenas have been complied with in good faith and to determine the degree of protection to be afforded documents produced, subject to Commission review for

abuse of discretion. *See Koppers Company, Inc.*, 77 F.T.C. 1675, 1680-81 (1970).

NADA is also concerned about the characterization of records produced by NADA members which may become evidence in a public hearing, ostensibly because of the possibility that these records may bear upon liability issues in this proceeding. In our order of July 13, 1976, affirming the orders of the administrative law judge granting limited intervention, we observed that we would be favorably disposed toward a renewal of NADA's application to intervene on liability issues upon a showing that significant issues in which NADA's members have an interest will not be adequately presented by the parties. No such showing has yet been made by NADA. It is premature to determine at this point whether business records produced by subpoenaed dealers which may be introduced into evidence will bear upon liability issues in which NADA's members have an interest and which will not be adequately presented by parties. As we noted in our order of July 13, 1976, an appropriate time for reconsideration might be at a prehearing conference convened prior to the commencement of respondent's discovery.

Since we have determined to deny this consolidated application for intervention, it follows that NADA's request for an order requiring complaint counsel to inform it of the names of subpoenaed dealers will also be denied. In addition, the consolidated motion for a stay of the administrative law judge's orders of October 29 and November 2, 1976, pending interlocutory appeal, will be denied as moot. Accordingly,

It is ordered, That the aforesaid motions be, and they are hereby, denied.

Commissioner Dole did not participate by reason of absence.

IN THE MATTER OF
BANKERS LIFE AND CASUALTY COMPANY, ET AL.

Docket 9075. Interlocutory Order, Dec. 20, 1976

Order granting complaint counsel's application for review of ALJ's order directing disclosure of correspondence from Commission staff to persons other than third party complainants and other consumers; vacating said order; granting motion of complaint counsel for leave to file application for review in excess of 15 pages; and granting request filed by respondents for leave to file out of time its application for review.

Appearances

For the Commission: *Gerald H. Jagers, John W. Madden, III and William K. Hickey.*

For the respondents: *Robert Inman, Inman, Flynn & Coffee, Denver, Colo., Alan Bucholtz, Quiat, Bucholtz & Bull, Denver, Colo., Earl W. Kintner and Daniel C. Smith, Arent, Fox, Kintner, Plotkin & Kahn, Washington, D. C., J. Wallace Adair and John F. Bruce, Howrey & Simon, Washington, D. C. and William T. Kirby and James T. Griffin, Hubachek, Kelly, Rauch & Kirby, Chicago, Ill.*

ORDER GRANTING APPLICATION FOR REVIEW

Complaint counsel, pursuant to Section 3.23(a)(1) of the Commission's Rules of Practice, apply for review of an order issued by the administrative law judge directing the disclosure of certain correspondence from the Commission's staff. According to complaint counsel's application, the ruling would require the disclosure of letters from staff "to federal, state or local governmental agencies seeking, providing or discussing information on several companies including some which are respondents in this matter and some which are unrelated to respondents herein" and "[c]orrespondence * * * with attached documentation, involving the Commission staff and five consultants who are potential expert witnesses. The materials discuss complaint counsel's preparation for trial including outlines of both objective and opinion evidence together with the methods of compilation, legal analysis and order of presentation of such evidence."¹ Complaint counsel have made available to respondents' counsel correspondence from staff to third party complainants and other consumers.

On November 15, 1976, the Commission granted complaint counsel's motion for a stay of the order pending appeal.

Complaint counsel object to the ALJ's order on the grounds that 1)

¹ Application for Review, pp. 11-12.

the documents are privileged as “work product” and as inter-agency memoranda; and 2) “there has been no showing by respondents of any need at all for these records as [Administrative Law] Judge Parker has not yet even asked for a written application for them pursuant to Rule 3.36 of the Commission’s Rules of Practice.”²

We agree with complaint counsel’s latter contention. Rule 3.36 requires that an application for issuance of a subpoena requiring the production of documents or other material in the records of the Commission shall be made in the form of a written motion and “[t]he motion shall specify as exactly as possible the material to be produced, the nature of the information to be disclosed, * * * and shall contain a statement showing the general relevancy of the material [or] information * * * and the reasonableness of the scope of the application, together with a showing that such material [or] information * * * is not available from other sources by voluntary methods or pursuant to §§3.33-3.34.” We are not persuaded by respondents that the Rule, designed to protect sensitive information in the Commission’s files from disclosure absent an adequate showing of need, may be avoided simply because the discovery order did not purport to be premised on Rule 3.36. Respondents’ analysis would render the Rule and its safeguards meaningless.³

We likewise reject respondents’ contention that the instant appeal is not authorized by Rule 3.23(a)(1) since the order appealed from does not require the production of Commission records “pursuant to §3.36.” Rule 3.23(a)(1) was intended to authorize interlocutory appeals to the Commission, without a certification by the ALJ, from orders requiring the disclosure of Commission records. We are confident that reference was made to Rule 3.36 simply because it was assumed that such orders would issue pursuant to that Rule. Since we have concluded that orders directing the production of Commission records may issue only pursuant to Rule 3.36, we cannot see how the ALJ’s failure to cite the Rule in his order makes his ruling unappealable.

We, therefore, believe that the ALJ’s order should be vacated to the extent that it requires the disclosure of correspondence from the Commission’s staff to persons other than third party complainants and

² Application for Review, p. 16.

³ Respondents rely on Rule 3.21(a)(4), (6) which authorizes the administrative law judge to conduct a prehearing conference to consider “expedition in the discovery and presentation of evidence” and “such other matters as may aid in the orderly and expeditious disposition of the proceeding, including disclosure of the names of witnesses and of documents or other physical exhibits which will be introduced in evidence in the course of the proceeding.” Rule 3.21(d) authorizes the ALJ to enter an order which recites the results of the conference and includes his rulings on matters considered at the conference. However, the ALJ’s authority is limited by the requirements of other applicable Rules. The ALJ’s, of course, may encourage the parties to agree to procedures that will expedite the proceedings and issue orders that reflect their undertakings.

other consumers. *See Jewel Companies, Inc.*, 81 F.T.C. 1034, 1037 (1972).⁴ This ruling should not be taken to suggest that the Commission is inclined to review the merits of discovery orders issued by the administrative law judges. The Commission has repeatedly held that the ALJ's have broad discretion in procedural matters, including discovery. *E.g., Kellogg Co.*, 83 F.T.C. 1756 (1974). The instant ruling is simply designed to ensure that the exercise of the law judges' discretion is based on a consideration of all of the factors indicated in the Rules of Practice.

Accordingly, *it is ordered*, That the aforesaid application for review be, and it hereby is, granted and the administrative law judge's order of October 27, 1976, directing complaint counsel to disclose correspondence from the Commission's staff addressed to persons other than third party complainants and other consumers be, and it hereby is, vacated;⁵

It is further ordered, That complaint counsel's motion for leave to file their application for review in excess of 15 pages be, and it hereby is, granted;

It is further ordered, That the request filed by respondents Bankers Life and Casualty Company, John D. MacArthur, Southern Realty and Utilities Corporation, Hartsel Ranch Corporation and Estates of the World, Inc., for leave to file out of time its application for review be, and it hereby is, granted.

. Chairman Collier dissenting.

DISSENTING STATEMENT OF CHAIRMAN COLLIER

I would affirm the order of the ALJ directing complaint counsel to produce these documents.

In an apparent attempt to expedite the hearing in this case the ALJ invoked Rule 3.21 and directed complaint counsel to produce all third party correspondence.¹ Rather than insisting that respondents file a

⁴ We reject respondents' claim that complaint counsel have been laggard in pursuing their objections to the ALJ's order. Some of the ALJ's comments at the June 23, 1976, and September 23, 1976, prehearing conferences indicated that he expected complaint counsel to "release everything you have in your files." Tr. 37, and "all letters between you and third parties." Tr. 106. However, the July 14, 1976, and October 8, 1976, prehearing orders indicated that complaint counsel were to produce documents they *received* from either respondents or from third parties. *See also* Tr. 50, 106. Until the ALJ advised complaint counsel by telephone on October 15, 1976, that he intended to include within his order correspondence to third parties, complaint counsel reasonably concluded that these documents need not be produced. In view of their lack of opportunity to address their objections to the production of these documents to the ALJ prior to issuance of the order, because of the judge's failure to require the filing of a motion under Rule 3.36, we believe that complaint counsel acted reasonably in moving for a protective order before filing their appeal with the Commission. This procedure, however, would not be countenanced where complaint counsel had an opportunity to address their objections to the ALJ before the entry of the order. *See Crown Central Petroleum Corp.*, 81 F.T.C. 1024 (1973).

⁵ This ruling is without prejudice to a redetermination of respondents' request pursuant to Rule 3.36.

¹ The Rule provides that:

The Administrative Law Judge in any case may, and upon motion of any party or where it appears probable that the hearing will extend for more than five (5) days he shall, direct counsel for all parties to meet with him for a conference to consider any or all of the following:

(Continued)

motion for subpoena under Rule 3.36,² complaint counsel agreed to production.

Much later, complaint counsel sought clarification of the ALJ's production order and learned that it contemplated the disclosure of correspondence *from* complaint counsel *to* third persons, including other government officials and prospective expert witnesses. A motion for a protective order for some documents in this class, based on their assertedly privileged nature, was promptly filed and promptly denied.

Complaint counsel's appeal to the Commission from this ruling for the first time invoked respondents' failure to follow Rule 3.36 procedures. I think it is far too late in the day for complaint counsel to insist that the strict requirements of Rule 3.36 be met.³

Although in my view the application of Rule 3.36 has been waived in this instance, I believe the motion for a protective order based on assertions of privilege was entirely appropriate in the context of Rule 3.21. Nonetheless, I cannot hold that the ALJ's denial of the motion was error. The motion for protective order failed to describe the documents in adequate detail and asserted the claim of privilege in conclusory terms. Indeed, the documents — although few in number — were not even submitted for *in camera* review nor are they in the record before us. One who claims privilege has a threshold burden to support the claim. The ALJ, in my view, did not err in concluding that complaint counsel failed to meet this burden.

(6) Such other matters as may aid in the orderly and expeditious disposition of the proceeding, including disclosure of the names of witnesses and of documents or other physical exhibits which will be introduced in evidence in the course of the proceeding.

Since I would find that Rule 3.36 procedures were effectively waived here (see *infra*), I would find it unnecessary to determine to what extent Rule 3.21 would allow the ALJ to abbreviate those procedures where complaint counsel resists discovery in the prehearing conference context.

² Rule 3.36(a) requires that "An Application for issuance of a subpoena requiring the production of documents, papers, books, physical exhibits, or other material in the records of the Federal Trade Commission, or for the issuance of a subpoena requiring the appearance of an official or employee of the Commission, shall be made in the form of a written motion filed in accordance with the provisions of §3.22(a)."

³ Respondents' claim that this appeal does not lie under Rule 3.23(b) is without merit. Although it is fair to imply waiver by failing to insist on Rule 3.36 procedures, it is illogical to limit appeals from 3.21 pre-hearing orders requiring disclosure of Commission documents. Rule 3.23(b) is available in these cases not for the benefit of complaint counsel but to allow the Commission to review production requests for its own documents.

IN THE MATTER OF
JIM WALTER CORPORATION

Docket 8986. Interlocutory Order, Nov. 23, 1976

Denial of respondent's motion that the Commission disqualify Chairman Collier from participating in the decision of the case.

Appearances

For the Commission: *Peter W. Kitson, Harold J. Lamboley, Gilbert E. Geldon and Joseph J. O'Malley.*

For the respondent: *John J. Voortman, W. Donald McSweeney, Susan A. Henderson, Schiff, Hardin & Waite, Chicago, Ill. and Dan L. Saltsman, Tampa, Fla.*

ORDER DENYING MOTION TO DISQUALIFY

During oral argument before the Commission on respondent's appeal from the initial decision of the administrative law judge in this matter, respondent's counsel questioned Chairman Collier's participation in the decision of the case because of his prior service as the Commission's General Counsel from July 1973 to April 1975. The Commission allowed respondent 30 days to file a motion for disqualification. Respondent now requests access to all records pertaining to the Chairman's participation in this matter as General Counsel and leave to file a motion for disqualification 15 days after delivery of the records. In the alternative, respondent moves that the Commission immediately require Chairman Collier's disqualification.

In response to the motion, Chairman Collier filed a memorandum stating that he declined to disqualify himself from participation and setting forth at length his reasons therefor.

The Commission has carefully reviewed respondent's motion, complaint counsel's answer, and the memorandum of Chairman Collier. In light of such consideration, the Commission has determined that no grounds exist for granting the requested disqualification. As the Commission stated in *Grolier, Inc.*, CCH [1973 - 76 Transfer Binder] Trade Reg. Rep. ¶21,095, at 20,957-58, [87 F.T.C. at 180],

The requirement that adjudicatory and prosecuting or investigative functions be segregated arose out of a concern that "a man who has buried himself in one side of an issue is disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of those who decide questions." See, Senate Judiciary Committee Print, June 1945. Those who have

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done the actual work of investigating and building the case and those who have prosecuted the case with a "will to win," Davis, *Administrative Law Treatise*, §13.07 (1958), may have a sufficient stake in the case to preclude the dispassionate judgment that due process and the Administrative Procedure Act require.

The General Counsel performs neither prosecuting nor investigative functions and lacks the kind of stake in the outcome of a case that would warrant disqualification. Because our decision turns on the nature of the General Counsel's responsibilities, we do not believe that documents relevant to Chairman Collier's participation in this matter as General Counsel would provide a basis for disqualification. Accordingly,

It is ordered, That the aforesaid motion be, and it hereby is, denied.

Chairman Collier did not participate in the Commission's determination of this matter.

MEMORANDUM OF CHAIRMAN COLLIER IN RESPONSE TO REQUEST
OF RESPONDENT JIM WALTER CORPORATION THAT HE WITHDRAW
FROM PARTICIPATION IN THIS PROCEEDING

At oral argument on September 15, 1976, respondent Jim Walter Corporation questioned my participation in this proceeding because of my prior service as the Commission's General Counsel from July 1973, to April 1975, but expressed uncertainty as to whether my former service would require disqualification. (Transcript of proceedings, September 15, 1976, p. 3). Respondent was given thirty days to file a motion for disqualification. In a motion of October 15, 1976, respondent now requests access to any records which would indicate that I had any involvement in the investigation, institution, or prosecution of this matter, and an additional fifteen days after receipt of such records within which to file such a motion for disqualification. Respondent filed a similar request for documents under the Freedom of Information Act on September 21, 1976. Alternatively, should the Commission deny that request, respondent asks the Commission to disqualify me at this time.

Because "the inquiry called for by a motion for disqualification is necessarily subjective in nature," I have decided to respond to respondent's motion in the first instance, in keeping with past Commission practice, *American Cyanamid Co., et al.*, 59 F.T.C. 1488 (1961); 60 F.T.C. 1881, 1885 (1962).¹ Respondent's specific concern is that my participation in this proceeding might constitute a mixture of

¹ See also *The B.F. Goodrich Co. and Texaco, Inc.*, 62 F.T.C. 1513, 1514 (1963); *The Texas Co.*, 62 F.T.C. 1558, 1559; 1560 (1963); *Kenecott Copper Corp.*, 75 F.T.C. 1091, 1096 (1969); *ITT Continental Baking Co., Inc., et al.*, 82 F.T.C. 1183, 1188 (1973); and *National Commission on Egg Nutrition, et al.*, Dkt. 8987 (July 14, 1976) [88 F.T.C. 84].

prosecutorial and adjudicative functions in violation of the Administrative Procedure Act, 5 U.S.C. §554(d).²

Respondent misapprehends the function of the Commission's General Counsel. As I said in *National Commission on Egg Nutrition, et al.*, Dkt. 8987 (memorandum of July 8, 1976):

As the Commission's General Counsel, I neither possessed nor exercised prosecutorial responsibility. On the contrary, the Commission's General Counsel is freed of such duties so that he may advise the Commission or individual Commissioners in all matters of law and policy in adjudicative or nonadjudicative settings.³

To protect against the intermingling of prosecutorial and adjudicative functions, the Commission has assigned exclusive responsibility for advocacy of administrative complaints to the Bureaus of Competition and Consumer Protection and its Regional Offices. Counsel supporting a complaint are organizationally independent of the General Counsel and are not subject to his supervision or control.⁴

As the Commission noted in *Grolier, Inc.*, Dkt. 8879 (Order Denying Motion to Disqualify Administrative Law Judge, February 10, 1976) [87 F.T.C. at 180], the

requirement that adjudicatory and prosecuting or investigative functions be segregated arose out of a concern that "a man who has buried himself in one side of an issue is disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of those who decide questions."

The Commission concluded that an assistant to a Commissioner, "who provides advice during the pre-complaint stage of an investigation," does not have the kind of stake in the outcome that would inhibit a fair decision. The General Counsel is in a similar position.

The General Counsel routinely attends meetings of the Commission and receives memoranda circulated by the Commissioners, including recommendations of the prosecuting Bureaus that complaints be issued. This case was no exception.⁵ I knew of the staff's complaint recommendation and the Commission's response to that recommendation. As I recall, and as my records indicate, I had no other role in this matter. The Commission is not disqualified from adjudicating a matter simply because the Commission received and accepted the recommendation of its staff that a complaint issue, *FTC v. Cinderella Career and Finishing Schools, Inc., et al.*, 404 F.2d 1308, 1315 (D.C. Cir. 1968), and I

² "Respondent's Motion Requesting the Production of Documents or, in the Alternative, the Disqualification of Chairman Calvin J. Collier," at 3-4.

³ [Note 7 in the original.] See 35 F.R. 10627 (1970), amended 36 F.R. 2943 (1971).

⁴ [Note 8 in the original.] See 35 F.R. 10627 (1970). Unlike the situation in *National Commission On Egg Nutrition*, I was not called upon in this case to represent the Commission in collateral litigation.

⁵ Because these documents are internal memoranda of the Commission, it is for the Secretary or the Commission to decide whether they should be made available to respondent either as discovery in response to respondent's motion or, pursuant to Section 4.11 of the Commission's Rules, 16 C.F.R. §4.11, in response to respondent's Freedom of Information Act request.

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do not see why I should be disqualified simply because, like the Commission, I received the same information.

I therefore conclude that there is no reason for me to decline to carry out my statutory duty to participate in this proceeding. My participation would neither result in a prohibited mixing of the Commission's prosecutorial and adjudicative functions, in violation of Section 5(c) of the Administrative Procedure Act, 5 U.S.C. §554(d), nor would my participation create an "appearance of impropriety." I therefore decline to recuse myself from further participation in this proceeding.

IN THE MATTER OF
THE PILLSBURY COMPANY, ET AL.

Docket 9091. Interlocutory order, Nov. 24, 1976

Commission issues instructions to ALJ pursuant to order of the court, and establishes reporting schedule as to status of case.

Appearances

For the Commission: *Peter J. P. Brickfield, Joseph Tasker, Jr.*

For the respondents: *Murphy & Pearson, Chicago, Ill. and Faegre & Benson, Minneapolis, Minn.*

INSTRUCTIONS TO ADMINISTRATIVE LAW JUDGE

On November 15, 1976, the Commission and the respondents, together with the United States Attorney for the Northern District of Illinois, entered into a stipulation and order which was approved and entered by Judge Flaum of the United States District Court for the Northern District of Illinois, a copy of which is attached. Section V of that order calls for all parties to these proceedings to expedite final disposition of this matter, without waiver of any legal rights.

Pursuant to the order of the court, the Commission hereby directs that the administrative law judge take all appropriate steps to expedite the proceedings before him and that he make a brief written report to the Commission on February 15, 1977, and on the 15th of every third month thereafter during the pendency of proceedings in this matter before him as to the procedural status of the matter and the steps which have been taken to expedite the proceedings.

STIPULATION AND ORDER

Pursuant to the motion filed by the Federal Trade Commission, Judge Leighton, U. S. District Judge for the Northern District of Illinois, Eastern Division, issued on November 12, 1976 a Temporary Restraining Order prohibiting the consummation of the acquisition of the assets of Fox Deluxe Foods, Inc. ("Fox") by The Pillsbury Company ("Pillsbury") for ten days.

The parties having met to consider the most appropriate manner in which to assure the continued viability of Fox's frozen prepared pizza operations as a readily identifiable operation which might most easily be divested by Pillsbury as a viable, separate and independent company, in the event a final order of divestiture results from the administrative proceeding against Fox and Pillsbury commenced by the Federal Trade

Commission on November 11, 1976, which challenges the lawfulness of the acquisition.

The Commission (being fully apprised of the unique factual situation in this matter and being mindful of the Temporary Restraining Order entered by Judge Leighton on November 12, 1976) Fox and Pillsbury stipulate to the entry of the following Preliminary Injunction and to the dissolution of the November 12, 1976 Temporary Restraining Order.

PRELIMINARY INJUNCTION

I

This Court has jurisdiction of the subject matter of this action and of the parties hereto. The complaint states a claim upon which relief may be granted against respondents under Section 13(b) of the Federal Trade Commission Act. Entry of this order is in the public interest.

II

As used in this order:

(A) "Pillsbury" means respondent The Pillsbury Company and its subsidiaries, divisions, affiliates and the predecessors and successors of any of the foregoing.

(B) "Fox" means respondent Fox Deluxe Foods, Inc. and its subsidiaries, divisions, affiliates and the predecessors and successors of any of the foregoing.

(C) "New Company" means the corporation formed as ordered in Paragraph III(A) hereof and its successors.

(D) "Final ordered divestiture" means any divestiture ordered by a final order as defined in 15 U.S.C. §§ 21 and 45 which may be issued by the Federal Trade Commission in respect to the administrative complaint issued November 11, 1976, Dkt. 9091.

(E) "Person" means an individual, partnership, association, firm, corporation or other legal or business entity.

(F) "Fox Pizza Assets" means all assets currently utilized by Fox to manufacture, sell and distribute frozen prepared pizza and any and all additions, replacements or other equipment added or installed in or to the acquired buildings in Joplin, Missouri, including but not limited to warehouses, fixtures and any vehicles, leases, contracts or agreements which are used in the manufacture, distribution and sale of Fox brand frozen prepared pizza.

(G) "Buyer" means any one or more persons who may acquire the stock or assets of New Company pursuant to final ordered divestiture.

III

Defendant Pillsbury is ordered and directed to do as follows:

(A) Not later than November 19, 1976, Pillsbury shall cause a new corporation to be established in the United States (hereinafter referred to as "New Company") to carry on the frozen prepared pizza business of Fox as hereinafter set forth.

(1) Transfer to New Company or cause New Company to hire personnel to enable New Company, with the services and investment to be furnished under subparagraphs (2), (3) and (4) to operate as a fully operative, viable, going business. Such personnel may include persons employed by Fox or by Pillsbury.

Pillsbury will use its best efforts to cause personnel employed by New Company to continue with New Company after final ordered divestiture, but shall not be obligated to require any person to accept employment with New Company or the Buyer if he shall be unwilling to do so. If requested by the Buyer, Pillsbury shall cause management personnel services to be furnished, for a period of up to twelve months after final ordered divestiture to New Company at its variable costs, determined in accordance with generally accepted accounting principles. For two (2) years after final ordered divestiture, if any, Pillsbury is enjoined and restrained from employing or offering to employ any of such transferred personnel in the manufacture or distribution of frozen prepared pizza, except with the prior consent of the Commission which consent shall not be unreasonably withheld, or of this Court if the Commission unreasonably fails to consent.

(2) Cause New Company to retain legal counsel not otherwise associated with Pillsbury. Pillsbury shall cause an independent firm of Certified Public Accountants to annually provide a certified financial audit of New Company, a copy of which will be sent to the staff of the Commission. Nothing in this paragraph shall preclude New Company from obtaining, at its option, any other independent consulting services.

(3) Furnish at its variable costs, determined in accordance with generally accepted accounting principles, to New Company pursuant to contracts, leases or other agreements with New Company until the date of divestiture of New Company, and, if requested by the Buyer, continuing for twelve months after divestiture of New Company, such market research, marketing and distribution consulting services, and such supplementary accounting, billing, data processing and other administrative services (including computer time) as New Company may reasonably request. Any of such services may be provided by Pillsbury, and in each case such services shall be furnished without

Pillsbury knowingly retaining any information, after divestiture of New Company, which has resulted from the furnishing of such services to New Company.

(4) In order to enable New Company to meet the requirements of this order, and to enable New Company to be a fully operative, viable, going business:

(a) Transfer to New Company all frozen pizza manufacturing and distribution assets acquired from Fox and in addition, will invest in New Company not less than \$1,000,000 to be used for the acquisition of manufacturing equipment and to improve the facilities, within 12 months of the entry of this order;

(b) Cause not less than one out of every three cases (and not less than 700,000 cases per year) of frozen prepared pizza manufactured on the one current production line, together with improvements thereto, to be of New Company's brand;

(c) Cause New Company to reinvest all earnings and to pay no dividends without the consent of the Commission which consent shall not be unreasonably withheld;

(d) Cause New Company not to be insolvent during the pendency of this order, solvency to be measured by total assets in excess of total liabilities (but excluding from liabilities all capital stock, retained earnings, and any debt of New Company in respect of loans or guarantees from Pillsbury);

(e) Enter into an agreement with New Company pursuant to which New Company will produce for Pillsbury such frozen prepared pizza as Pillsbury may from time to time order at prices not less than variable cost of manufacture as determined in accordance with generally accepted accounting principles, plus five percent thereof;

(f) Maintain the Fox frozen prepared pizza business as a viable separate and independent company and make no changes in its frozen prepared pizza operations likely to hinder a future divestiture.

(g) Use its best efforts to maintain the Fox or New Company brands in the marketplace and to maintain or improve the quality of Fox or New Company labeled frozen prepared pizza;

(h) Refrain from obtaining or using the customer lists, trade secrets, formulas, knowhow, or manufacturing processes of Fox or New Company;

(i) Cause to be sent to all of the brokers selling frozen prepared pizza under the Fox brand and/or Totino brand a letter which will be agreed upon between Pillsbury and Commission staff advising that the Fox brand of frozen prepared pizza will continue to be

manufactured and sold and that the Fox brand of frozen prepared pizza will continue to be marketed and distributed independent of and in competition with the Totino brand of frozen prepared pizza;

(j) Refrain from attempting to influence or interfere with the independent judgment of Fox or New Company on any matter so as adversely to affect its competitive position; and

(k) Pending a final order of divestiture, refrain from making any changes, other than in the ordinary course of business, or permit any deterioration in New Company which may impair its capacity for the manufacture, distribution or sale of frozen prepared pizza.

IV

(A) For the purpose of determining or securing compliance with this order and for no other purpose, and subject to any legally recognized privilege, duly authorized representatives of the Commission shall, upon written request, and on reasonable notice to Pillsbury or New Company at its principal office be permitted:

(1) Access, during office hours of Pillsbury and New Company to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Pillsbury relating to any matters contained in this order; and

(2) Subject to the reasonable convenience of Pillsbury and without restraint or interference from it, to interview officers or employees of Pillsbury, who may have counsel present, regarding any such matters.

(B) For the purpose of determining or securing compliance with this order, Pillsbury, upon the written request of the Commission's staff, shall submit such reports in writing to the staff with respect to matters contained in this order as may, from time to time, be requested.

No information obtained by the means provided in this order shall be divulged by any representative of the Commission to any person other than a duly authorized representative of the Commission except in the course of court or administrative proceedings to which the Commission and Pillsbury or New Company are parties, or as otherwise required by law.

V

This order shall continue in full force and effect until the complaint issued by the Commission on November 11, 1976, against Pillsbury and Fox is dismissed by the Commission or set aside by the Court on review, or until the order of the Commission made thereon has become final. All parties agree to the expedition of the administrative proceeding in this matter, without the waiver of any legal rights.

Order

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VI

This injunction is granted pursuant to 15 U.S.C. §53(b) without the necessity of the Commission furnishing bond.

The Temporary Restraining Order issued by Judge Leighton on November 12, 1976, in this proceeding is hereby dissolved.

It is further ordered, That jurisdiction is hereby retained for the purpose of enabling any party to this proceeding to apply to this Court upon notice to all other parties at any time for such further orders and directions as may be necessary and appropriate for the construction or carrying out of this order, for the modification of any provision thereof, and for the enforcement of compliance of any term or condition thereof and the punishment of any violations thereof.

Entered this 15th day of November 1976.

Complaint

IN THE MATTER OF

MAYDAY COMPANY, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-2866. Complaint, Nov. 12, 1976 — Decision, Nov. 12, 1976*

Consent order requiring a Seattle, Wash., correspondence school, and its advertising agency, among other things to cease misrepresenting the salary ranges and employment opportunities available to its graduates; misrepresenting endorsements or recommendations of government agencies; misrepresenting the purpose, benefit or significance of placement tests given by respondents; and failing to disclose pertinent terms and conditions regarding sales contracts. Further, respondents are to provide disclosures as to cancellation procedures and rights to refunds, and to provide a ten-day cooling-off period during which prospective students may cancel their contracts with full refunds.

*Appearances*For the Commission: *Sharon S. Armstrong.*For the respondents: *John R. Tomlinson*, Seattle, Wash. and *C. M. McCune*, Seattle, Wash.

COMPLAINT

The Federal Trade Commission, having reason to believe that Mayday Company, Inc., a corporation, G. Ward Keller, individually and as an officer of said corporation, Richard M. Jackson, an individual, and Ricks-Ehrig, Inc., a corporation, hereinafter sometimes referred to as respondents, have violated and, with the exception of Ricks-Ehrig, Inc., are now violating Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), and believing that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint:

PARAGRAPH 1. Respondent Mayday Company, Inc. (hereinafter Mayday) is a Washington corporation with its principal office and place of business located at 1511 Queen Anne Ave. North, Seattle, Washington.

Respondent G. Ward Keller is an individual and an officer of Mayday. He formulates, directs, and controls the policies, acts and practices of Mayday, including those hereinafter set forth. His address is the same as that of Mayday.

Respondent Richard M. Jackson is an individual and a former officer of Mayday. Together with respondent Keller, he formulated, directed and controlled the policies, acts and practices of Mayday, including the

acts and practices hereinafter set forth. His address is 2846 West Viewmont Way West, Seattle, Washington.

Respondents Mayday, Keller and Jackson are hereinafter referred to collectively as the Mayday respondents.

Respondent Ricks-Ehrig, Inc. (hereinafter Ricks-Ehrig) is a Washington corporation with its office and principal place of business located at Eighth Floor, Fourth & Vine Building, Seattle, Washington.

The aforementioned respondents have cooperated and acted together in bringing about and carrying out the acts and practices hereinafter set forth, with the exception of Ricks-Ehrig as to those acts and practices set forth in Paragraphs Twelve through Fifteen and Seventeen through Nineteen.

PAR. 2. The Mayday Respondents are now and have been engaged in the formulation, promotion, advertising, offering for sale, sale, and distribution of a course of home study and instruction purporting to prepare graduates thereof for employment in the fields of security and investigative work, including such positions as store detective, airport security, accident investigator, private investigator, undercover agent, insurance investigator, missing persons tracer, and industrial security guard. Said course consists of a series of home study lessons pursued by correspondence through United States mail.

PAR. 3. Respondent Ricks-Ehrig was the advertising agency for Mayday from November 1971 until April 1973. In such capacity, Ricks-Ehrig has created, prepared and placed for publication various advertisements, including but not limited to the advertising referred to herein, to promote the sale of the Mayday course of study. In the course and conduct of its business, Ricks-Ehrig has been and is now in substantial competition, in or affecting commerce, with other corporations, firms and individuals in the advertising business.

PAR. 4. In the course and conduct of their business, the Mayday respondents cause the correspondence portion of their course, when sold, to be sent from their place of business in the State of Washington to purchasers located in Oregon, California, Alaska, and various other States in the United States. Thus, said respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said course of study and instruction in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 5. In the course and conduct of their businesses, and for the purpose of inducing the purchase of the aforesaid course of study and instruction, the Mayday respondents and respondent Ricks-Ehrig have made and caused to be made, through advertisements disseminated in newspapers of interstate circulation and in television broadcasts

received in States other than the State of broadcast and in Canada, and through other forms of advertising, numerous statements and representations respecting the Mayday course, the services provided by Mayday, employment opportunities in the fields of security and investigation, the rewards of such work, and the necessity for and usefulness of Mayday training in obtaining security and investigational employment.

Typical and illustrative of said statements and representations, but not all inclusive thereof, are the following:

A. On Television

Today, with proper training, you could enter the exciting field of the private investigator * * * or you could have a new life as an accident investigator * * *.

Civil crime is growing eleven times faster than the population. That means trained investigators and security personnel are needed now. Today with proper training from the Mayday Company, you can join the thousands of men and women who have found exciting careers in crime prevention. You could safeguard some of America's largest corporations in industrial security * * * meet the challenge of a store detective * * * work in airport security * * * or guard homes and businesses on a security patrol.

I opened my own detective agency in September. The skills I learned at Mayday are ones I use every day on the job. If it hadn't been for Mayday I probably wouldn't be where I am today.

B. In Newspapers, Magazines, Brochures and Other print Media

DID YOU KNOW THAT CRIME IS GROWING MORE THAN ELEVEN TIMES FASTER THAN THE POPULATION? That means there are jobs right now in the fast-growing field of investigation and security. To join one of America's most exciting professions, you need the right training.

Mayday, the nation's leading investigation and security training school, can give you the start you need in fields like:

Store Detective	Undercover Agent
Airport Security	Insurance Investigator
Accident Investigator	Missing Persons Tracer
Private Investigator	Industrial Security

No previous education or experience is necessary.

Mayday gives *placement assistance* to all graduates.

Mayday training is approved for veterans. For eligible veterans, the government will pay all costs.

We're an eligible institution under the Federally Insured Student Loan program. Accepted students need pay no money down. Small monthly payments begin nine months after graduation.

You learn through actual field assignments, audio-visual workshops and at-home study.

Mayday has training facilities in your area.

PAR. 6. By and through the use of the above-quoted statements and representations, and others of similar import and meaning but not expressly set out herein, respondents have represented, directly or by implication, that:

A. There is now and will continue to be in the foreseeable future an urgent need or demand for trained people in the fields of investigation and security.

B. Well-paid positions and career opportunities in investigative and security work are available to persons who have completed Mayday's course but lack other education and experience in such work.

C. Prior training is required before a person can obtain employment in the fields of investigation and security, and Mayday provides that training.

D. Mayday maintains a placement service which assists its graduates in finding employment.

E. In substantially all instances, Mayday supplements its home study materials with field assignments and classroom workshops in a training facility located near the student's home.

F. The Mayday course has been endorsed or approved as to quality by the United States Veterans Administration.

G. All students accepted under the Federally Insured Student Loan (FISL) program are excused from making any payments until nine months after graduation.

PAR. 7. In truth and in fact:

A. Respondents have no reasonable basis from which to conclude that there is now or will be in the foreseeable future an urgent need or demand for trained people in the fields of investigation and security.

B. Well-paid positions and career opportunities in investigative and security work are not available to persons who have completed Mayday's course but lack other education and experience in such work.

C. Many jobs in the fields of investigation and security do not require prior training. Moreover, some major employers of industrial security personnel prefer to do their own training and regard a mail-order course as a drawback in a candidate for employment. Those jobs which do require prior training and experience require training and experience of a type different than that provided by Mayday.

D. Mayday did not, throughout the period the representation was made, maintain a placement service. Such placement assistance as

Mayday has provided has been ineffective in finding employment for Mayday graduates.

E. At some times and in some areas where the representation was made, Mayday did not provide field assignments or classroom workshops, and did not have training facilities.

F. The Mayday course has not been endorsed or approved as to quality by the United States Veterans Administration. The willingness of the Veterans Administration to pay the costs of such training is not an endorsement of the course by such agency.

G. Students accepted under the Federally Insured Student Loan program are not necessarily excused from making any payments until nine months after graduation. Under applicable Federal regulations, the student may be required to begin repayment earlier than nine months after graduation.

Therefore, the statements and representations set out in Paragraphs Six and Seven were and are false, misleading and deceptive.

PAR. 8. Among the advertisements described and alluded to in Paragraph Five hereof are brochures and other promotional matter which contain photographs and professional identifications of persons who have purportedly completed the Mayday course. Typical and illustrative thereof are the following:

What Some of our Graduates Are Doing:



John Engstler
Vice President
and General Manager
Detective Agency



Art Kaplan
Representative
Finance Company



Raymond D. McKenna
Staff Investigator
Legal Firm



John Rogers
Investigator
Detective Agency

PAR. 9. Through the use of said advertisements containing photographs and identifications, respondents have represented, directly or by

implication, that the typical graduate of Mayday's course can reasonably expect to obtain a position of responsibility and status such as those identified in the advertisements, and that the Mayday course is a substantial factor in obtaining such positions. In fact, the positions attained by the individuals depicted do not reflect the typical or ordinary experience of graduates of Mayday's course, and Mayday's course was not a determinative or substantial factor in their obtaining such positions. Such facts, if known to consumers, would be likely to affect their decision to purchase the Mayday course. Therefore, respondents have failed to disclose material facts in their advertising.

PAR. 10. Among the advertisements described and alluded to in Paragraph Five hereof are advertisements which set forth endorsements of Mayday's course by various persons. Typical and illustrative thereof are the following:

A. On Television

Announcer: Here's Gerry Poth, former police detective and now first vice president of the World Association of Detectives.

Poth: I hire Mayday graduates for my detective agency because I know Mayday training is the best and most complete.

B. In Print Media

What the Professionals Think:



John C. Hoberg
Detective, Seattle Police Department
Lt. Col., U.S. Army Reserve

"For the past 19 years, I've been associated with the Seattle Police Department as a detective and an instructor in the Police Academy. I've also worked extensively with the Military Police. And I find the training available through the Mayday Investigation & Security Training School an invaluable prerequisite for investigation and security work.

"The instructors are expertly qualified. Courses are excellently presented and very pertinent to the tasks an investigator faces every day. The approach is realistic, practical, professional.

"There's no better way to prepare for a career in the investigation-security field. And no vocational training offers a more compatible use of a person's military experience."

PAR. 11. In the aforesaid advertisements setting forth endorsements of Mayday's course, and in other advertisements of similar import and

meaning but not expressly set out herein, respondents have failed to disclose that the persons identified as endorsing said course are paid consultants of Mayday, or owners of businesses related to Mayday, or are compensated by Mayday for making said endorsements. Such facts, if known to consumers, would be likely to substantially limit or nullify the impact of such endorsements and affect the consumers' decision to purchase the Mayday course. Therefore, respondents have failed to disclose a material fact in their advertising.

PAR. 12. In the further course and conduct of their business, the Mayday respondents cause prospective purchasers of their course to be interviewed by sales representatives, usually at the place of residence of individual prospective purchasers. Said sales representatives endeavor to sell and do sell the Mayday course of instruction to such prospective purchasers. For the purpose of inducing the sale of Mayday's course, said sales representatives make many statements and representations, directly and by implication, regarding said course and the benefits thereof, both orally and by means of brochures and other promotional material displayed to prospective purchasers.

Typical and illustrative of said statements and representations, but not all inclusive thereof, are the following:

A. Any person who passes the Mayday entrance test or tests is capable of successfully completing the course of instruction.

B. All persons accepted for enrollment in the Mayday course meet minimum standards of physical fitness, reading ability and bondability necessary to obtain entry-level positions in the fields of investigation and security.

C. Mayday provides to each of its graduates membership in an exclusive and prestigious professional organization affiliated with the United States Government, namely the International Police Congress.

D. Graduates of the Mayday course will receive college credit for said course.

E. Mayday will pay a referral fee or other compensation to each and every student who refers to Mayday a stated number of prospective students who ultimately enroll in the course.

PAR. 13. In truth and in fact:

A. Mayday's entrance tests do not determine whether a person is capable of completing the course of instruction. Mayday accepts as students persons with test scores indicative of insufficient reading ability to comprehend the course materials.

B. Not all persons accepted for enrollment in the Mayday course meet minimum standards of physical fitness, reading ability, and bondability necessary to obtain entry-level positions in the fields of investigation and security. Indeed, Mayday has accepted as students

persons who are legally blind, persons who are deaf and mute, persons who are lame, persons who cannot read, and persons with prior felony convictions.

C. Mayday does not provide to each of its graduates membership in the International Police Congress, and said Congress is not an exclusive and prestigious professional organization affiliated with the United States Government. Membership in said organization is available to any person who is actively engaged in some aspect of the investigation profession, is of good reputation and character, is licensed (where required), and pays the annual membership fee.

D. Graduates of the Mayday course do not receive college credit for said course.

E. Mayday does not pay a referral fee or other compensation to each and every student who refers to Mayday the stated number of prospective students who ultimately enroll in the course.

PAR. 14. The Mayday respondents have offered for sale their aforesaid course of home study instruction purporting to prepare purchasers thereof for employment as investigators and security personnel without disclosing in advertising or through their sales representatives: (1) the recent percentage of persons who have completed Mayday's course and have obtained employment in the positions for which they were trained, (2) the employers that hired such persons, (3) the initial salary such persons received, and (4) the percentage of recent enrollees who have failed to complete their course of instruction. Knowledge of such facts would indicate to prospective purchasers the possibility of securing future employment upon graduation and the nature of such employment. Thus, the Mayday respondents have failed to disclose material facts which, if known to consumers, would be likely to affect their decision to purchase the Mayday course.

PAR. 15. In the further course and conduct of their business, and for the purpose of preventing students from withdrawing from their course, the Mayday respondents have represented that tutoring will be provided to students who need such help. However, in some instances no tutoring was provided and the students were merely given answers to lesson test questions. The Mayday respondents have thereby falsely and deceptively represented that tutoring assistance was available when in fact it was not.

PAR. 16. The statements, representations and failures to disclose material facts by respondents, described in Paragraphs Eight through Fifteen hereof, were and are misleading, deceptive and unfair acts or practices.

PAR. 17. In the further course and conduct of their business the Mayday respondents have retained as sales representatives military

officers who personally offer for sale and sell the Mayday course to enlisted personnel on military bases. Because of the pressures inherent in the system of military rank, some enlisted personnel have been induced to purchase the Mayday course who would not have purchased the course from a non-officer sales representative. Such purchasers have been denied the opportunity to choose freely the education to be purchased with their military education benefits and have thereby lost some of the value of said benefits.

Therefore, the Mayday respondents' utilization of military officers as sales representatives to sell the Mayday course to enlisted personnel on military bases was and is an unfair act or practice.

PAR. 18. In the further course and conduct of their business, the Mayday respondents have utilized a financing system by which prospective students deemed eligible for veteran education benefits execute at the time of enrollment in Mayday's course (1) an application for veteran education benefits, and (2) a retail installment contract to Mayday for the cost of the course, which is assigned by Mayday to a third party lender.

In some instances the Mayday respondents have failed to disclose to the student that the lender may hold the student liable in the event that veteran education benefits are delayed or denied. Thus, the Mayday respondents have failed to disclose a material fact which, if known to prospective students, would be likely to affect their decision to purchase the Mayday course. Failure to disclose said fact was and is misleading, deceptive and unfair.

PAR. 19. The use by respondents of the aforesaid false, misleading, unfair and deceptive statements, representations, acts and practices has had, and now has, the tendency and capacity to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true, and to induce a substantial number thereof to purchase the Mayday respondents' course by reason of said erroneous and mistaken belief.

PAR. 20. In the course and conduct of their business, and at all times mentioned herein, the Mayday respondents have been and now are in substantial competition, in or affecting commerce, with corporations, firms, and individuals engaged in the sale and distribution of courses of instruction covering the same or similar subjects as those sold by Mayday.

PAR. 21. The aforesaid acts and practices of respondents as herein alleged were and are all to the prejudice and injury of the public and of respondents' competitors and constituted and now constitute unfair and deceptive acts and practices in or affecting commerce and unfair

methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

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

The 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 Act, 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 sixty days, and having duly considered comments filed pursuant to Section 2.34 of its Rules, 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:

A. Respondent Mayday Company, Inc. (hereinafter Mayday) is a Washington corporation with its office and principal place of business located at 1511 Queen Anne Ave. North, Seattle, Washington.

Respondent G. Ward Keller is an officer of Mayday. He formulates, directs and controls the policies, acts and practices of Mayday, and his address is the same as that of Mayday.

Respondent Richard M. Jackson was an officer of Mayday until March 1975. Together with respondent Keller he formulated, directed and controlled the policies, acts and practices of Mayday. His address is 2846 West Viewmont Way West, Seattle, Washington.

Respondents Mayday, Keller and Jackson are hereinafter sometimes referred to collectively as the Mayday respondents.

Respondent Ricks-Ehrig, Inc. (hereinafter Ricks-Ehrig) is a Washington corporation with its office and principal place of business located at

Eighth Floor, Fourth & Vine Building, Seattle, Washington. Ricks-Ehrig was the advertising agency for Mayday from November 1971 until April 1973.

B. 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

I

It is ordered, That respondents Mayday Company, Inc. and Ricks-Ehrig, Inc., corporations, their successors and assigns, and their officers, and G. Ward Keller, individually and as an officer of Mayday, and Richard M. Jackson, an individual, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division, franchisee, licensee or other device, in connection with the advertising, offering for sale, sale or distribution of any course of study, training or instruction purporting to prepare or qualify individuals for employment or training in any occupation, trade or in work requiring mechanical, technical, business, trade, artistic, supervisory, clerical or other skills, or purporting to enable a person to improve his or her skills in any of these categories, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

A. Representing, orally, in writing, visually, or in any other manner, directly or by implication:

1. The general conditions or employment demand in any employment market now or at any time in the future.
2. The amount of salary or earnings generally available to persons employed in any occupation.
3. The specific employment opportunities available or demand for persons who purchase such course or courses of study, provided that respondents may disclose the information contained in Paragraph II(G)(1)-(3) of this order if all three disclosures appear together.
4. The specific amount of salary or earnings available to persons who purchase such course or courses of study, provided that respondents may disclose the information contained in Paragraph II(G)(1)-(3) of this order if all three disclosures appear together.
5. The training provided by such course or courses is a prerequisite to obtaining employment in the vocation or fields covered by such courses.
6. Placement assistance will be provided to persons who complete its course, unless respondents can establish that they provide, at all

times and in all locations in which the representation is made, placement assistance which is effective in finding employment for their graduates, and unless such representation is accompanied by the information specified in Paragraph II(G)(2) of this order; or misrepresenting, in any manner, the nature or effectiveness of any placement assistance provided by respondents.

7. Home study materials will be supplemented with field assignments, classroom workshops or training facilities near the student's home, unless respondents can establish that such is the fact at all times and in all locations in which the representation is made.

8. Said courses are approved, recommended or endorsed by any government or agency thereof; *provided, however*, that if eligible veterans may receive financial assistance from the United States Veterans Administration to pay for such courses, respondents may state this fact.

9. Students accepted under any governmentally assisted or insured student loan program are excused for any period from making payments, unless respondents clearly and conspicuously disclose, in immediate conjunction therewith, the full terms regarding time limitations applicable to such payments.

10. The endorsement of such course or courses by any person, organization or association has been given without compensation when such is not the fact; or failing to disclose the fact of compensation unless the endorser is an expert, or the endorser is known to a significant portion of the viewing public, or the compensation or promise of compensation was given subsequent to the giving of the endorsement.

11. Such course or courses are endorsed by any person, organization or association without disclosing that such person, organization or association either in whole or in part owns or is owned by, or is employed by the advertiser, unless such is not the fact.

B. Making any representations of any kind whatsoever in connection with the advertising, promoting, offering for sale, sale or distribution of any course of study, training or instruction in the fields of investigation or security or any other subject, trade or vocation in or affecting commerce, for which respondents have no reasonable basis prior to the making or dissemination thereof.

It is further ordered, That the Mayday respondents and their successors, assigns, agents, representatives and employees, directly or through any corporation, subsidiary, division, franchisee, licensee or other device, in connection with the advertising, offering for sale, sale

or distribution of any course of study, training or instruction purporting to prepare or qualify individuals for employment or training in any occupation, trade, or in work requiring mechanical, technical, business, trade, artistic, supervisory, clerical or other skills or purporting to enable a person to improve his skills in any of these categories in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

A. Representing orally, in writing, or in any other manner, directly or by implication that:

1. Any entrance examination or aptitude test or quiz determines whether a person is capable of completing said course or courses of instruction or is qualified for employment or will achieve employment in the vocation or fields covered by such courses; or misrepresenting in any manner the meaning, purpose, benefit, significance or use of any examination or test or its results.

2. Acceptance for enrollment in said course or courses bears any significance whatsoever to physical, educational, character or other qualifications necessary to obtain any position in the vocation or field covered by such courses.

3. Each of respondents' graduates is provided membership in any professional organization, or that successful completion of said course or courses is a requirement for membership in any professional organization; or misrepresenting in any manner the meaning, purpose, benefit, or significance of membership in the International Police Congress or any other professional organization.

4. Graduates of said course or courses will receive college credit for their course work; or misrepresenting in any manner the meaning, purpose, benefit, or significance of credit from any course work approval entity.

5. A referral fee or other compensation will be paid to students who refer to respondents prospective students who ultimately enroll in said course or courses, unless respondents can establish that such fee or other compensation is in fact paid to each student entitled thereto within ten (10) days of qualification therefor.

B. Providing students with answers to test questions before the test is taken, or assisting students in the completion of lessons in any other manner which does not genuinely aid the student in understanding the lesson; or representing that tutoring is provided when it is not.

C. Compensating any employee on the basis of the number of lessons completed by students.

D. Failing to disclose, in any instance in which a student applies for veteran education benefits or any other governmental assistance, for the purpose of paying for said course, training or instruction, and also

executes a retail installment contract for the amount of the course, that the payee or its assignee may hold the student liable for the amount of the retail installment contract in the event veteran education benefits or other governmental assistance is delayed or denied.

E. Using military personnel on active duty to solicit or sell to military personnel junior in rank or grade, at any time, on or off duty, in or out of uniform, any product or service.

F. Furnishing or otherwise placing in the hands of others the means and instrumentalities by and through which the public may be misled or deceived in a manner prohibited by this order, or by acts and practices prohibited by this order.

G. Failing to disclose in writing, clearly and conspicuously, prior to the signing of any contract, to any prospective enrollee of any course of instruction, the following information in the format prescribed in Appendix A and for a base period determined as described in Appendix B:

1. The number and percentage of enrollees who have failed to complete their course of instruction, such percentage to be computed separately for each course of instruction offered by respondents;

2. The number and percentage of enrollees and of graduates who obtained employment within three months of leaving a school in a position for which respondents' course of instruction prepared them; such rate or percentage to be computed separately for each course of instruction offered by respondents;

3. The salary range of respondents' graduates who obtained employment within three months of leaving a school in a position for which respondents' course of instruction prepared them, the percentage ratio of such graduates to the total number of enrollees, and the percentage ratio of such graduates to the total number of graduates;

4. A list of firms or employers which are currently hiring graduates of said courses in substantial numbers and in the positions for which such graduates have been trained, and the number of such graduates hired, as to the same graduates used to compute the placement percentage in (2) above.

Provided, however, this paragraph shall be inapplicable to any course newly introduced by respondents, until such time as the new course has been in operation for the base period established pursuant to Appendix B as prescribed in this paragraph. However, during such period the following statement, and no other, shall be made in lieu of the Appendix A Disclosure Form required by this paragraph:

DISCLOSURE NOTICE

This school [or course, as the case may be] has not been in operation

long enough to indicate what, if any, actual employment or salary may result upon graduation from this school [course].

H. 1. Contracting for the sale of any course of instruction in the form of a sales contract or any other agreement which does not contain, in immediate proximity to the space reserved in the contract for the signature of the prospective enrollee, the following statement in 10-point or larger boldface type:

You, the prospective enrollee, may cancel this transaction and receive a full refund at any time prior to midnight of the tenth business day after the day of this transaction. If you withdraw after 10 days, you are entitled to a partial refund. See attached cancellation and withdrawal forms for explanations of these rights.

2. Failing to furnish each prospective enrollee, at the time he or she signs the sales contract or otherwise agrees to enroll in a course of instruction offered by respondents, complete cancellation and withdrawal forms in duplicate which shall be attached to the contract or agreement and easily detachable therefrom, and which shall contain in ten (10) point or larger boldface type the following information and statements:

NOTICE OF CANCELLATION DURING TEN-DAY COOLING OFF
PERIOD

[enter date of transaction]

(date)

YOU MAY CANCEL THIS TRANSACTION WITHOUT ANY PENALTY OR OBLIGATION, WITHIN TEN (10) BUSINESS DAYS FROM THE ABOVE DATE.

IF YOU CANCEL, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT OR SALE, AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN TEN (10) BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF YOUR CANCELLATION NOTICE, AND ANY SECURITY INTEREST ARISING OUT OF THE TRANSACTION WILL BE CANCELLED.

IF YOU CANCEL, YOU MUST MAKE AVAILABLE TO THE SELLER AT YOUR RESIDENCE, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED, ANY GOODS DELIVERED TO YOU UNDER THIS CONTRACT OR SALE; OR YOU MAY, IF YOU WISH, COMPLY WITH THE INSTRUCTIONS OF THE SELLER REGARDING THE RETURN SHIPMENT OF THE GOODS AT THE SELLER'S EXPENSE AND RISK.

IF YOU DO MAKE THE GOODS AVAILABLE TO THE SELLER AND THE SELLER DOES NOT PICK THEM UP WITHIN TWENTY (20) DAYS OF THE DATE OF YOUR NOTICE OF CANCELLATION, YOU MAY RETAIN OR DISPOSE OF THE GOODS WITHOUT ANY FURTHER OBLIGATION. IF YOU

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FAIL TO MAKE THE GOODS AVAILABLE TO THE SELLER, OR IF YOU AGREE TO RETURN THE GOODS TO THE SELLER AND FAIL TO DO SO, THEN YOU REMAIN LIABLE FOR PAYMENT FOR SAID GOODS.

TO CANCEL THIS TRANSACTION AND OBTAIN A FULL REFUND, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM, TO *[name of seller (must be filled in)]*, AT *[address of seller's place of business (must be filled in)]* NOT LATER THAN MIDNIGHT OF *[date (must be filled in)]*.

I HEREBY CANCEL THIS TRANSACTION.

(Date)

(Buyer's signature)

NOTICE OF WITHDRAWAL AFTER EXPIRATION OF TEN-DAY
COOLING OFF PERIOD

[enter date of transaction]

(date)

AFTER THE TEN-DAY COOLING OFF PERIOD EXPIRES YOU ARE STILL FREE TO WITHDRAW FROM THIS COURSE AT ANY TIME. YOU WILL HAVE TO PAY ONLY FOR LESSONS SUBMITTED TO THE SCHOOL PLUS A REGISTRATION FEE OF FIVE PERCENT (5%) OF THE TOTAL CONTRACT PRICE, NOT TO EXCEED TWENTY-FIVE DOLLARS (\$25).

THE AMOUNT YOU WILL HAVE TO PAY FOR THE LESSONS SUBMITTED WILL BE DETERMINED BY DIVIDING THE NUMBER OF LESSONS SUBMITTED UP TO THE TIME OF YOUR WITHDRAWAL BY THE TOTAL NUMBER OF LESSONS CONTAINED IN THE COURSE. IF, PRIOR TO WITHDRAWAL, YOU HAVE PAID MORE THAN THIS AMOUNT PLUS THE REGISTRATION FEE, THE EXCESS WILL BE REFUNDED TO YOU WITHIN TEN (10) BUSINESS DAYS.

TO WITHDRAW FROM THIS COURSE AFTER THE TEN-DAY COOLING OFF PERIOD EXPIRES, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS WITHDRAWAL NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM, TO *[name of seller (must be filled in)]*, AT *[address of seller's place of business (must be filled in)]*. YOU MAY ALSO WITHDRAW BY FAILING TO SUBMIT A LESSON FOR NINETY (90) DAYS.

I HEREBY WITHDRAW FROM THIS COURSE.

(Date)

(Buyer's signature)

3. Failing to orally inform each prospective enrollee, at the time he or she signs a contract or agreement for the sale of any course of instruction, of his or her right to cancel or withdraw.

4. Misrepresenting in any manner the prospective enrollee's right to cancel or withdraw.

5. Initiating contacts with such contracting persons prior to expiration of the ten-day cooling off period described herein.

6. Failing or refusing to take the following actions within ten (10) business days after the receipt of any valid notice of cancellation by a prospective enrollee during the ten-day cooling off period:

- a. Refund all payments under the contract or sale;
- b. Return any goods or property trade-in, in substantially as good condition as when received by respondent;
- c. Cancel and return any negotiable instrument executed by the prospective enrollee in connection with the contract or sale.

7. Failing or refusing to take the following actions within ten (10) business days after (1) receipt of an enrollee's notice of withdrawal, or (2) expiration of a 90-day period during which a student fails to submit a lesson:

a. Refund a pro rata portion of the total contract price, plus a registration fee of five percent (5%) of the total contract price but not to exceed twenty-five dollars (\$25). For purposes of this provision:

(i) Withdrawal shall mean the date of mailing or delivering to the school a signed and dated copy of the "Notice of Withdrawal," a student's written letter or telegram of withdrawal, or a lapse of ninety (90) days since the student's submission of a lesson.

(ii) The pro rata portion shall be determined by dividing the number of correspondence lessons submitted by the student prior to withdrawal, by the total number of lessons contained in the course, and multiplying the total contract price by the result.

b. Cancel that portion of the student's indebtedness which exceeds the amount due respondents under the refund formula of this provision.

III

It is further ordered, That the Mayday respondents, their successors and assigns:

A. Deliver, by registered mail, a copy of this order to each of their present and future franchisees, licensees, employees, salesmen, agents, solicitors, independent contractors, advertising agencies, and other persons who promote, offer for sale, sell or distribute any course of instruction covered by this order.

B. Provide each person so described in paragraph A above with a form returnable to respondents clearly stating his or her intention to agree with respondents to conform his or her business practices to the requirements of this order; retain said statement during the period said person is so engaged; and make said statement available to the Commission's staff for inspection and copying upon request.

C. Inform each person so described in paragraph A above that

respondents will not use or engage and will terminate the use or engagement of any such person unless such person agrees to and does file notice with respondents that he or she agrees to conform his or her business practices to the provisions contained in this order.

D. Shall not use or engage or continue the use or engagement to promote, offer for sale, sell or distribute any course of instruction whatsoever, of any such party as described in paragraph A above who will not agree to so file the notice set forth in paragraph B above with the respondents and agree to conform his or her business practices to the provisions of the order.

E. Inform the persons described in paragraph A above that respondents are obligated by this order to discontinue dealing with or to terminate the use or engagement of persons who continue on their own the acts or practices prohibited by this order.

F. Institute a program of continuing surveillance adequate to reveal whether the business practices of each person described in paragraph A above conform to the requirements of this order.

G. Discontinue dealing with or terminate the use or engagement of any person described in paragraph A above, as revealed by the aforesaid program of surveillance or otherwise, who continues on his or her own any act or practice prohibited by this order.

IV

It is further ordered, That respondent Ricks-Ehrig, its successors and assigns, promptly deliver a copy of this order to each of its operating divisions and to each employee now or hereafter engaged in the preparation, creation or placing of advertising for Mayday or any other client engaged in a similar business activity; and that said respondent secure from each such person a signed statement acknowledging receipt of said order.

V

It is further ordered, That all parties respondent hereto shall maintain complete business records, which may be inspected by Commission staff members upon reasonable notice, to fully disclose the manner and form of their compliance with this order, including but not limited to the following records to be maintained by the Mayday respondents:

A. Records which disclose the facts upon which any job availability or placement claims, or other representations of the type described in Paragraph II(G) of this order are based; and

B. Records from which the validity of any job availability or

placement percentages or other representations of the type described in Paragraph II(G) or this order can be determined.

VI

Provided, however, That:

A. This order shall not apply to the operation of not-for-profit resident primary or secondary schools or institutions of higher education which offer for resident students at least a two-year program of accredited college level studies generally acceptable for credit toward a bachelor's degree.

B. Subparagraphs E, F, G and H of Paragraphs II and III of this order shall not apply to the advertising, offering for sale, sale or distribution of a course of study or instruction to a business or a governmental entity for use by their existing employees, provided such course is offered free of charge to said employees and respondents are not compensated for such course on the basis of the number of employees to whom such course is offered.

VII

It is further ordered, That the corporate respondents notify the Commission at least thirty (30) days prior to any proposed change in a 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 corporations which may affect compliance obligations arising out of the order.

In the event that respondent Mayday merges with another corporation or transfers all or a substantial part of its business or assets to any other corporation or to any other person, said respondent shall require said successor or transferee to file promptly with the Commission a written agreement to be bound by the terms of this order; *provided,* That if said respondent wishes to present to the Commission any reasons why said order should not apply in its present form to said successor or transferee, it shall submit to the Commission a written statement setting forth said reasons prior to the consummation of said succession or transfer.

VIII

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and/or their affiliation with a new business or employment. Such notice shall include the respondents' current business address and a statement as to the nature of the business or

employment in which they are engaged, as well as a description of their duties and responsibilities.

IX

It is further ordered, That respondents shall, within sixty days after service upon them of this order, file with the Commission a written report setting forth in detail the manner and form of their compliance with this order.

Commissioner Dole did not participate.

APPENDIX A

DISCLOSURE FORM

(NAME OF SCHOOL)

DROP OUT AND PLACEMENT RECORD FOR
(NAME OF COURSE) FOR THE PERIOD OF (DATE) TO (DATE)

1. TOTAL ENROLLEES [Number]
2. TOTAL WHO FAILED TO COMPLETE THE COURSE [Number]
3. PERCENTAGE WHO FAILED TO COMPLETE THE COURSE [%]
4. TOTAL NUMBER OF STUDENTS WHO OBTAINED EMPLOYMENT IN THE POSITION FOR WHICH THIS COURSE OF STUDY PREPARED THEM WITHIN THREE MONTHS OF TERMINATING THE COURSE [Number]
5. PERCENTAGE OF STUDENTS WHO OBTAINED EMPLOYMENT IN THE POSITION FOR WHICH THIS COURSE OF STUDY PREPARED THEM WITHIN THREE MONTHS OF TERMINATING THE COURSE [% of Enrollees]
6. PERCENTAGE OF GRADUATES WHO OBTAINED EMPLOYMENT IN THE POSITION FOR WHICH THIS COURSE OF STUDY TRAINED THEM WITHIN THREE MONTHS OF COMPLETING THE COURSE [% of grads]

775

Decision and Order

7. NUMBER AND PERCENTAGE OF
TOTAL ENROLLEES AND GRADU-
ATES WHO OBTAINED EMPLOY-
MENT IN THE FOLLOWING SALA-
RY RANGES:

	[Number] STUDENTS, WHICH IS [%] OF TOTAL ENROLLEES AND [%] OF TOTAL GRADUATES
Less than \$2.50 per hour	
\$2.50 - \$3.99 Per Hour	"
\$4.00 - \$5.50 Per Hour	"
\$5.51 - \$7.00 Per Hour	"
More than \$7.00 Per Hour	"

8. EMPLOYERS HIRING PERSONS
WHO GRADUATED FROM [NAME
OF COURSE] FROM [DATE] TO
[DATE] AS INVESTIGATORS AND
SECURITY PERSONNEL:

NAMES OF EMPLOYERS	TOTAL NUMBER OF GRADUATES HIRED
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APPENDIX B

"Base period" shall mean Mayday's most recent fiscal year ending at least three (3) months prior to the date on which respondents must begin to disseminate the necessary statistics with respect to the base period.

The three (3) month period immediately following the close of the base period shall be used by the Mayday respondents to monitor and record the employment success of all enrollees whose enrollment terminated during the base period. Said respondents may not include in the computation of statistics for the base period persons whose enrollment terminated during this three (3) month recordation period. Such persons will be included in the statistics for the next fiscal year.

On the first business day falling more than three (3) months after the end of Mayday's most recent fiscal year, the Mayday respondents shall begin to disseminate statistics for that base period. The Mayday respondents shall continue to distribute said statistics until the first

business day falling three (3) months after the end of Mayday's next fiscal year.

The following example describes how base periods will be utilized by the Mayday respondents.

Base period number one (1) will cover the first fiscal year ending after the effective date of this order. Therefore if the first fiscal year ending after the effective date of this order ends June 30, 1975, then from July 1, 1975 until October 1, 1975 respondents would monitor and record the employment experience of all enrollees whose enrollment terminated during the base period, July 1, 1974 to June 30, 1975. Respondents would begin disseminating these statistics on the first business day after October 1, 1975.

Base period number two (2) would begin July 1, 1975 and end June 30, 1976. During the next three months, the Mayday respondents would monitor and record the employment experience of all enrollees whose enrollment terminated during base period number two (2) and would begin disseminating these statistics on the first business day after October 1, 1976.

IN THE MATTER OF
RSR CORPORATION

Docket 8959. Interlocutory Order, Dec. 2, 1976

Commission rules on motions and counter motions with respect to material contained in complaint counsel's reply brief; accords *in camera* treatment to certain information on pp. 19-25 of the reply brief; and restores the brief to the public record.

Appearances

For the Commission: *K. Keith Thurman, Annthalia Lingos, and James C. Egan, Jr.*

For the respondent: *Robert L. Wald, Wald, Harkrader & Ross, Washington, D.C.; and Merrill L. Hartman, Hewett, Johnson, Swanson & Barbee, Dallas, Tex.*

ORDER DENYING MOTION TO STRIKE, ETC.

The initial decision of the administrative law judge in this matter was greeted with appeals by both sides. Pursuant to the Commission's Rules of Practice, each party was entitled to submit an Appeal Brief (in support of its appeal), an Answer Brief (in response to the other side's Appeal Brief), and a Reply Brief (in response to the other side's Answer Brief.) Each of these briefs, three for each side, three for each appeal, was duly prepared and submitted.

And there it might have ended, except that respondent subsequently filed a "Motion to Strike" pages 19-25 of complaint counsel's Reply Brief, arguing that it contained inaccurate and misleading statements. Complaint counsel struck back with the observation that respondent's Motion constituted nothing more than an unauthorized answer to their Reply Brief, expressly forbidden by Section 3.52(d) of the Rules of Practice. In case the Commission were inclined to consider this "Fourth Brief," however, complaint counsel appended a "Reply to Respondent's Unauthorized Answer." ("The Fifth Brief")

Not to be outdone, respondent thereupon filed for "Leave to Respond to 'Complaint Counsel's Reply to Respondent's Unauthorized Answer' ", appending thereto, "The Sixth Brief." Complaint counsel rejoined with what we might term, for ease of reference, their "Answer to Respondent's Answer to Complaint Counsel's Answer to Respondent's Unauthorized Answer to Complaint Counsel's Reply to Respondent's Answer to Complaint Counsel's Appeal Brief, etc." Therein complaint counsel observed that respondent had no right to "yet another unauthorized pleading" in this matter, and that the time for

briefing having long passed, complaint counsel would not declaim further, except to request the right to file a "Seventh Brief" if the Commission should decide to consider respondent's "Sixth Brief." Respondent has allowed these observations to go unanswered, and the various motions summarized above are thus before us for disposition.

The Law of the Last Word, like the Doctrine of Judicial Repose, is a mainstay of Anglo-American jurisprudence. Briefly, it prescribes that in any dispute between two parties, one of them must be allowed to have the Last Word, in order that both of them may stop talking. A corollary of the rule is that the Last Word is not always the Best Word, nor necessarily the Word that prevails.

Section 3.52 of the Commission's Rules of Practice makes clear that the Last Word in any matter on appeal belongs by right to the party with the burden of sustaining the appeal. In this case both sides were blessed with a Last Word as of right since each prosecuted an appeal, but complaint counsel were clearly entitled to the Last Word with respect to their appeal.

We agree with complaint counsel that Respondent's Motion to Strike is little more than a substantive answer to complaint counsel's Reply Brief. Although it seeks *in camera* treatment of pages 19-25 of complaint counsel's brief, the bulk is devoted simply to a recitation of arguments in opposition to those made by complaint counsel, and the *in camera* request could easily have been made without argument as to the substance of the Reply Brief arguments.

The Commission recognizes that there may be certain extraordinary circumstances in which an exception to Section 3.52 of its Rules is warranted. When a party believes such circumstances have arisen, the appropriate way to proceed is via a request that the Commission exercise its discretion to make an exception to Section 3.52 rather than via a ruse designed to circumvent the express mandates of the Rule. Although we thus do not believe that respondent's use of a Motion to Strike in this instance is appropriate, we have determined to treat it as a Motion to Waive Section 3.52(d) of the Rules in order to permit the lodging of a supplemental brief.

There is an extraordinary circumstance in this case which warrants the relief requested. The material to which respondent's argument is principally addressed concerns the financial status of RSR, details of which were the subject of *in camera* treatment by the ALJ. For this reason, counsel for respondent could not prudently have discussed this matter at oral argument, as Counsel in an ordinary case would be able to do were he or she to choose to address an opponent's reply brief in that forum. Under these circumstances, the Commission has determined to admit respondent's Motion, and complaint counsel's response

thereto, as supplements to the briefs in this case. However, the "Sixth Brief" is rejected since the Last Word still belongs to complaint counsel. [16 CFR §3.52(d)]

Respondent also requested in its Motion to Strike that certain portions of complaint counsel's Reply Brief be maintained *in camera* since they were derived from *in camera* exhibits in the record. By order of July 28, 1976 [p. 206, herein] the Commission temporarily placed pages 19-25 of complaint counsel's brief *in camera* pending receipt from respondent of specific indication of the portions which it believed merited such treatment. That response having been received, it appears that seven figures on pp. 19-25 are drawn from *in camera* exhibits and these figures will be accorded *in camera* treatment co-extensive with that previously ordered by the ALJ for the exhibit from which they are drawn. The rest of pp. 19-25 of complaint counsel's brief will be restored to the public record. Therefore,

It is ordered, That pp. 19-25 of complaint counsel's Reply Brief be, and they hereby are, restored to the public record, except that the below-referenced figures shall be accorded *in camera* treatment to the extent ordered by the ALJ for RX 111 from which they are drawn:

- P. 19, line 17, word 6
- P. 19, line 20, word 12
- P. 20, line 19, word 9
- P. 20, line 20, word 4
- P. 20, footnote, line 6, word 7
- P. 22, line 14, word 3
- P. 24, line 4, word 4

It is further ordered, That respondent's Motion to Strike pp. 19-25 of complaint counsel's Reply Brief be denied, and that respondent's "Request for Leave to Respond to 'Complaint Counsel's Reply to Respondent's Unauthorized Answer' " be denied, but that respondent's "Motion to Strike" and Complaint Counsel's Reply thereto shall be added to the briefs previously filed in this matter.